

University of Stirling

School of Law

Disability, Sport and the Limits of Law

by

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I am very grateful to the Jean Clark Foundation for funding a studentship for the research project from which this thesis was drawn. The purpose of the project was to address specific knowledge-gaps and advance the study of Scots law through comparative analysis of both disability discrimination legislation and the wider legal issues relevant to sports participation in Scotland and beyond. I am also indebted to my supervisor, David McArdle, whose advice has been patient, thoughtful and supportive throughout.

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## *Forward*

This thesis has resulted from a graduate research project undertaken at the School of Law, University of Stirling, in 2007. The starting point for the project was to note research that has been conducted into the relationship between disability discrimination law and sports participation from a North American perspective. Secondly, it was notable that there has been an absence of comparative discussion and critique into the broader range of disability discrimination law issues identified in that research, and very little analysis outwith North America of how either disability discrimination legislation or other areas of law have impacted upon sport organisations and athletes with disabilities. The purpose of the project was therefore to address specific knowledge-gaps and advance the study of Scots law through comparative analysis of both disability discrimination legislation and the wider legal issues relevant to sports participation in Scotland and beyond. The aims and objectives of this thesis reflect the purpose of the project.

The thesis considers disabled people's participation in sport at both the recreational and elite level; however it covers 'participation' in a wide sense, which encompasses playing competitive sport, but also sport as leisure and as a spectating activity. Although sporting activity at recreational and elite level may seem ostensibly 'worlds apart', the legal issues arising have much in common. The aim is to consider these issues together, by identifying and exploring common themes. Common to all levels of sport for disabled people is the theme of how barriers are created and broken down, on the one hand technological and physical barriers, and on the other, social barriers, including eligibility criteria and the rules of competitive play.

The thesis focuses on the rights of disabled people to participate in sport, examining various aspects of human rights law and disability discrimination law, as well as sports governance issues. One of the primary objectives is to identify how rights arguments might be utilised to improve participation in sport, in the wide sense described above.

## *Abstract*

*Disability, sport and the law are three concepts which have rarely been linked in academic research. This thesis attempts to fill a gap by drawing these concepts together, in relation to public law and human rights, discrimination, education, planning and health and safety. Chapter 1 establishes frames of reference for the ensuing analysis of how the law can be applied to the participation of disabled people in sport. Some reasons for focussing the study of disability rights law on sport are provided; and different legal issues arising in the context of 'mainstream' and 'disability specific' sport are explored. The chapter then considers the framework of sports governance, and the powers of the courts in relation to sports organisations. Chapter 2 examines models and definitions of disability and the fundamental purpose of discrimination law, as it relates to sport. It concludes that current law insufficiently interprets progressive models of disability. It also concludes that the political and legal purpose of discrimination law in this context may be better understood in terms of 'social inclusion', rather than the more orthodox concept of 'equality'. Chapter 3 considers rights which indirectly impact on participation in sport and it also considers the possible evolution of a 'new' right to sport. To facilitate this, a comparative examination is made of three different 'models': 1) bills of rights and the European Convention on Human Rights, as adopted into the Law of Scotland; 2) the Treaty of Lisbon and the constitutional model; 3) international human rights law and the United Nations Convention on the Rights of Persons with Disabilities. The chapter concludes that it is probably too early to posit a legal right to sport for disabled people, but that the combined impact of other human rights have some force – in particular the right to be free from discrimination. Chapter 4 then explores the*

*fundamental characteristics of disability discrimination rights contained in domestic legislation, in the context of sports services. Enforcement mechanisms and 'fourth generation' equality law are considered. The chapter ends by noting how this area of the law may evolve in the light of current reforms. Chapter 5 considers disability education law, discussing judicial interpretation of debates about integration in, or segregation from, mainstream and 'special' sport in education. The courts may be justified in hesitating when they are asked to consider matters which are traditionally regarded as areas of public policy rather than of law. Lastly, Chapter 6 considers physical barriers to participation in sport by disabled people, focussing on discrimination issues in terms of planning and health and safety. The perception of the disabled athlete as a 'threat' to sport has influenced the way that the law has largely failed to protect disabled participants, specifically in relation to the 'health and safety justification' defence, which allows organisations to exclude disabled people from participating.*

## *Introduction: disability, sport and the limits of law*

In the first decade of the new millennium, two high-profile events have drawn attention to legal issues that arise through disabled people's involvement in sports. On 29 May 2001, the United States Supreme Court decided in *PGA Tour Inc. v Martin*<sup>1</sup> that the professional golfer, Casey Martin, was entitled to use a golf cart during competitions, in order to accommodate the effects of his impairment, and that this accommodation would not 'fundamentally alter the nature' of the sport. On 14 January 2008, the International Association of Athletics Federations (IAAF) announced its decision that it would not permit the South African sprinter Oscar Pistorius to compete in the Beijing 2008 Olympic Games on the grounds that his prosthetic limbs give him an unfair advantage over able-bodied athletes.<sup>2</sup>

Casey Martin and Oscar Pistorius are both elite athletes whose physical impairments have required adjustments to be made to their chosen sports in order for them to participate in competitions with able-bodied athletes, and their circumstances are exceptional; nonetheless, the legal issues to which their cases give rise may apply well beyond their specific circumstances. Whilst the greater commercial interests involved in, and public focus on, elite sports tend to give rise to more contentious scenarios than in amateur settings, there are parallel issues identifiable within amateur sport for

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<sup>1</sup> (2001) 532 U.S. 661. Casey Martin received significant media attention around the turn of the century, even featuring in Alistair Cook's 'Letter from America' for the BBC: BBC News online, 8 June 1999, 'Laws doomed from the start'.

<sup>2</sup> 'Oscar Pistorius banned from Olympics' Times Online, 14 January 2008. Pistorius has now successfully appealed the decision. The appeal was heard in the Court of Arbitration for Sport on 29 and 30 April, CAS 2008/A/1480 *Oscar Pistorius v/IAAF*, and the decision was issued on 16 May.

disabled people and these issues potentially affect us all.<sup>3</sup> In fact, the issues arising around disability, enhancements and other types of adjustments may extend to many other areas of life, leading one academic commentator to observe that: “Sports...highlight the importance of thinking clearly about basic goals for understanding how to deal with issues of disability and enhancement, of the normal and of the exceptional”.<sup>4</sup>

The issues highlighted by Casey Martin and Oscar Pistorius allow the debate to be framed both for competitive and elite level sport, but also for amateur and recreational sport, at the other end of the spectrum. The discussion of sports governance in Chapter 1 demonstrates the powers to regulate participation in sport that different decision making bodies have, from public authorities, to sports governing bodies, international organisations and private clubs. However, these cases have demonstrated that the courts also have a new found role to play in defining and regulating different aspects of disabled people’s rights to participate in sport. These aspects are underpinned by social issues of equality and social inclusion, and they have their expression in legal debate about the legitimacy of technological enhancements, which can be seen as a specific form of ‘reasonable adjustment’ or ‘accommodation’. These aspects are inextricably linked to the formal social elements of sport, such as eligibility criteria to participate and the rules of competition. These social elements are found in varying degrees at all levels of sport.

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<sup>3</sup> See chapter 1.

<sup>4</sup> Greely, H T (2004) ‘Disabilities, Enhancements, and the Meaning of Sports’ 15 *Stanford Law and Policy Review* 99, at p. 132.



Different impairments are of course manifest very differently. As shall be seen, legal definitions of disability include a wide variety of impairments. There is also a corresponding variety of adjustments that could be made to accommodate different disabilities. These include adjustments to sports rules, equipment and technology, various aspects of the social and physical environment, eligibility criteria, and a variety of types of enhancement.<sup>5</sup> Some examples of relevant cases which have been heard in Scottish courts have reflected this diversity, both in terms of disability and sports settings.

The first case in Scotland involving the education provisions of Part IV of the Disability Discrimination Act 1995 (DDA), *Parent A as parent and legal representative of the Child (Assisted Person) v East Ayrshire Council*,<sup>6</sup> concerned the exclusion from school of an eight-year-old child with complex needs arising from his being diagnosed with attention deficit hyperactivity disorder (ADHD), oppositional defiance disorder (ODD) and, subsequently, Asperger's Syndrome. During a game of football with other children, the child became violent and physically attacked first another child, and then several teachers who tried to calm him down. Based on this incident, the school made the decision to exclude him. The pursuer, the child's father on behalf of the child, brought an action in Kilmarnock Sheriff Court<sup>7</sup> for various declarators, reduction and orders for specific implement against the defenders, East Ayrshire Council (being the education authority which oversees the school in question). The pursuer's contention was that the defenders unlawfully discriminated against him in terms of sections 28A and 28B of the DDA and that in failing to take

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<sup>5</sup> *Ibid.*

<sup>6</sup> (2006) SC B152/04. The pursuer has indicated his intention to appeal to the Sheriff Principal.

reasonable steps in accordance with their duties under section 28C, they further unlawfully discriminated against him in terms of section 28B (2).<sup>8</sup>

This case raised a number of questions: whether the child had a disability for the purposes of section 1, DDA; whether the defenders discriminated against the pursuer by treating him less favourably than non-disabled children, contrary to section 28B (1) and/or in failing to draw up either/or both of a School Health Plan or a Risk Assessment Plan;<sup>9</sup> and whether the defenders' behaviour could be justified either by lack of knowledge of the child's disability or by the treatment being "material" or "substantial".<sup>10</sup>

Sheriff Ireland's findings were that the child was disabled at the time of his exclusion and that the defenders did not know, but *could reasonably have been expected to know* that he was disabled. The child's behaviour which caused the exclusion was related to his disability. He was treated less favourably than other pupils to whom the exclusion did not apply, but that treatment was justified by a reason that was both "material" and "substantial" and the child was therefore not placed at a substantial disadvantage. Thus, the Sheriff found that there had been no unlawful discrimination contrary to the terms of section 28A.

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<sup>7</sup> Section 28N, DDA, determines that Part IV cases are heard in the Sheriff Court in Scotland (and in the Special Educational Needs and Disability Tribunal (SENDIST) in England and Wales.

<sup>8</sup> See Chapter 5 for a fuller explanation of these sections of the DDA.

<sup>9</sup> These are particular educational examples of the concept of 'reasonable adjustments', which is central to the ensuing discussion.

<sup>10</sup> Section 28B (7), DDA: the school had to show that the action it took was "material to the circumstances of the particular case and substantial".

According to his note, Sheriff Ireland took account of and accepted a consensus view in the expert evidence that a child suffering from Asperger's Syndrome (or being otherwise 'on the autistic spectrum') would be expected to fail to understand the normal rules of football and other team games. This finding is indeed backed up by research in the field of sports medicine which has demonstrated that children with Asperger's Syndrome rarely participate in group or team sports, and that this observation can even be used as a means of diagnosis;<sup>11</sup> although, conversely, team sports can be used as a means to teach social skills to children with Asperger's Syndrome.<sup>12</sup>

In assessing whether the child's behaviour was related to his disability, and consequently whether there was unlawful discrimination on the part of the defenders, the Sheriff revealed in his note his view as to the correct question to consider: "The question is, was the behaviour on [the date in question] related to his disability namely the ability to learn and understand social matters in this case in particular relation to the football match". The answer to this question was found to be 'yes'.

This approach demonstrates that Scottish courts may be willing to accept that an inability on the part of a disabled child to learn and understand social matters such as the rules of a team sport is a relevant consideration in assessing whether unlawful discrimination has taken place. This in turn raises the prospect that the rules in competitive sports might be a factor that acts to treat less favourably a disabled child

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<sup>11</sup> Haney, K (2002) 'Team Sports as a Diagnostic Measure' 29(2) *Journal of the Philosophy of Sport* 121.

who is participating in such sports. It should, however, be noted that this case did not involve competitive, fully organised football, though staff were supervising the activity (which appears to have been organised to a degree).

As it happens, Sheriff Ireland accepted the defence that the extent to which the child's behaviour posed a health and safety risk to those at the school meant that his exclusion from school (and, as a by-product, from participation in the sport) was material and substantial. In a hypothetical case, however, which did not involve violence and the resulting health and safety risks would the school be found to have unlawfully discriminated against the child?

At first sight this begs the question what manner of behaviour would be sufficiently serious to cause the child to be excluded from school and yet insufficiently serious to meet the "material" and "substantial" test? All this then shows is that the justifications of "material" and "substantial" are relatively widely construed, and perhaps justifiably so. Well, perhaps that is true where exclusions from school altogether are concerned, but what if a disabled child broke the rules of the school sport she was playing so as to seriously disturb and interrupt the game, but not so as to endanger any person? It is conceivable that she would then be excluded from participating. It would then seem that the school would no longer have available the material or substantial defence, since there would be no health and safety issue, and accordingly the school would

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<sup>12</sup> Groft, M and Block, M E (2003) 'Children with Asperger Syndrome: Implications for General Physical Education and Youth Sports' 74(3) *The Journal of Physical Education, Recreation and Dance* 38.

have unlawfully discriminated against the child.<sup>13</sup> Whilst the adjustments that Casey Martin and Oscar Pistorius require are relatively apparent technological aids, or enhancements – a golf cart and prosthetic limbs, respectively – the nature of the adjustments required for the child in *A v East Ayrshire Council* may be less clear, reflecting the different demands of his impairments. One sort of adjustment or accommodation that can be made in order to enable people with learning difficulties to engage in sports is to provide human assistance in the form of either a support worker or an access worker, but it is by no means easy to see how such a worker would be involved and would fit in with the rules of the game.<sup>14</sup>

The considerations in *A v East Ayrshire Council* in fact give rise to the same central question which has been the subject of debate in the USA since *Martin*, and which have resurfaced with Oscar Pistorius' appearance on the world stage: to what extent does the law require the rules, or even the playing culture, of any sport to be changed in order to accommodate a disabled participant?<sup>15</sup> The natural extension of this is the question as to whether it is the sport itself that is regarded as 'problematic' or whether the disabled person is legitimately seen to be the 'problem'.

Although the disabilities concerned in these three cases differ, and the required adjustments similarly differ, they all result in the exclusion or restriction of a disabled person from participating in sport in circumstances that may amount to unlawful

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<sup>13</sup> Of course, other characteristics of the child are surely also relevant. For example, it is not clear that any eight-year old child should necessarily be expected to fully understand the rules of a complex team game like football, whether or not he or she is disabled.

<sup>14</sup> See Devas, M (2003) 'Support and Access in Sports and Leisure Provision' 18(2) *Disability and Society* 231.

<sup>15</sup> See Chapter 4.

discrimination. In determining whether or not unlawful discrimination has taken place, it will be necessary to establish when exclusion from participation is justified. Later on, it will be argued that disabled people may sometimes be perceived by society, and consequently by the law, as a ‘threat’ both to sport itself and to the interests and involvement of non-disabled participants.

What is less clear is the extent to which, and the sense in which, disabled people may have a right to participate in sports – are such rights sufficiently strong so as to entail that adjustments must be made; what sorts of legal rights are applicable and how do they relate to sport; what sorts of reasons are there not to take account of these rights? Questions of definition must also be addressed – what is the legal meaning of ‘disability’ in the context of sport; what counts as ‘sport’; and what counts as unlawful discrimination? These questions will be addressed in the following chapters.

This thesis seeks to show that the legal controversies raised by *Martin* and Pistorius’ case are applicable to the domestic Scottish setting, which is demonstrable in such cases as *A v East Ayrshire Council*. This serves to highlight that such controversies are not remote and are not restricted to extraordinary individuals such as elite athletes. In terms of public policy, sports opportunities for disabled children and adults within education may be far more important than elite sport opportunities in establishing an overarching culture of equal access and opportunities to participate.<sup>16</sup> Access to sport in education is inextricably linked to debates about segregation and integration, social

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<sup>16</sup> Elite participation and opportunities for sport in education are, nonetheless, inextricably linked. A recent example of these issues arising was when the disability charity Mencap, and other organisations, successfully campaigned for the rules to be changed to permit children with learning disabilities to take

exclusion and social inclusion and it will be necessary to venture into these debates in Chapter 5 in order to understand some of the deeper issues which pervade this area of the law.

On 9 November 2007 it was announced that Glasgow had been awarded the 2014 Commonwealth Games.<sup>17</sup> As Scotland gears up to play host to such a large-scale, international sporting event, it is likely that there will be an increasing need to address equity in sport for disabled participants at both elite and amateur levels. Whether or not Oscar Pistorius is eligible to compete in the Games, the interaction between disability, sport and those laws contained in sources such as disability discrimination legislation, international human rights law and European law will continue.

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part in the UK School Games, which are regarded as a precursor to the Olympics. See BBC News online, 7<sup>th</sup> February 2008, 'Youth games exclusion 'unlawful''.

<sup>17</sup> See <http://www.glasgow2014.com/>.

# *Chapter 1: Sports and Disability in Scotland – the regulatory framework*

## **Introduction – Disabled People and Participation in Sport**

The broad topic of this thesis is disability rights law.<sup>18</sup> Following chapters will unpack the law to demonstrate how rights ‘work’ in relation to participation in sport for disabled people, focussing in turn on several aspects of the right to be free from discrimination. First, however, there are two words to define: ‘participation’ and ‘sport’. Both words will be used fairly flexibly. People participate in sport in a wide variety of ways: from playing sport; to spectating; to working in the sports industry; sports administration or in sports education. The thesis will primarily examine *direct* participation, in terms of either playing or watching sport, but that emphasis is not intended to exclude *indirect* means of participation such as employment in the sports industry, which share many of the issues arising.<sup>19</sup> The second word, sport, has been variously defined.<sup>20</sup> It is not necessary for the purposes of this discussion to attempt to arrive at a precise definition, partly because that would pre-empt the debate, since one

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<sup>18</sup> Throughout this chapter, and the chapters that follow, there will be a slight focus on people with mental, intellectual or learning disabilities. This is partly in order to escape a common conflation of different sorts of disability, whether mental or physical. It is also an attempt to transcend the strictures of a single concept of ‘disability’. Lastly, without wishing to diminish the importance of considering purely physical disabilities, the characteristics of mental disabilities raise especially uncomfortable and challenging questions about the coherence of social and legal values and structures; as well as ultimately prompting us to consider what it means to be human.

<sup>19</sup> Disability employment rights and discrimination law in particular is a discrete topic, which already has a substantial literature and history of case law devoted to it, so this topic will only be addressed indirectly.

<sup>20</sup> For a cogent summary of what constitutes ‘sport’ see Savulescu, J (2006) ‘Justice, Fairness and Enhancement’ 1093 *New York Academy of Sciences* 321, pp.326-330.



of the themes is how the law grapples with the concept of sport.<sup>21</sup> The working definition will, however, include both recreational and competitive sport, and will not enter into finer debates about whether, for example, a particular activity constitutes a ‘game’ or ‘physical education’ (PE), rather than sport.<sup>22</sup>

### ***Focus on sport***

Why focus on sport? In both disability rights thinking and practice, there is very often an emphasis on the basics of living – shelter, food and mobility/transport. Consequently, the other needs of disabled people are often overlooked. Sport is often overlooked as a critical area of participation in society, even in the context of medico-legal analyses of issues for disabled people.<sup>23</sup> A similar oversight occurs in analyses of medico-legal sports issues, in which the topic of disability often only arises indirectly.<sup>24</sup>

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<sup>21</sup> In terms of asking questions such as: how, and if, adjustments should be made for disabled people to the rules or the sporting environment; how inclusive sport is for disabled people; to what extent it is part of education; and whether there is a right to sport. This loose approach to the definition is also useful because it will be essential to draw on cases which may not involve sport in a material sense, but will involve legal principles which may be applicable in the context of sport.

<sup>22</sup> An example of a suitably broad and inclusive working definition for this purpose is: “Sport means all forms of physical activity which, through casual and organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels” (Council of Europe (2001) *European Sports Charter* Brussels: Council of Europe.

<sup>23</sup> See, for example Rich, R F, Erb, C T and Rich R A (2002) ‘Critical Legal and Policy Issues for People with Disabilities’ 6 *DePaul Journal of Health Care Law* 1. There is a good summary of ‘critical legal and policy issues’ at pp. 11-18 – yet there is no mention of sport.

<sup>24</sup> See, for example Opie, H (2002) ‘Australian Medico-Legal Issues in Sport: The View from the Grandstand’ 13 *Marquette Sports Law Review* 113, which does mention the issue of HIV and sport, but from the perspective of ‘disease’, rather than disability.

There are a number of possible reasons for this apparent oversight. Firstly, it is only in very recent years that civil rights and human rights traditions have relocated from occupying a niche to their current position at the centre of legal debate. Discrimination law, as a function of civil and human rights, is even newer.<sup>25</sup> Disability discrimination law is newer still.<sup>26</sup> These areas of law have yet to discover the extent of their possible social influence and much of the discrimination case law so far has centred exclusively on employment issues.<sup>27</sup> Secondly, sports law as a ‘serious’ discipline in its own right is also relatively new.<sup>28</sup> Hence, the point at which sports law and disability rights law intersect may simply be at the vanguards of both disciplines.<sup>29</sup>

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<sup>25</sup> In illustration of this historical point, see generally the sketch of the history of human rights in Shelton, D (2007) ‘An Introduction to the History of International Human Rights Law’ The George Washington University Law School Public Law and Legal Theory Working Paper No. 346, available at <http://ssrn.com/abstract=1010489> (last checked December 2007). For an up to date assessment of disability human rights law, see Stein, M A (2007) ‘Disability Human Rights’ 95 California Law Review 75. For an overview of the development of discrimination law in Europe and Britain, see Bell, M (2004) ‘A Patchwork of Protection: the New Anti-Discrimination Law Framework’ 67 Modern Law Review 3. More recently, the British Government has reviewed discrimination legislation and proposes to create a Single Equality Bill, incorporating disability discrimination provisions – see Department for Communities and Local Government (2007) *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* London: HMSO, (available at [www.communities.gov.uk](http://www.communities.gov.uk)).

<sup>26</sup> The primary disability discrimination legislation under consideration (the Americans with Disabilities Act 1990; the Australian Disability Discrimination Act 1992; the British Disability Discrimination Act 1995, as amended by the Disability Discrimination Act 2005) was slowly formulated through the 1970s and ‘80s but did not come into force till the ‘90s.

<sup>27</sup> There are a number of possible reasons for this focus. Weak enforcement mechanisms and poor access to justice in goods, facilities and services cases are two.

<sup>28</sup> This is the case even in the USA, where the sheer size of the legal system can lead to the development of specialisations earlier than in other jurisdictions. See generally Lazaroff, D E (2001) ‘The Influence of Sports Law on American Jurisprudence’ 1 Virginia Sports and Entertainment Journal 1.

<sup>29</sup> As the introduction suggests, in terms of legal history it was in 2001 that the high-profile Supreme Court case of *PGA Tour, Inc. v Martin* 532 U.S. 661 (2001) (discussed in more detail in later chapters)

So should these vanguards of sports and disability rights law be permitted to reach as far as, and hold any influence over, this intersection between them? That is a question of political and legal theory which must ultimately depend on deeper questions about the philosophy of law, which there is not enough space to consider here.<sup>30</sup> Nonetheless, the following three arguments need to be considered due to the extent to which they inform the debates in the rest of the thesis.

The first argument is premised with three simple observations. 1) Disability discrimination legislation has been constructed with political aims in mind.<sup>31</sup> 2) There is a high probability in the case of every individual that he or she will encounter disability first-hand at some stage in his or her life (if only towards the end of his or her life).<sup>32</sup> 3) It is hardly necessary to produce evidence to support the observation

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propelled into the public consciousness in the USA the issues arising at the intersection of these areas of law. Although, to date, there has not been quite the same level of judicial, political and public interest in other jurisdictions, there have been cases which raise very similar questions, and these merit attention. These cases will be discussed throughout the text.

<sup>30</sup> These questions, however, will be addressed indirectly throughout the thesis. By way of a brief example of the extent of these debates – the emergence in the USA of ‘critical legal studies’ (CLS) has emphasised the centrality of political and ideological purpose in law, an emphasis which could be applied to questions such as whether or not there is a political incentive for disability discrimination law to regulate sport (a classic exposition of CLS is found in Kennedy, D (1979) ‘The Structure of Blackstone’s Commentaries’ 28 Buffalo Law Review 209). The classic ‘public versus private’ debate is also of relevance to the question of whether or not the law should encroach on decisions as to whether and how disabled people should participate in sport (see later discussion of an aspect of this debate).

<sup>31</sup> See Chapter 2.

<sup>32</sup> The frequency of the occurrence of disability in a given population obviously depends on how ‘disability’ is defined (see Chapter 2) but some sources estimate about twenty percent of the population is disabled or has a long-term illness at any given time. See, for example, the Scottish Executive Report (2004) *Social Focus on Disability* Edinburgh: Scottish Executive (available at

that participation in sport is an important feature in the lives of a considerable proportion of people in society.<sup>33</sup> It seems fair to make at least an initial conclusion from these observations that this intersection between disability and sport is now governed by law.

The second argument is ‘politico-legal’. By overlooking, and neglecting to provide adequate legal protection for, the importance to disabled people of activities such as sport, society may be denying them the benefits of mainstream political goals such as equality and social inclusion, which are increasingly expressed by means of the law.<sup>34</sup>

It is arguably in light of our approach to providing ‘lesser’ legal rights to such areas of an active cultural life as participation in sport, that the true extent of equality and social inclusion for disabled people is revealed. Disability rights and sport can act as a prism through which to assess the spectrum of possible results which this area of the law effects (and to assess the extent to which the law can be used as a social determinant).

The third argument is based on empirical research, and leads to a wider discussion. Public health research has been able to demonstrate that, in general terms, physically disabled people are less likely than the general population to take part in regular physical activity, even though they stand to achieve greater benefits from such

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[www.scotland.gov.uk/socialfocusondisability](http://www.scotland.gov.uk/socialfocusondisability)), p.5 noting that older adults have a much higher probability of being disabled – forty-five percent of those seventy-five years or older are disabled.

<sup>33</sup> This is, however, partly revealed through the economic impact of sport in Scotland, see sportscotland (2007) *The Economic Importance of Sport in Scotland 2004 (Research Digest No.101)* Edinburgh: sportscotland. Sportscotland reports that sport-related consumer expenditure was 2.7% of total consumer expenditure in Scotland (£1.6 billion) in 2004; value added to the Scottish economy was 1.9% of gross value added (£1.5 billion), p.3.

<sup>34</sup> See further discussion of these political goals of the law in Chapter 2.

activity than do non-disabled people.<sup>35</sup> Such activity includes doing sport. Unfortunately, this precedent seems to be set early on in life as there is also evidence that children with physical disabilities are at increased risk of limitations to participation in everyday activities such as sport.<sup>36</sup>

What are the reasons for this lower level of participation amongst physically disabled people? One reason may be that, as sport becomes increasingly regarded as a commodity, disabled people are under threat of exclusion if they cannot find a way to fit into the consumer model.<sup>37</sup> The ‘corporitization’ of sport and the contemporary obsession with high-earning elite sports stars<sup>38</sup> means that if disabled people cannot reasonably aspire to take part in competitive, or even elite, sport they may be frozen out of the action.<sup>39</sup> It is not enough to want to take part in sports; you have to be a potential sports star. This emphasis on ability begins early and some educationalists have pointed out that in schools the focus is invariably upon who is able, or ‘more suited’ to taking part in sport, and that this creates a situation where many young people are discriminated against on the ground of their bodily performances rather than upon their willingness to take part.<sup>40</sup> If such discrimination exists, and if it causes

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<sup>35</sup> Spivock, M (2007) ‘Promoting Physical Activity Among Persons with Physical Disabilities: Steps Towards a Population-based Perspective’ 5 *International Journal of Disability, Community & Rehabilitation* 1.

<sup>36</sup> Law, M (2006) ‘Patterns of Participation in Recreational and Leisure Activities Among Children With Complex Needs’ 48 *Developmental Medicine & Child Neurology* 337.

<sup>37</sup> See discussion of the ‘commodification’ of sport in Walsh, A J and Giulianotti, R (2001) ‘This Sporting Mammon: A Normative Critique of the Commodification of Sport’ 28 *Journal of the Philosophy of Sport* 53.

<sup>38</sup> *Ibid.* p.59.

<sup>39</sup> At least in the sense that coaching resources are heavily weighted towards non-disabled elite athletes, to the detriment of disabled sports participants at all levels and abilities.

<sup>40</sup> Wellard, I (2006) ‘Re-Thinking Abilities’ 11 *Sport, Education and Society* 3.

such a ‘disparate impact’ on disabled people, it seems *prima facie* reasonable to expect the appropriate existing rights and discrimination law to be able to tackle it.

### ***The benefits of sport***

By way of wider discussion, why should such inequality and discrimination be tackled through law? It is uncontroversial to say that law must benefit society in some way. It is also uncontroversial to say that improving the health of humanity is a social ‘good’, which benefits society. If sport can be linked to the social good of improving the health of disabled people, then it would also seem relatively uncontroversial if law were to help facilitate this.

The health of people with intellectual disabilities is relatively undeveloped as a topic of study.<sup>41</sup> Despite this, there is evidence to suggest that people with intellectual disabilities benefit their health through taking part in sport to an extent at least equal to those without such disabilities. In fact, limited access to sports activities and other strenuous exercise has been identified as a lifestyle-related health threat which particularly affects this group.<sup>42</sup>

Even when their participation in sport is assured, disabled athletes with intellectual disabilities suffer the same problems with accessing a good standard of health that disabled people often experience in general. For example, research has shown that a

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<sup>41</sup> See van Schroyen Lantman-de Valk, H M J (2005) ‘Health in People with Intellectual Disabilities: Current Knowledge and Gaps in Knowledge’ 18 *Journal of Applied Research in Intellectual Disabilities* 325.

<sup>42</sup> *Ibid.* p.327.

high proportion of athletes with intellectual disabilities suffer from ocular and visual defects and often fail sufficiently to access appropriate treatment.<sup>43</sup> Hence, there are two layers of inequalities the law may be equipped to address: a health threat arising from reduced access to sport itself; and a health threat arising from the quality of service and care provided once access to sport has been achieved.<sup>44</sup>

In terms of physical disabilities, and musculoskeletal disabilities in particular, it has been demonstrated that at all levels of the main causes of disability it is possible by regular physical activity and exercise to prevent disease and the further consequences of disease.<sup>45</sup> One example of the potential therapeutic effects of sport on people with physical disabilities is horseback riding in children with cerebral palsy, which some medical research has demonstrated may improve gross motor function.<sup>46</sup>

The benefits of sport do not amount simply to a public health project to increase physical fitness. Sport also has potential psychological benefits for disabled people in terms of the sense of empowerment and self-efficacy achievable through

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<sup>43</sup> Woodhouse, J M, Adler, P and Duignan, A (2004) 'Vision in Athletes with Intellectual Disabilities: the Need for Improved Eyecare' 48 *Journal of Intellectual Disability Research* 8.

<sup>44</sup> There should be recognition of the fact that an individual participant may experience multiple disabilities and that these can entail multiple forms of discrimination.

<sup>45</sup> Schroll, M (1994) 'The Main Pathway to Musculoskeletal Disability' 4 *Scandinavian Journal of Medicine & Science in Sports* 3.

<sup>46</sup> See Sterba, J A (2007) 'Does Horseback Riding Therapy or Therapy-Directed Hippotherapy Rehabilitate Children with Cerebral Palsy?' 68 *Developmental Medicine & Child Neurology* 49; Sterba, J A et al (2002) 'Horseback Riding in Children with Cerebral Palsy: Effect on Gross Motor Function' 44 *Developmental Medicine & Child Neurology* 301. In Scotland, there is a national centre for therapeutic riding based at the Highland Riding Centre, Borlum Farm, by Drumnadrochit.

participation,<sup>47</sup> as well as a possible improved sense of ‘body-consciousness’.<sup>48</sup> Lastly, in terms of social relationships, sport has an enormous capacity to unite people and to increase their quality of life.<sup>49</sup> It has knock-on benefits for those close to disabled people who may not necessarily be disabled themselves. For example, participation in sport by their children has been demonstrated as decreasing the stress-levels in parents with children who are disabled.<sup>50</sup>

It could be argued that these largely utilitarian concerns should be the subject of, for example, public policy and educational measures, rather than of law.<sup>51</sup> This study is, however, mainly an examination of the law *as it stands* and, as Chapter 4 suggests, there is evidence that disability rights law owes its existence to such concerns and that it should be interpreted accordingly. (If that point is not accepted, Chapter 2 also considers the possibility of a legal ‘right to sport’, in and of itself, irrespective of normative foundations of the law, or of political intent.)

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<sup>47</sup> Hutzler, Y and Bar-Eli, M (1993) ‘Psychological Benefits of Sports for Disabled People: A Review’ 3 *Scandinavian Journal of Medicine and Science in Sports* 217.

<sup>48</sup> Dadkhah, A (1998) ‘The Effect of *Dohsa-Hou* on Body Consciousness in Disabled Sportsmen’ 40 *Japanese Psychological Research* 3.

<sup>49</sup> For a Scotland-specific survey of the social benefits of sport, see Coalter, F (2005) *The Social Benefits of Sport: An Overview to Inform the Community Planning Process (sportscotland Research Report No. 98)* Edinburgh: sportscotland.

<sup>50</sup> Weiss, J A and Diamond, T (2005) ‘Stress in Parents of Adults with Intellectual Disabilities Attending Special Olympics Competitions’ 18 *Journal of Applied Research in Intellectual Disabilities* 263.

<sup>51</sup> These concerns are, on the face of it, broadly utilitarian because they involve the simple aim of maximizing the social welfare, and health, of disabled people and hence the population as a whole. If a deeper consideration of the provision of opportunities for disabled people to participate in sport were to lead us into questions of limited resources and distribution, these concerns could be approached from another moral perspective. This might be egalitarianism (according to which the proper grounds for distribution of resources is need), or Rawlsian ‘justice as fairness’ (distribution of resources so that the worst off are as well off as they can be).



### *'Mainstream' and disability sport*

The next question is: what manner of sport for disabled people should the law facilitate? One of the underlying themes in disability rights discourse is the question of what is the best approach to integrating disabled people (both individuals and disabled 'communities') into society.<sup>52</sup> One aspect of this debate is whether, and in what circumstances, disabled people should participate in 'mainstream sport' (i.e. with non-disabled people) or 'disability sport' (with other disabled people).<sup>53</sup> This sort of policy question is at the boundaries of the courts' jurisdiction, as Casey Martin and Oscar Pistorius illustrate, but as will be seen in later chapters, courts have to a certain extent been called on to overcome their natural reluctance to answer it. There are at least two reasons why this question is difficult.

One reason is that the comparative psychological and social effect on disabled people participating in sport, whether with other disabled people or with non-disabled people, is complex and difficult to determine. For example, the effect for people with intellectual disabilities on their perceived physical capacity for participating in integrated sport with non-disabled people, can be initially negative, but can then lead to greater performance and opportunities for them to participate.<sup>54</sup>

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<sup>52</sup> For a general review of this debate, see Cummins, R A and Lau, A L D (2003) 'Community Integration or Community Exposure? A Review and Discussion in Relation to People with an Intellectual Disability' 16 *Journal of Applied Research in Intellectual Disabilities* 145.

<sup>53</sup> Varying definitions of 'mainstream' and 'disability sport' are used in the literature. The straightforward division outlined above, between the two types of sports participation, will be used in this thesis for the sake of simplicity, given the wide sense of 'participation' which is used.

<sup>54</sup> Ninot, G, Bilard, J and Delignieres, D (2005) 'Effects of Integrated or Segregated Sport Participation on the Physical Self for Adolescents with Intellectual Disabilities' 49 *Journal of Intellectual Disability*

Another reason is to do with a series of related questions about identity. Is it better for disabled athletes to take part in their own sport with specific recognition, or to be subsumed into a sport with wider access, including non-disabled people? Does literal equality of access with non-disabled athletes (rather than parallel equality of access with other disabled athletes) also mean loss of identity as ‘athletes with disabilities’ – and would that have a positive or negative impact? Although in the case of equal access to mainstream sport, disabled athletes would still be identifiable as disabled, there may be less of a beneficial emphasis on disability type than in the case of parallel disability sport provisions.<sup>55</sup> The uncertainty of possible outcomes inherent in the weighing up of these possible advantages or disadvantages makes any decision about integration harder.

### *Elite sport and enhancements*

There is one further distinction to make. The term ‘elite sport’ is no more than a way of describing high-level, competitive sport. Some disabled athletes participate in elite mainstream sport, whether at professional or amateur level.<sup>56</sup> Other disabled athletes

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Research 9. See also, Dykens, E (1996) ‘Effects of Special Olympics International on Social Competence in Persons with Intellectual Disability’ 35 *Journal of the Academy of Child and Adolescent Psychiatry* 223.

<sup>55</sup> This series of questions is adapted from Hums, M A, Moorman, A M and Wolff, E A (2003) ‘The Inclusion of the Paralympics in the Olympic and Amateur Sports Act: Legal and Policy Implications for Integration of Athletes with Disabilities Into the United States Olympic Committee and National Governing Bodies’ 27 *Journal of Sport & Social Issues* 3, pp.269-270.

<sup>56</sup> Examples of elite disabled athletes competing in mainstream competitions will be given in further chapters, including ‘Magic’ Johnson, Casey Martin and Oscar Pistorius. For further examples, see Ham, E L (1998) ‘Disabled Athletes: A Last Vestige of Court Tolerated Discrimination?’ 8 *Seton Hall Journal of Sport Law* 741.

participate in elite disability sport, which is almost invariably amateur.<sup>57</sup> These two different forms of participation each give rise to their own sets of legal problems, which can be drawn out by considering issues surrounding the use of ‘enhancements’.<sup>58</sup> Enhancements in sport can take a variety of forms, some of which are deemed to be illegitimate and some of which are not. These include the use of drugs,<sup>59</sup> sports equipment<sup>60</sup> or artificial limbs.<sup>61</sup> This last example is very close to the concept of ‘reasonable adjustment’/‘accommodation’ which is a feature of disability discrimination law.<sup>62</sup> In some cases, such an enhancement or adjustment is necessary in order for a disabled athlete to compete in elite mainstream sport, whether it consists of an artificial limb or a golf cart.<sup>63</sup> Very soon a conflict can arise between the athlete’s right to be free from unlawful discrimination, and the rules of the sport in question. This was the conflict arising in *Martin*, as shall be seen.

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<sup>57</sup> Disabled professional athletes generally take part in mainstream sport. For example, the disabled athlete Jim Abbott was a professional major league baseball pitcher who retired in 1999 after a very high-earning career. Also note that professional disability specific sport can arise in unusual circumstances such as (controversially) ‘dwarf-tossing’, which flourished in the 1990s and in which professional dwarf participants can reportedly make ‘six-figure’ sums (see McGee R W (1993) ‘If Dwarf Tossing is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?’ 38 American Journal of Jurisprudence 335).

<sup>58</sup> The use of the term ‘enhancements’ in this section roughly follows the definition in Savulescu, J (2006) ‘Justice...’ Savulescu develops what he calls a ‘welfarist’ definition of enhancements, in which deciding when enhancements are necessary involves answering the question ‘when should we increase human well-being?’ In the context of sport, the use of enhancements is tempered by fairness-based objectives.

<sup>59</sup> These include both illegal drugs, such as steroids; and legal drugs, such as caffeine. Refer to World Anti-Doping Agency (WADA) (2003) *World Anti-Doping Code* Montreal: WADA. (A revised Code is expected to come into force in 2009.)

<sup>60</sup> The use of enhancements in sports equipment is prescribed by rules specific to each sport. For example, powerful composite rackets are permissible in tennis, but they must not be double-strung, which it is commonly agreed would impart too much spin on the ball.

<sup>61</sup> As in the case of Oscar Pistorius.

<sup>62</sup> This concept is considered in greater detail in following chapters.

In elite disability sport it is generally more accepted that enhancements, beyond those used in mainstream equivalent sports, should be accommodated. An obvious example of this would be the use of wheelchairs in wheelchair basketball or tennis.<sup>64</sup> Specific categories of disabilities lead to specific categories of competitive disability sport, such as swimming events for people with impairments to their limbs. Issues arising in relation to these types of sports are consequently usually to do with general rights of access and the availability and provision of enhancements or adjustments.<sup>65</sup>

### **Sports Organisations and Disabled People**

Who makes the decision as to whom can participate in a particular sport, and how that decision is made, are crucial questions for disabled sportsmen and women. Very often in the case of organised sport, these decisions are not made by the disabled person. This is not only an issue within professional sports, but also within amateur sports.<sup>66</sup>

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<sup>63</sup> As in the cases of Oscar Pistorius and Casey Martin, respectively.

<sup>64</sup> An example of a subtler form of enhancement or adjustment might be assistance provided by a seeing person to a blind golfer. (See [www.scottishblindgolf.com/](http://www.scottishblindgolf.com/).)

<sup>65</sup> In the field of elite disability sport, various specific characteristics of the bodies of disabled athletes also give rise to particular issues which may not apply in the case of non-disabled athletes. One example is the reported use of 'autonomic dysreflexia' in competitive wheelchair sport, in which the athlete inflicts injury on their own body (possibly in a part of the body where no pain is felt) in order to produce a natural physiological response which increases performance. See further discussion in Legg, D and Mason, D S (1998) 'Autonomic Dysreflexia in Wheelchair Sport: A New Game in the Legal Arena?' 8 *Marquette Sports Law Journal* 225. (This article also points out that drug enhancement issues apply in disability sport, just as they do in mainstream sport, citing examples.)

<sup>66</sup> If it is assumed that the medical and other impacts of the disability have been correctly diagnosed, and that there has been full disclosure of all material health risks in playing, the question becomes who has ultimate legal authority to make the decision whether or not the athlete can participate. See Mitten, M J (1992) 'Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?' 71 *Nebraska Law Review* 987, p.990.

The regulation of the decision to include or exclude disabled people in sport is often made by private bodies, sports organisations, associations, clubs, etc;<sup>67</sup> other relevant decision-making bodies include public authorities such as councils and education authorities.

### ***The influence of sports organisations for disabled people***

Although this thesis is primarily concerned with national and international law, rather than regulation at the level of sports governance, given the fundamental influence of sports organisations involved with sport for disabled people, the study would be incomplete without considering their relationship with the law (comparative reference will be made throughout to various sports governing bodies and other organisations).

The inclusion of disabled people's interests in the regulation of sport is very often lacking, although in the USA it is possible to identify a limited framework of disability sports governance.<sup>68</sup> For example, the Stevens Amendment 1998 to the Amateur Sports Act 1978 introduced provisions for the governance of Paralympic sport<sup>69</sup> in the USA, also changing the name of the legislation to the Olympic and Amateur Sport Act (OASA). The OASA designates the United States Olympic

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<sup>67</sup> See De Santis, K (1982) 'The Disabled Student Athlete: Gaining a Place on the Playing Field' 5 Communications and Entertainment Law Journal 517.

<sup>68</sup> See discussion in Hums, M A, Moorman, A M and Wolff, E A (2003) 'The Inclusion of the Paralympics in the Olympic and Amateur Sports Act: Legal and Policy Implications for Integration of Athletes with Disabilities Into the United States Olympic Committee and National Governing Bodies' 27 Journal of Sport & Social Issues 3.

<sup>69</sup> The Paralympics are the elite disability sport equivalent of the Olympics, for people with physical impairments, held every four years. The Special Olympics are the equivalent games for people with learning difficulties. Note also other world competitions such as the Deaflympics.

Committee (USOC) as the ‘umbrella’ organisation for Paralympic sport; USOC can delegate its authority by designating in turn (where feasible and where such designation would serve the best interest of the sport) a national governing body for particular sports; and where that would be unfeasible or against the interest of the sport, USOC is authorized to recognise another amateur sports organisation as a Paralympic sports organisation.<sup>70</sup> At the level of sports in education, there are a number of mainstream governing bodies which have had a significant impact on the participation of disabled people in sport. Prominent among these is the National Collegiate Athletic Association (NCAA), which is a voluntary organisation by which colleges and universities govern their athletics programmes.<sup>71</sup> The NCAA is a powerful organisation, in part because of the very significant revenue which it generates, mainly from television and marketing rights fees.<sup>72</sup>

The framework of sports governance in Scotland, and indeed in the rest of the UK, is typically less statutory by nature and is certainly less commercially-orientated than in the USA.<sup>73</sup> Scottish Disability Sport (SDS)<sup>74</sup> is the governing and coordinating body of sport and physical recreation for all people with a disability in Scotland.<sup>75</sup> The

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<sup>70</sup> 36 USC § 220522.

<sup>71</sup> For further details, refer to the website of the NCAA at [www.ncaa.org/](http://www.ncaa.org/).

<sup>72</sup> According to the NCAA 2006-2007 budget (available on its website), the revenue from these sources was \$508,250,000, which constituted 90.12% of the total revenue.

<sup>73</sup> This is a generalisation since there are a few highly commercialised sports organisations in Scotland, such as the Scottish Football Association, which turned over £18,600,000 in 2006, largely through television rights (see Scottish Football Association Annual Review 2007, available on the Association website, at <http://www.scottishfa.co.uk/index.cfm>).

<sup>74</sup> (<http://www.scottishdisabilitysport.com/>.)

<sup>75</sup> Formerly the Scottish Sports Association for Disabled People (SSAD), which was founded in 1962 to provide facilities for, and to encourage the development of sport and physical recreation for disabled people.

Scottish Government and the National Lottery<sup>76</sup> fund SDS, via the non-departmental public body (NDPB), sportscotland (see below).<sup>77</sup> (SDS is also a member organisation of the British Paralympic Association and it works closely with Scottish Local Authorities and Scottish sports governing bodies (SGBs)). The strategy of SDS consists mainly of a mixture of policy goals to promote the participation of disabled people in sport.<sup>78</sup>

The integration debate, outlined above, necessarily plays an important part in how the framework of disability sports governance in Scotland is established. SDS reported in 2006 that “[a]s a national association, [it] has fewer young people, (particularly those

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<sup>76</sup> ‘BIG Lottery Fund’, associated with the National Lottery, also contributes.

<sup>77</sup> For example, in March 2003 the (then) Scottish Executive allocated £600,000 to sportscotland to establish a ‘dowry’ for Scottish Disability sport. This enabled the appointment of a Chief Executive to develop existing and new programmes to widen the opportunities for disabled people to participate in sport from local to elite level. In the financial year ending 31 March 2007, sportscotland invested £215,250 in SDS, and a further £17,000 in disability sport directly, (sportscotland (2007) *Making an Impact Annual Review 06/07* Edinburgh: sportscotland, p.29). This is a very small proportion of the £32,263,044 total invested in sport.

<sup>78</sup> The national strategy of the SDS, outlining future priorities, is identified in Scottish Disability Sport (2006) *Towards London and Beyond, 2006-2012* Edinburgh: Scottish Disability Sport. Priority policy aims include: support the development of a ‘sporting pathway’ for young people with a physical, sensory and learning disability; encourage and support Scottish athletes with a disability to realise their full potential in sport; recruit new partners involved in physical activity and/or disability and further develop existing partnerships; work with regional coaching partnerships to access education and leadership for athletes and volunteers; promote a clear pathway towards elite performance for those with the potential to compete at the highest level.

with physical disabilities), involved in its squads and programmes than ever before”.<sup>79</sup>

This becomes an acute debate at the level of schools and education.<sup>80</sup>

The overall governing body is sportscotland, which in turn acts to regulate other SGBs.<sup>81</sup> One of sportscotland’s main roles is to invest in sport development, mainly through the development of sporting infrastructure.<sup>82</sup> It also decides whether or not something constitutes a ‘sporting activity’ based on specific criteria.<sup>83</sup> These include the requirement to meet the terms of the definition of sport in the European Sports

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<sup>79</sup> Scottish Disability Sport (March 2006) *Written Evidence to the Scottish Parliament (Equal Opportunities Committee’s Disability Inquiry “Removing Barriers and Creating Opportunities”* (Available from the Scottish Parliament website: <http://www.scotland.parliament.uk/>.)

<sup>80</sup> This debate will be discussed further in Chapter 5. City of Edinburgh Council recently appointed an Active Schools Coordinator (Inclusion), whose role is to work with local schools to identify young people with disabilities and ensure that they are exposed to physical activity and sport programmes.

<sup>81</sup> <http://www.sportscotland.org.uk/>. (Refer to this website for all sportscotland policy documents.) It should be noted that the Scottish National Party, currently in government, included a commitment in its most recent manifesto to abolish sportscotland, as part of what has been dubbed a ‘bonfire of the quangos’. At time of writing, the government is undertaking a review and Steward Maxwell MSP, the Minister for Communities and Sport, has made it clear that another system will be put in place. This may be a central government department for sport. A number of legal issues may arise in relation to these proposals – sportscotland was founded by Royal Charter (see below), which may mean that its future status is a matter reserved to the UK government; furthermore, a substantial part of its funding originates from the National Lottery and this has to be distributed independently of government, so it is not clear what arrangements would need to be made to distribute these funds. See The Sunday Herald, 28 March 2008, ‘Fears of SNP Plans to Abolish sportscotland’. Proposals may also include a merger with the Scottish Institute of Sport.

<sup>82</sup> sportscotland was founded by Royal Charter in 1971, as ‘The Scottish Sports Council’, changing to its current name by amendment in 1996. For further information about sportscotland’s roles, see <http://www.sportscotland.org.uk>.

<sup>83</sup> sportscotland *Criteria and Process for the Recognition of a Sporting Activity* (available on the sportscotland website, above).



Charter;<sup>84</sup> and an established structure defined by rules and where appropriate, organised or international competition. The criteria also require that a sport “...must also demonstrate that there are no barriers to participation that could be viewed as creating inequity of access”.<sup>85</sup> This latter criterion raises the interesting possibility that an activity could be ‘de-recognised’<sup>86</sup> by what is the main statutory governing body (with all the funding and other implications that might entail) if it failed to show that there were no barriers to participation that could be viewed as creating ‘inequity of access’ for disabled people. The following chapters consider a number of instances which might constitute unequal access to sports for disabled people, caused by barriers to participation. This criterion might be worth bearing in mind for any disabled athlete who felt she was unlawfully discriminated against by a SGB, as she might also have recourse for action via a complaint to sportscotland on the grounds of unequal treatment.

sportscotland also publishes criteria for the recognition of an SGB.<sup>87</sup> In terms of the governance structure, this requires that an “...appropriate constitution and statement on... equity [is] in place”. This reflects the requirements of the disability equality duty, under the Disability Discrimination Act 2005.<sup>88</sup> It also publishes an Equity

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<sup>84</sup> *Ibid.* (Quoting the European Charter: “Sport means all forms of physical activity which, through casual or organised participation aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels”, as noted above.)

<sup>85</sup> *Ibid.*

<sup>86</sup> In the terminology of sportscotland.

<sup>87</sup> sportscotland *Criteria for the Recognition of a Governing Body of Sport* (available on the sportscotland website, above).

<sup>88</sup> See Chapter 4.

Policy, which details its policy on equality and its compliance with the statutory equality duties.<sup>89</sup> SDS likewise publishes its own Equity Policy.<sup>90</sup>

In England, the umbrella organisation, which acts as the equivalent of SDS, is the English Federation of Disability Sports (EFDS). The EFDS encompasses seven National Governing Bodies (NGBs) for Impairment Specific Sports.<sup>91</sup> These are also important to take account of for Scottish disabled sportsmen and women, because some of these NGBs act across the jurisdictions.<sup>92</sup> From a legal perspective, this potentially entails an element of ‘forum shopping’ – should a dispute arise over a decision made by an NGB, the Scottish courts are traditionally a better forum than the courts in England and Wales in which to obtain judicial review of a sports organisation’s decision-making (see below).

#### *Organisations which provide sports for disabled people and potential disputes*

Other than the SGBs, organisations in Scotland which provide sports services include local authorities (of which Scottish Education Authorities are part, governing school-level public education);<sup>93</sup> private educational establishments; colleges and universities; and of course private clubs and commercial sports organisations. All of these are potential defendants or respondents, should a disabled sportsperson wish to

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<sup>89</sup> See [www.sportscotland.org.uk/ethics](http://www.sportscotland.org.uk/ethics).

<sup>90</sup> (The Equity Policy is available on the organisation’s website, above.)

<sup>91</sup> These NGBs are: The English Sports Association for People with Learning Disabilities, British Blind Sport, British Amputees and Les Autres Sports Association, Disability Sport England, Cerebral Palsy Sport, The British Wheelchair Sports Foundation, British Deaf Sports Council.

<sup>92</sup> See the British NGBs, above.

<sup>93</sup> As defined by section 61(b) of the Local Government in Scotland Act 2003. These are ‘councils’ in common parlance.

raise a court action against them for an alleged wrongdoing, such as an illegal decision to exclude them, which has been based on discriminatory practices. Historically, and in broad terms, Scottish public organisations providing sports services and facilities have been liable to judicial review (usually in relation to disciplinary decisions), but the utility of purely judicial review principles, as a means of obtaining a remedy, in the sorts of discriminatory situations that disabled sportsmen and women might find themselves in, has largely been overtaken by the impact of human rights and discrimination law, which will be the main subject of this thesis.<sup>94</sup>

As part of their function, sports governing bodies are often able to act as dispensers of alternative dispute resolution. For example, SDS provides both a code of conduct and disciplinary procedures.<sup>95</sup> The code of conduct covers specific roles such as SDS athletes and coaches, management committee members, sports co-ordinators, and sport team managers.<sup>96</sup> Complaints about the conduct of any of these can be made to SDS, which operates a complaints committee structure and an appeal structure.<sup>97</sup>

If an appellant has his appeal dismissed, the matter may be referred to the Sports Dispute Resolution Panel, which is an independent body established to provide a UK-

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<sup>94</sup> For a general account of the use of judicial review in this context, see Miller, S (2000) 'Judicial Review of Disciplinary Decisions of Sporting Bodies' in Stewart, W J (ed) *Sport and the Law: the Scots Perspective* Edinburgh: T&T Clark Limited.

<sup>95</sup> See Scottish Disability Sport *Code of Conduct/Disciplinary Procedures & Guidelines*, available on the SDS website, above.

<sup>96</sup> *Ibid.* Section C.1.1.

<sup>97</sup> *Ibid.* Section C.2.1 – C.3.0.

wide dispute resolution service to sport.<sup>98</sup> Matters relating to international sport can be dealt with by the Court of Arbitration for Sport, outlined below.

## **The Law and the Regulatory Framework**

### ***The role of the courts***

How does the law relate to the regulatory framework outlined above? For example, what happens when sports organisations make the ‘wrong’ decision? Like many other common law countries, it is possible to judicially review the decisions of sports governing bodies in Scotland.<sup>99</sup> (This is not, however, the position in England and Wales, where the courts have proved reluctant to recognise sports organisations as public bodies, amenable to judicial review.)<sup>100</sup> What follows is a very brief review of the current position of judicial review in Scotland, which is designed to demonstrate the relation to human rights and discrimination actions, which, it will become apparent, are the most powerful elements of Scots law in the context of sport for disabled people.<sup>101</sup>

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<sup>98</sup> For further details, see <http://www.sportsdisputes.co.uk/>.

<sup>99</sup> See comparative discussion of the status of judicial review of Scottish SGBs in Anderson, J (2006) ‘An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review’ 35 Common Law World Review 173, pp.185-186.

<sup>100</sup> See discussion in McArdle, D (1999) ‘Judicial Review, ‘Public Authorities’ and Disciplinary Powers of Sports Organisations’ 30 Cambrian Law Review 31.

<sup>101</sup> Unfortunately, there is not enough space here to conduct a comparative study of judicial review in the specific context of sport for disabled people.

The status of judicial review in Scotland was summarised by Lord Hope in *West v Secretary of State for Scotland*,<sup>102</sup> which established that, in bringing an action for judicial review, a party must prove the existence of a ‘tri-partite relationship’ “between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised”.<sup>103</sup> Hence, applying this to the framework of Scottish sports governance above, a disabled sportsperson who wished to have judicially reviewed a decision by an organisation providing sports services or facilities, such as a club, an SGO, or a public body such as a school, would need to demonstrate the existence of a tri-partite relationship within the sports governance framework. An example might be where the relevant decision maker is a committee of a sports club which has been authorised by the members of the club to take a decision to exclude an individual participant.<sup>104</sup>

The utility of access to judicial review for the disabled sports participant is broadly equal to the utility of any other participant, but how likely is it that disabled people will wish to, or be able to, use judicial review to influence their opportunities to participate in sport?<sup>105</sup> As noted above, most of the cases which involve the judicial

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<sup>102</sup> (1992) SLT 636; followed by *Fraser v Professional Golfers Association* (1999) SCLR 1032 and *Crocket v Tantallon Golf Club* [2005] CSOH 37 (see below). *West* involved a judicial review of the Scottish Prison Service’s decision to refuse a prison officer reimbursement of expenses involved in his compulsory employment relocation. It provided an opportunity for the Court to thoroughly review its supervisory jurisdiction.

<sup>103</sup> Lord President Hope, page 413.

<sup>104</sup> As happened in *Crocket v Tantallon Golf Club*, below.

<sup>105</sup> Petitions for judicial review in Scotland have to be lodged in the Court of Session and are associated with prohibitively high legal costs, frequently amounting to several tens of thousands of pounds. It is

review of the decisions of governing bodies involve disciplinary procedures, and of course these could apply to disabled participants as much as to non-disabled participants.<sup>106</sup> In some cases, however, a sports body may be found to be exercising its powers in an unfair or discriminatory manner and this could form the basis of review.<sup>107</sup> Recently, judicial review has been used in courts in the UK in diverse circumstances of alleged discrimination and related human rights violations. Examples include reviews on the basis of: freedom to manifest one's religious belief in school;<sup>108</sup> freedom of assembly and association in fox hunting;<sup>109</sup> and, in *R (on the application of T) v Independent Appeal Panel for Devon County Council*, alleged disability discrimination in the decision of a school to exclude an autistic child.<sup>110</sup> There is a growing body of case law which utilises both human rights and discrimination legislation as the basis for review, and this provides a potential opportunity to use the law to influence decisions made within a context of sports for disabled people. In *R v Devon County Council*, a school's appeal panel was found not to have engaged with a number of key questions which it was bound to consider under the Disability Discrimination Act 1995 and on that basis its decision-making process was unlawful. It is also possible for individuals or organisations to judicially review

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likely that access to this form of justice is ordinarily beyond the means of the majority of disabled sportsmen and women.

<sup>106</sup> In some cases, however, the sports participant may have a private law remedy if a contract exists – for example, in the case of a health club membership.

<sup>107</sup> See discussion of the possibility of such cases being the subject of judicial review in Anderson, J (2006) 'An Accident of History...' pp.184-195.

<sup>108</sup> *R (on the application of Playfoot) v Millais School Governing Body* [2007] EWHC 1698 (Admin) which concerned a pupil's right to wear a 'purity ring' on the basis that it was a manifestation of her religious belief.

<sup>109</sup> *Friend v Lord Advocate* [2007] UKHL 53 which concerned an appeal against a dismissal of a petition for judicial review, on human rights grounds, of the enactment of the Protection of Wild Mammals (Scotland) Act 2002.

decisions by public bodies where they have been made in breach of the positive duties contained in the Disability Discrimination Act 2005. In *R (on the application of Chavda and others) v London Borough of Harrow*<sup>111</sup> it was held that a public authority's decision-making process had failed to comply with the disability equality duty contained in the 2005 Act. Crucially, the implications of the duty had insufficiently been brought to the attention of the decision makers concerned.

There have been a number of recent Scottish judicial reviews of the decisions of sports organisations, the leading case being *Crockett v Tantallon Golf Club*,<sup>112</sup> which concerned a review relating to the rules of a sports club and the exclusion of one of its members.<sup>113</sup> *Harrison v West of Scotland Kart Club (and others)*<sup>114</sup> concerned the liability of a sports club in the context of serious injury to the pursuer. Taking the above issues together, these demonstrate that there may be some scope within the judicial review mechanism for disability human rights and discrimination arguments about issues arising in respect of sport for disabled people.

### ***From judicial review to human rights***

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<sup>110</sup> [2007] EWHC 763 (Admin).

<sup>111</sup> [2007] EWHC 3064 (Admin).

<sup>112</sup> [2005] CSOH 37.

<sup>113</sup> Mr Crockett, a member of Tantallon Golf Club, had received a complaint against him and a subsequent vote to expel him by the Club's membership. He brought an action for judicial review on the grounds that the decision-making process employed did not give him sufficient detail of the complaint, and that there was insufficient enquiry made.

<sup>114</sup> [2004] CSOH A300/01.

The rights contained in the European Convention on Human Rights (ECHR) have the potential to significantly impact on the regulation of sport.<sup>115</sup> Section 6, Human Rights Act 1998 (HRA) requires that UK public authorities must act in accordance with the ECHR and the Scotland Act 1998 also incorporates the ECHR into domestic law in Scotland.<sup>116</sup> It is possible to identify two ways in which the Convention rights, incorporated into the law of Scotland, are likely to impact upon the activities of sports governing bodies.<sup>117</sup> Firstly, by means of what can be described as the ‘horizontal effect’ of the HRA. Although the HRA does not explicitly extend to relationships between private parties, it is arguable that it can have an indirect influence on them, by virtue of the way in which the courts must interpret and develop pre-existing law in accordance with the Act.<sup>118</sup> (By virtue of section 6(3)(a), HRA, courts count as public bodies which are required, by section 6(1), to act in accordance with the other rights in the Act.) One way of approaching this is, provided individuals can identify a cause of action against a SGB, or another sports organisation, they can tack on a Convention right to that cause of action, reminding the court of its duty to take the ECHR into account in interpreting all law.<sup>119</sup>

Secondly, there are a number of Convention rights which could impact on the provision of sport for disabled people,<sup>120</sup> and as has just been seen, the mechanism of judicial review is potentially amenable to enforcing those rights. How exactly does

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<sup>115</sup> See, in general, the discussion in Boyes, S (2000) ‘The Regulation of Sport and the Impact of the Human Rights Act 1998’ 6 *European Public Law* 517.

<sup>116</sup> See further discussion in Chapter 3.

<sup>117</sup> These two mechanisms are identified in Boyes, S (2001) ‘Regulating Sport after the Human Rights Act 1998’ 151 *New Law Journal* 444.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* P.445.

<sup>120</sup> As will be seen in chapter 3.



that mechanism work? As noted above, section (6)(1) applies Convention rights to public bodies and makes it unlawful for a public authority to behave in a way contrary to a Convention right. The question then becomes – do sports organisations count as public bodies for the purposes of the HRA? In answering in the affirmative, Anderson says, “...it appears that the key battleground as to the public nature of the functional and decision-making competencies of sports organizations has been subsumed within an understanding of the Human Rights Act 1998, s.6.”<sup>121</sup>

As noted above, whereas English courts have been reluctant to construe sports organisations as public bodies for the purposes of judicial review, Scottish cases such as *Tantallon* have established that they are considered to be public bodies in Scotland, and hence amenable to judicial review. This would suggest that the Scottish courts might follow a similar line with the cases under the HRA. The distinction between private and public functions, for human rights purposes, has been the subject of considerable debate during recent years, however,<sup>122</sup> and it was only very recently that the House of Lords was able to decide this matter in *YL v Birmingham City Council*.<sup>123</sup> In this case, Mance, LJ decided that the issue turned on whether functions performed by the body in question were such as to engage the liability of the UK under the Convention and it was held that the key question was whether the body was undertaking a ‘governmental’ function.<sup>124</sup> It will be interesting to see how courts in

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<sup>121</sup> Anderson, J (2006) ‘An Accident of History...’ p.192.

<sup>122</sup> See the examination of the term ‘public authority’ in Bamforth, N (1999) ‘The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies’ 58 Cambridge Law Journal 159.

<sup>123</sup> [2007] UKHL 27; [2007] 3 WLR 112. This case concerned the provision of residential care and accommodation and the right to respect for a ‘home’ under Article 8, ECHR.

<sup>124</sup> See Elliott, M (2007) ‘Case and Comment: “Public” and “Private”’: Defining the Scope of the Human Rights Act’ 66 Cambridge Law Journal 3.

England and Wales, and Scotland interpret this judgment in the context of sports organisations.<sup>125</sup> Palmer has argued that the House of Lords has adopted an unacceptably narrow approach to the meaning of public authority, but she also notes that there was significant dissent in the judgments, which betrays the extent to which this debate is a deep one about fundamentally competing ideologies.<sup>126</sup>

### ***The Court of Arbitration for Sport***

It is not only the domestic courts that are available for disabled athletes to pursue their rights. The Court of Arbitration for Sport (CAS), based in Lausanne Switzerland, is increasingly recognised as an emerging leader in international sports dispute resolution.<sup>127</sup> Many of the cases heard in CAS have concerned drugs in elite sport since Rule 13.2.1 *Appeals Involving International Level Athletes* of the 2003 World Anti-Doping Code determines that such cases, involving international-level athletes and sports events, can be appealed there.<sup>128</sup> Notably, Oscar Pistorius is pursuing his appeal against his Olympic ban by the IAAF in the CAS.<sup>129</sup> It may become the case that disabled athletes who are competing internationally will increasingly make use of this forum when disputes arise. The UN Convention on the Rights of Persons with

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<sup>125</sup> See also House of Lords and House of Commons Joint Committee on Human Rights (2007) *The Meaning of Public Authority under the Human Rights Act – Joint Committee Report* (available at [www.parliament.uk](http://www.parliament.uk)).

<sup>126</sup> See Palmer, S (2007) 'Public, Private and the Human Rights Act 1998: an Ideological Divide' 66 *Cambridge Law Journal* 559. This could be an issue that in due course has to be addressed by appropriate legislation – perhaps via the prospective British Bill of Rights. At time of writing, the UK Parliament's Joint Committee on Human Rights continues to take evidence on the government's stated commitment to introduce such a bill.

<sup>127</sup> See Gilson, E T (2006) 'Exploring the Court of Arbitration for Sport' 98(3) *Law Library Journal*.

<sup>128</sup> See <http://www.wada-ama.org/en/>.

<sup>129</sup> See later chapters.

Disabilities has now entered force and international provisions such as this may become increasingly relevant to CAS's developing body of decisions.<sup>130</sup>

### *Private sports clubs – an aside*

So far, there have been several indications in this chapter about the importance of disability discrimination law. Chapter 3 begins to look in detail at the Disability Discrimination Act 1995 (DDA) and related provisions. A superficial look at the DDA might suggest that issues in relation to sport for disabled people would concentrate on the liability of sports clubs. From what has just been discussed, however, it may be seen that this issue is a 'red herring' because there are so many different providers of sports services, many of which are public by nature. Furthermore, sports 'clubs' which provide a service to the public, such as health or fitness clubs, despite being private in other respects, are subject to the less favourable treatment provisions and the reasonable adjustment duty under Part 3, DDA.<sup>131</sup> Nonetheless, regarding disabled people who wish to be involved in private sports clubs, the changes brought about by the Disability Discrimination Act 2005 are important. Section 12 inserts a new section 21F into the DDA, which entails that clubs with twenty-five or more members, and by which admission is regulated by a constitution cannot discriminate against a disabled person in the terms on which it is prepared to admit him to membership; or by refusing or deliberately omitting to

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<sup>130</sup> See Wolbring, G (2008) 'Oscar Pistorius and the Future Nature of Olympic, Paralympic and Other Sports' 5(1) *Scripted – A Journal of Law, Technology and Society* (available online at [www.script-ed.org](http://www.script-ed.org)).

<sup>131</sup> See Chapter 4.

accept his application for membership.<sup>132</sup> When a disabled person is a member of a club, it must not discriminate against him by depriving him of membership, or by varying the terms on which he is a member.<sup>133</sup> Comparable provisions also exist for club associates. There has yet to be a body of case law on these provisions, but it is reasonable to expect that cases will generally follow some of the approaches in relation to the goods, facilities and services provisions.<sup>134</sup>

### *Sports governance to human rights – from micro to macro regulation*

Although this chapter has been primarily concerned with establishing how the law interacts with the framework of sports governance, the link to human rights hopefully has become clearer and chapter 3 follows this lead, taking a large ‘step back’ from micro regulation to macro regulation issues, in order to consider in more depth human rights in the context of sport for disabled people.<sup>135</sup>

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<sup>132</sup> Section 21F(2).

<sup>133</sup> Section 21F(3) (c).

<sup>134</sup> These provisions are discussed in further chapters.

<sup>135</sup> The following chapters should be read with reference to the explanation in the current chapter of the framework of sports governance and how human rights relate to it.

## *Chapter 2: Models of Disability – aims and definitions*

### ***Introduction***

The first part of this chapter examines the relative merits of the medical and social models of disability in the context of sport. Whilst the social model of disability has had a significant impact on discrimination law, its primary worth is in the observation that external factors are what create disability. The chapter explores the argument that there is no necessary connection between this empirical aspect of the theory and normative moral or political concerns. (It is a theory about what ‘is’ and does not necessarily tell us what ‘ought’ to be.) Whilst it is important to acknowledge the social model’s contribution in relation to understanding disability as a result of stigma, and how that acts on the social environment – to a certain extent this may be a result of ignorance of the medical implications and limitations of disabled people.

The second part of the chapter considers the underlying purpose of disability discrimination legislation in terms of three formulations of the meaning of ‘equality’, concluding that the concept of ‘social inclusion’ might better suit the context of sport.

### **The medical and the social models of disability**

The ‘social model’ of disability has its origins in the disability rights movement of the 1960s and 70s, although it was popularized through the work of Michael Oliver in the

1980s and '90s.<sup>136</sup> In part, the model arose as a reaction to the medical approach to disability, sometimes referred to as the 'medical model', which was regarded as placing an over reliance on individual medical remedies to specific impairments. It also reflected a new mood of activism amongst disabled communities, which were casting off the traditional reliance on charitable and welfare provisions organised by non-disabled sectors of society. Since then, the social model has had a considerable impact on policy and legislation in common law countries, including the UK, the USA, Canada and Australia.

By the 1970s, American sociologists were beginning to form a conception of disability that concentrated on the impact on disabled people of the social and wider environment, for example taking account of the effect of stigma. Yet even in sociological research it was still possible to note at this time that one of the shortcomings of sociologists working in the area of disability was their tendency to accept the medical model as the legitimate framework upon which to build their research.<sup>137</sup>

A shift in thinking came when it was realised that the crucial disabling factor in the lives of many people with impairments was not the 'internal' factors to do with personal mental or physical ability, but the 'external' factors to do with how society treats impaired individuals, by virtue of both the socio-political structures and the man-made physical environment. Disability was then seen to arise through the

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<sup>136</sup> See Oliver, M (1983) *Social Work with Disabled People* Basingstoke: Macmillan Limited; and Oliver, M (1996) *Understanding Disability: From Theory to Practice* Basingstoke: Macmillan Limited.

<sup>137</sup> Bynder H and Kong-Ming New P (1976) 'Time for a Change: From Micro- to Macro-Sociological Concepts in Disability Research' 17 *Journal of Health and Social Behaviour* 1, p.50.

limitations imposed by society's failure to remove barriers, whether those are discriminatory rules, social attitudes or architectural designs limiting accessibility. Thus, disability was no longer seen as the medical model sees it, simply as a 'problem' for the individual, stemming from the functional limitations or psychological losses as a result of 'personal tragedy'.<sup>138</sup>

The social model can be placed in the wider context of the disability rights movement and its recognition of the social stigma experienced by disabled individuals (see below).<sup>139</sup> The model helps to recognise the view of disabled activists and social scientists that individual and institutional behaviour towards people with disabilities is shaped by historical and cultural presuppositions about disability and social norms.<sup>140</sup>

Hence, according to this view, the 'disabling' experience of an athlete with a mental or physical impairment might arise as a result of inadequate access to sports grounds, through discriminatory architectural design, or it might arise as a result of the social perceptions and attitudes of other athletes or sports officials leading to discriminatory exclusion from team games. Each of these reasons is independent of the athlete and instead depends to a large degree on external factors that are under the control of wider society.

### ***Disability, sport and stigma***

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<sup>138</sup> Oliver M (1990) 'The Individual and Social Models of Disability' (unpublished paper presented at Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians), pp.2-3.

<sup>139</sup> Bagenstos S (2000) 'Subordination, Stigma and Disability' 86 Virginia Law Review 3, pp.436-445.

<sup>140</sup> Longmore K (1995) 'Medical Decision-making and People with Disabilities: A Clash of Cultures' 23 Journal of Law, Medicine and Ethics 1, p.84.

The observations of the social model are inextricably linked with the central impact of social ‘stigma’ in the lives of disabled people, which was developed as a theory by Goffman in the 1960s.<sup>141</sup> Stigma arises in the case of a disabled person when negative assumptions are made about his characteristics so as to create a ‘virtual social identity’ that is different from his ‘actual social identity’. For example, in noticing her impaired speech patterns, society might create a virtual social identity for an athlete with cerebral palsy as an individual who is less capable of understanding the rules of a team sport; whereas in fact her normal intelligence means that her actual social identity entails a perfect understanding of those rules. Hence, society notices an attribute about the disabled person that apparently makes him different from others in the category of persons available for him to be, and of a less desirable kind – “in the extreme, a person who is quite thoroughly bad, or dangerous, or weak. He is thus reduced in our minds from a whole and usual person to a tainted, discounted one. Such an attribute is a stigma...”<sup>142</sup> Goffman further wrote:

*...even while the stigmatized individual is told that he is a human being like everyone else, he is being told that it would be unwise to pass or to let down ‘his’ group. In brief, he is told he is like everyone else and that he isn’t – although there is little agreement among spokesmen as to how much of each he should claim to be. This contradiction this, joke is his fate and his destiny.*<sup>143</sup>

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<sup>141</sup> Goffman, E (1963; 1990) *Stigma: Notes on the Management of Spoiled Identity* London: Penguin Books Ltd.

<sup>142</sup> *Ibid.*, p. 12.

<sup>143</sup> *Ibid.*, p.150.



The analysis of the disability discrimination legislation in Chapter 3 revealed what may now be seen to be a disturbing parallel between this passage by Goffman and the indecisive and contradictory passages in the legislation. Disabled people are simultaneously treated as being *the same as* and *different from* non-disabled people, both by society and by the law.

***To what extent does the social model have implications for policy and law?***

The chapter now turns to a comparative look at the impact of the social model on disability policy and legislation in Scotland and further afield.

Some of the relevant legislative provisions have been framed in terms that respond to the key observations of the social model. One aspect of the Australian legislation that highlights this is the positive action element.<sup>144</sup> For example, section 10(5) of the Anti-Discrimination Act 1991 (Queensland) provides that:

*in determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.*

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<sup>144</sup> Dickson E (2003) 'Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in its Interpretation and Application' 8 Australia and New Zealand Journal of Law & Education 45, pp. 47-48.

Thus, the Act recognises that the responsibility for managing the impairment does not rest solely with the individual but is a responsibility for all in society, and that positive action may be required.

Another example of the model's impact is the UK's Disability Discrimination Act 2005, where a fundamental concern is the need for relevant public authorities to anticipate the specific requirements of individuals and to act to minimize their effective disability.<sup>145</sup> This means that the impact on individuals of the social and physical environment is statutorily required to be at the forefront of the minds of public authority officials, and that they must act according to a 'disability equality duty'. Thus, in terms of sports facilities design and management within the public sector, officials are statutorily required to take account of the impact on disabled people of everything they do and may be held liable if they do not observe these duties.

Despite the influence of the social model in legislation, research into the jurisprudence of the Americans with Disabilities Act 1990 suggests that the judiciary of the Supreme Court in the USA appears not to be fully engaging with the social model and are instead by and large preserving a medical model approach.<sup>146</sup> There is also research to suggest that the medical model prevails in the USA at the level of Federal Judiciary.<sup>147</sup> In spite of this, there are clear instances of senior judicial

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<sup>145</sup> Disability Rights Commission (2006) *The Duty to Promote Disability Equality: Statutory Code of Practice Scotland*, paragraph 2.20.

<sup>146</sup> Pendo, E (2003) 'Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation' 35 *University of California Davis Law Review*, pp. 1194-1195.

<sup>147</sup> Areheart B (forthcoming – 2008) 'When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma' 83 *Indiana Law Journal* 1.

engagement with the model in other jurisdictions – for example, the case of *Granovsky v Canada*<sup>148</sup> in which the Supreme Court of Canada stated that:

*[The focus of anti-discrimination law] is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the [remedial and ameliorative purposes of the anti-discrimination provision] that creates the legally relevant human rights dimension to what might otherwise be a straightforward biomedical condition.*<sup>149</sup>

As has been seen in Chapter 3, central to both the UK's Disability Discrimination Act 1995 (DDA) and the Americans with Disabilities Act 1990 (ADA) is the concept of the need to make reasonable changes to the social and physical environment in order to facilitate the participation of disabled people (generally termed 'reasonable adjustment' and 'reasonable accommodation' respectively).<sup>150</sup> To recap, in *Martin* the concept of reasonable accommodation could be seen in action and the key question was whether or not a disabled contestant should be denied the use of a golf cart on grounds that it would 'fundamentally alter the nature' of the tournaments in question to allow him to ride when all other contestants must walk. In *Martin* the use of the social model was evident in the examination of the social and environmental structures, which failed to accommodate his physical impairment and the Rules of

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<sup>148</sup> [2000] 1 SCR 703 (QL).

<sup>149</sup> Paragraph 26.

<sup>150</sup> Americans with Disabilities Act 1990 sections 12182 (a), (b)(2)(A)(iv), 12183(b).

Golf were a fundamental part of those structures. From the perspective of the social model, what was legally objectionable was the *stigmatic* assumption that it was fair for the Rules to reflect a norm in which all participants could walk and that the Rules should not be altered to accommodate a disabled person who was unable to walk.

This short discussion has provided some evidence to demonstrate the impact of the social model on law; however it would be misleading to suggest that the legislation completely follows this model. For example, the ADA prescribes that an individual has a disability if he or she has an impairment that substantially limits a major life activity (Sec. 12102 (2) (A)). Most of the examples given of major life activities, however, focus on personal, physical functioning (for example, walking, breathing, seeing and hearing), rather than in relation to the social environment.<sup>151</sup> This corresponds better with the medical or personal model.

***To what extent should the social model influence policy and law?***

Despite its ability to describe how disability discrimination occurs in the context of society, and its observable impact on policy and law, the usefulness of the social model may have been exaggerated. There are a number of criticisms which can be made in this vein.

One recent criticism, by Samaha, is that the social model of disability is merely an empirical observation and in fact it has no policy implications.<sup>152</sup> Throughout the

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<sup>151</sup> Crossley, M (1999) 'The Disability Kaleidoscope' 74 Notre Dame Law Review 3, p. 648.

<sup>152</sup> Samaha, A (2007) 'What Good is the Social Model of Disability?' 74 University of Chicago Law Review 4.

academic literature there has been little analysis of the moral connotations of the social model and instead it appears simply to have been assumed that the model necessitates a particular set of policies.<sup>153</sup> The mere observation that disability is to a large extent caused by external environmental factors does not automatically provide us with a set of moral norms.

If this criticism is correct, what it entails is significant. This is because the increasing entrenchment of the social model in sociology, and academic law in more recent years, appears to have carried through to the world of government and policy, which means that policy decisions are being made without due regard to any underlying philosophy.<sup>154</sup> The model is arguably so entrenched in current policy-making that the prospect that there may be an alternative theory is sometimes not even challenged. Hence, in the recent report of the Equal Opportunities Committee of the Scottish Parliament, it was possible merely to assert that: “The Committee acknowledges the differing views with regard to the definition of disability. However, the Committee, throughout the inquiry, has worked to the social model of disability and is pleased to see it being adopted by many employers and service providers”.<sup>155</sup>

### ***The social model and moral theory***

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<sup>153</sup> *Ibid.*, pp. 4, 20-22.

<sup>154</sup> See discussion in Shakespeare, T (2006) *Disability Rights and Wrongs* London: Routledge.

<sup>155</sup> Scottish Parliament (2006) *Removing Barriers and Creating Opportunities* (2<sup>nd</sup> Report of the Equal Opportunities Committee, Session 2).

In order to frame a theoretical discussion about disability it is useful to ask two questions.<sup>156</sup> First, what is it to have a disability? Second, what should be done to address disability? Although these questions are self-evidently closely linked, the social model seems mainly to answer the first question, but, according to Samaha's view, it does not seem to answer the second. This is not to say that there is no answer to the second question, but it is to ask for a further, or underlying, philosophy, which justifies a particular set of normative policy decisions.

Most subscribers to the social model might also be expected to follow one of a number of moral approaches or normative frameworks. These might include libertarian, utilitarian and egalitarian theories.<sup>157</sup> Whichever normative framework one subscribes to, in relation to disability that approach will have to address strategies to overcome disadvantage and to provide opportunities to participate in sport. It is at this juncture that, contrary to Samaha, the social model could in fact have a bearing on answering the second, moral question.

### ***The social model and sport***

Wolff uses the terminology 'personal enhancement' to capture those changes made to the person through surgery or medicine, and 'status enhancement' to capture changes to technology or laws, the built environment or public understandings.<sup>158</sup> These phrases correspond to the two broadly different techniques, used to address disability,

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<sup>156</sup> Wolff J (2008) 'Disability Among Equals' (forthcoming) in Brownlee, K and Cureton, A (eds) *Philosophy and Disability* Oxford: Oxford University Press. (Note, the version of this paper referred to here is available at Professor Wolff's homepage <http://www.homepages.ucl.ac.uk/~uctyjow/>.)

<sup>157</sup> Samaha, A (2007) 'What Good...' pp. 39-61.

of the medical and social models, respectively. In Wolff's analysis, a varying combination of these enhancements constitutes strategies to combat disadvantage and to provide worthwhile opportunities for what he calls 'securing social functionings', in which security is understood in terms of risk. In this way, sport could be seen as a 'social functioning' and the matter of securely participating in sport would depend on a number of specific risk factors. Following Wolff, these might be: the real possibility of physical harm; the fear of and anxiety about that harm; the 'planning blight' of living with uncertainty in terms of the difficulty of planning one's life under such conditions; steps taken to mitigate risks; and the mere fact of being subject to risks that others are not.<sup>159</sup> To these might be added the risk of experiencing a negative, stigmatic response from other sports participants; and the fear and anxiety triggered in the disabled person.

Returning to the choice of enhancements, in favouring status enhancement as a strategy to combat disadvantage – that is, the strategy corresponding to the social model – one is in fact aiming at a definable moral goal – creating a society in which people stand as equals to one another.<sup>160</sup> The choice of strategy should be based on its effectiveness in pursuing this goal. This is one possible way in which the social model of disability sport could be seen to have a moral underpinning and to contribute to moral norms.

### *Some advantages of the medical model*

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<sup>158</sup> Wolff J (2008) 'Disability Among Equals', pp. 8-9.

<sup>159</sup> *Ibid.*, p.18.

<sup>160</sup> *Ibid.*, p.21.

It seems an acceptable interim conclusion that the social model is at least of some use in emphasising the environmental barriers which act to counter the opportunities of disabled people to participation in sport. It is not, however, the whole story and it is possibly not even the most important part of the story. In several respects, it is the personal or medical model which is most relevant to participation in sport. In *White v Clitheroe Royal Grammar School*,<sup>161</sup> a boy brought a claim against his school on the grounds that he suffered discrimination in not being permitted to go on a planned water sports holiday. Part of the reason Tom was excluded from the holiday was that his teachers did not understand the implications of his medical condition. The teachers did not take advice from Tom's doctor, despite opportunities to do so. The slight deference shown by the court to medical authority, in that the doctor's opinion (or lack of it) was taken to be one of the key material facts in establishing unlawful discrimination, partly demonstrates how a medical analysis can benefit a disabled person, rather than hinder him.

As noted above, the medical model focuses on the impairment, or the personal aspect of disability, and medical or technological solutions to that. In achieving full access to participation in sport, this is sometimes undeniably the most significant aspect. An example of this from the world of elite sport is the progress of the South African runner Oscar Pistorius.<sup>162</sup> His prosthetic limb is a personal solution to the limitations of his disability, which is largely medical or technological in nature. In this way his disability is addressed through the use of personal enhancement. This also serves to highlight one of the fundamental shortcomings of the social model – an inability to

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<sup>161</sup> See discussion of *White* in Chapter 4.

<sup>162</sup> See discussion of Pistorius' case in Chapter 4.



tackle limitations inherent in bodily impairments.<sup>163</sup> This criticism may also be applied to the language of discrimination law itself – the concept of reasonable adjustments/accommodations may be insufficient to fully capture the subtleties of such inherent limitations.

Leading on from this, a second possible advantage is that, because the medical model focuses on the personal aspect – the individual addressing his or her disability – there is also less of a need to identify an artificial minority group of ‘disabled’ sportspeople. This is not necessarily a criticism of the social model specifically, but of an aspect of the interpretation of the model by the disability movement in which disability advocates have argued that people with disabilities form a ‘discrete and insular minority’.<sup>164</sup> In the case of sport, this is patently untrue. One example of this is the very different nature of the Paralympics (for physically disabled people) and the Special Olympics (for people with learning difficulties); and also the Deaflympics (for people with hearing impairments).<sup>165</sup> Of course, that does not exclude the possibility to construe a series of discrete and insular minorities (rather than one disability minority) as deaf culture sometimes appears to prescribe.<sup>166</sup> Another aspect of this approach to avoiding such a grouping is in the understanding that everybody is likely to experience disability in their lives and the idea that there is an identifiably discrete group of disabled people is simply wrong.

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<sup>163</sup> Crossley, M (1999) ‘The Disability Kaleidoscope’, p. 657.

<sup>164</sup> Bickenbach, J (2003) ‘Disability and Equality’ 2 *Journal of Law and Equality* 1, p. 10.

<sup>165</sup> For further details, see the websites of the respective games: [www.paralympic.org/](http://www.paralympic.org/); [www.specialolympics.org/](http://www.specialolympics.org/); [www.deaflympics.com/](http://www.deaflympics.com/).

<sup>166</sup> See for example, Tucker, B P (1994) ‘Deafness – Disability or Subculture: the Emerging Conflict’ 3 *Cornell Journal of Law and Public Policy* 265. Tucker explores examples of discrete deaf cultures. Also see the classic account of the unique ‘world’ of deaf people in Sacks, O (1989; 1990) *Seeing Voices: A Journey into the World of the Deaf* London: Picador.

On the other hand, there may be political advantages in recognising a minority grouping, however artificial. Some disability theorists have advocated that ‘disabled culture’ should be encouraged and celebrated and that a person’s ‘disabled identity’ should be reaffirmed – that this is crucial to ensure society acknowledges people with disabilities.<sup>167</sup> It seems intuitive, however, that there should be more motivation to, and reason for, a grouping than public relations and in this respect the medical model seems to have greater potential than the social model to avoid the shortcomings of a single classification. This is a question of purpose. In a scientific or factual meaning of classification it may not make sense to generalise disabled people into an artificial minority grouping, but it is still possible to argue that the use of generalizations in such a context as disability is an inevitable process in a complex society, as well as a useful tool in mediating social reality. (This general argument has been made by Schauer, and his argument is cited and applied to the context of discrimination under the ADA by Stein.)<sup>168</sup>

Nonetheless, according to a compelling argument by MacIntyre, dependency is a fundamental concept in disability and we are all dependent rational animals.<sup>169</sup> There is therefore no such thing as full independence as it is a matter of degree and not of kind. On this interpretation it does not make sense to divide individuals into the dependent and the independent and, likewise, to divide them into the disabled and non-disabled. In Chapter 3, the discussion of the future development of enhancements

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<sup>167</sup> See for example, Drimmer, J (1993) ‘Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities’ 40 University of California Los Angeles Law Review 134, pp.1408-1409.

<sup>168</sup> See Stein, M (2004) ‘Generalizing Disability’ 102 Michigan Law Review 1373.

in the field of sport for disabled people was designed to show how the disability discrimination legislation may turn out to be inadequate in aspects of its fundamental design. What such examples demonstrate is that the law may require in due course to re-align itself in parallel with a necessary re-alignment in the way that disability may come to be perceived. Central to MacIntyre's thesis is the need to put stronger "... emphasis upon the vulnerability and disability that pervade human life, in early childhood, in old age and during those periods when we are injured or physically or mentally ill, and the extent of our consequent dependence on others".<sup>170</sup>

A third reason why the medical model should not be too hastily jettisoned is to do with stigma. As was noted above, it is important to take account of stigmatic attitudes held towards disabled people by society, in understanding the context of the social model. Much of this stigma, however, may arise less as a result of ignorance about the effect of the social environment and more as a result of ignorance of the medical and physiological limitations of specific impairments. Examples of this are to be found in the US instances to do with HIV-positive sportsmen.<sup>171</sup> Wolohan argues that, in relation to HIV infection in the boxing ring, "[t]he question is not whether there is a statistically small chance that someone can transmit HIV in the boxing ring, but whether the fear of transmission is reasonable. If the fear is not reasonable, then the fighters are being denied the opportunity to box because of the unreasonable fear of others".<sup>172</sup> His point reveals the impact of the public's misunderstanding of impairments and the resulting stigma, which can in turn lead to discrimination.

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<sup>169</sup> MacIntyre, A (1999) *Dependent Rational Animals* London: Duckworth.

<sup>170</sup> *Ibid.*, p.155.

<sup>171</sup> See in general Wolohan, J (1997) 'An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes' 7 *Marquette Sports Law Journal* 373. See further discussion in Chapter 6.

Readjusting the balance to achieve a better understanding of disability in medical terms may be useful in countering such stigma; whereas, if disability is regarded as purely the product of the environment, one risk is that society will fail to try to achieve a better understanding of the genuine medical implications of impairments.

It has also been argued by Areheart that the fixation with the definition of disability itself by the courts is demonstrative of a medical model approach.<sup>173</sup> In fact, however, if the medical model is about an individualised, medical, solution-based approach to disability, it need not be the case that the model entails a strict examination of whether or not somebody is disabled. After all, non-disabled people receive medical and technological attention. Once it is determined that a claimant qualifies for protection under the relevant statute, the medical model could be brought into play in helping to understand the discrimination element, perhaps in terms of stigma (as above).

### *Unifying the models?*

Having discussed advantages and criticisms of both the social and medical models of disability, which are arguably the two most persistent models, it would seem to be time to judge between them, in respect of framing the law governing participation in sport. In making such an assessment, it is important to say that the models should not be mutually exclusive. Depending on the purpose of the law in question, aspects of the medical and the social model may be used.<sup>174</sup>

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<sup>172</sup> *Ibid.* at 393.

<sup>173</sup> See Areheart B (forthcoming – 2008) ‘When Disability Isn’t “Just Right”...’

<sup>174</sup> Bickenbach, J (2003) ‘Disability and Equality’, p.10.

One conclusion is that it could be helpful to fracture models of disability in order to piece together a more complex theoretical structure, taking account of different models of disability for different circumstances – for example, a social model might be more appropriate in an education setting;<sup>175</sup> whereas the health and safety aspects of the legislation may better suit a medical model.<sup>176</sup> Whilst the social model contributes an invaluable observation about the impact of the social environment, there are also aspects of the medical model which are suited to the application of discrimination law to participation in sport.

### **The purpose behind antidiscrimination legislation**

The consideration of theories of ‘disability’ in turn leads to the fundamental question: what is disability discrimination law trying to achieve? For example, is the goal of antidiscrimination law to promote substantive ideals of equality between different, identifiable ‘minorities’; or is it limited to remedying wrongful acts of discrimination at the level of the individual?<sup>177</sup> The answer to this question is usually couched in terms of ‘equality’.<sup>178</sup> There is, however, a wider philosophical debate to be had about

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<sup>175</sup> See Chapter 5.

<sup>176</sup> See Chapter 6.

<sup>177</sup> This question is raised and discussed in Suk, J (2006) ‘Antidiscrimination Law in the Administrative State’ 2 *University of Illinois Law Review* 405.

<sup>178</sup> There is a close association between antidiscrimination and equality made by leading writers in the field; for example, Fredman, S (2001) ‘Equality: A New Generation?’ 30 *ILJ* 145, and Hepple, B et al (2000) *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* Oxford: Hart. Also, the political orthodoxy of the concept of equality is so apparent that the main British public body governing antidiscrimination law has been named the Equality and Human Rights Commission.

where the pursuit of sport and leisure lies in our hierarchy of normative priorities,<sup>179</sup> and within that context it is valuable to examine discrimination law for alternative underlying political or moral concepts, such as ‘social inclusion’.<sup>180</sup> Despite being grouped within the same statutes in Britain, Australia and America, disability discrimination provisions relating to participation in sport do not necessarily serve the same purpose as applications of discrimination law relating to other areas, such as employment.

This section considers the relative merits of three formulations of equality: ‘formal equality’, ‘equality of opportunity’ and ‘substantive equality’,<sup>181</sup> and whether these are compatible with participation in sport, before going on to consider other underlying aims of discrimination law. It may be possible to identify a composite purpose to the legislation, depending on which aspect of life the provisions in question relate to. Different concepts of ‘equality’ may be postulated as underpinning normative values applicable to certain aspects, however, the purpose of the legislation as it applies to sport may be best characterised by the concept of ‘social inclusion’ rather than equality.

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<sup>179</sup> See Van Parijs, Philippe (1991) ‘Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income’ 20 *Philosophy and Public Affairs* 2, p.108, discussing the prospect of positing leisure as a ‘primary good’, in the sense advocated in Rawls, J (1988) ‘The Priority of Right and Ideas of the Good’ 17 *Philosophy and Public Affairs* 4, p.255; which in turn follows and revises Chapters II and VII of Rawls, J (1999) *A Theory of Justice* Oxford: Oxford University Press (revised edition).

<sup>180</sup> See Collins, Hugh (2003) ‘Discrimination, Equality and Social Inclusion’ 66 *Modern Law Review* 16, p.22, defining ‘social inclusion’ as an aim or principle of justice, rather than an egalitarian notion of distributive justice.

<sup>181</sup> Broadly following the three main concepts of equality described in Fredman, S (2002) ‘Equality: Concepts and Controversies’ in her *Discrimination Law* Oxford: Oxford University Press.

### *Formal equality*

The concept of ‘formal equality’ is commonly attributed to the Aristotelian premise that ‘likes should be treated alike’.<sup>182</sup> Whatever its origin, the concept is firmly established as a maxim in contemporary British case law.<sup>183</sup> The DDA is to a significant extent based on a formal conception of equality – particularly in its antidiscrimination provisions, which determine that disabled people should be given consistent, equal treatment to non-disabled people; disregarding their impairments so far as they are irrelevant.<sup>184</sup> Even taking into account ‘adjustments’, which is the second concept in the legislation examined above, the fundamental purpose of the law is to neutralise the effects of impairment and place the disabled person at a comparable starting point to a non-disabled person. As a liberal concept,<sup>185</sup> formal equality requires a level of State neutrality in that what is required is simply for all individuals to be treated consistently.

If it is assumed for the moment that formal equality is indeed the ‘be all and end all’ of disability discrimination law, it should now seem available to ensure that disabled sports participants are treated so far as possible in a fashion consistent with that to which non-disabled participants are treated. So, for example, public authorities could

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<sup>182</sup> *Ibid*, p. 7.

<sup>183</sup> As evidenced by Lord Hoffman’s observation that “...treating like cases alike and unlike cases differently is a general axiom of rational behaviour.” (*Matadeen v Pointu* [1999] 1 AC 98.)

<sup>184</sup> Arguably, this reflects the history of discrimination law in Britain which has tended to follow the symmetrical, consistent approach of formal equality, as illustrated by the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751 (HL), which held that the simple question to be considered in a sex discrimination case was whether the complainant would have received the same treatment as the defendant ‘but for’ his or her sex.

provide funding for a range of sports facilities and services which are comparable to, although they need not be exactly the same as, those available to non-disabled people.<sup>186</sup> At first this seems like a reasonable relationship between purpose and effect, yet formal equality suffers significant problems and limitations on a closer examination.

One of these problems demonstrates that formal equality creates weak law, and ends up demanding very little for disabled people. If all that the law requires is consistent treatment in cases where non-disabled people are provided with an inadequate service, it would nonetheless still be consistent, and hence on this conception non-discriminatory, to provide disabled people with an equally inadequate service. This problem was highlighted, in the context of race discrimination, by the notorious US case of *Palmer v Thompson*,<sup>187</sup> in which the requirement under race laws to open swimming pools to black people simply resulted in the civic decision to close the pools altogether. Following a narrow conception of formal equality, the court held that, since both whites and blacks were now identically (badly) provided for, no discrimination had in fact occurred. Thus, if their requirement is to achieve formal equality, there is nothing to stop organisations reducing the level of service provided for non-disabled people until it is consistent with a previously lower level which was

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<sup>185</sup> For a discussion of equality as a liberal egalitarian concept, and the moral status of human beings with impairments, see McMahan, J (2007) 'Challenges to Human Equality' 12 *Journal of Ethics* 1.

<sup>186</sup> An example of this is the former Scottish Executive having funded, via the agency sportscotland, adaptive skiing facilities at the Cairngorm ski resort, near Aviemore, in order to provide a service for disabled skiers. This is to a limited degree comparable to the service provided for non-disabled skiers. (See the details of this facility at [www.disabilitysnowsport.org.uk](http://www.disabilitysnowsport.org.uk).)

<sup>187</sup> (1973) 403 US 217, 91 S Ct 1940.



provided for disabled people. This result, by any account, would be a perverse effect of the law, benefiting nobody.<sup>188</sup>

A further significant limitation of formal equality is that it is inconsistent with reverse discrimination, which many commentators believe is an essential tool to be utilised if unwarranted discrimination is to be meaningfully combated.<sup>189</sup> As soon as an individual or group receives discriminatory treatment in their favour, there can no longer be a claim to consistent treatment or formal equality. There has been substantial debate and judicial disagreement in the US Supreme Court, held over a series of prominent cases in recent decades, as to whether formal equality, or whether reverse discrimination should hold sway when interpreting the law.<sup>190</sup> This argument has been set against several different backdrops, including: hiring policy,<sup>191</sup> public procurement,<sup>192</sup> and voting rights.<sup>193</sup> It does not seem clear, however, that it is a necessary debate to be had when set against the backdrop of sport.

At least in those cases where significant or costly adjustments are required in order for a disabled person to participate, a form of reverse discrimination appears to be the

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<sup>188</sup> This procedural approach, which apparently ignores sensible outcomes, has not been limited to the USA. A Scottish case, which reached the House of Lords, held that there was no violation of the equal treatment principle if an employer treats white and black employees equally badly (*Zafar v Glasgow City Council* [1998] IRLR 36 HL) and it is entirely conceivable that this approach might be taken in the context of sport.

<sup>189</sup> See the discussion above, and also the argument in Pitt, G (1992) 'Can Reverse Discrimination Be Justified?' in Hepple, B and Szyszczak, E M (eds.) *Discrimination: the Limits of Law* London: Mansell Publishing Limited.

<sup>190</sup> This debate is chronicled and further analysed in Fredman, S (2002) 'Symmetry or Substance: Reverse Discrimination' in Fredman, S (2002) *Discrimination Law*.

<sup>191</sup> *Johnson v Santa Clara* (1987) 480 US 616, 107 SC 1442.

<sup>192</sup> *Fullilove v Klutznick* (1980) 448 US 448, 100 SC 2758.

only logical, and just, solution. Imagine, for example, that proportionately greater resources than those spent on non-disabled people, need to be spent on purchasing a portable pool lift for disabled swimmers.<sup>194</sup> In terms of policy, surely few people would openly begrudge such spending. The reason this example seems intuitively unlike the case of employment is that it cannot reasonably be perceived as an instance of reverse discrimination which directly impacts on the ongoing competition for resources;<sup>195</sup> whereas the greater intensity of competition found in the job market leads to a more aggressive perception that any reverse discrimination is akin to illegitimate favouritism. So, if it is accepted that reverse discrimination is a legitimate tool of disability discrimination law, it becomes apparent that since it is incompatible with reverse discrimination, the concept of formal equality is insufficient to describe what must be the aim of the law, at least in the context of sport.

### ***Equality of opportunity***

As discussed in Chapter 1, the evidence suggests that there are reasons why in general disabled people have fewer opportunities to take part in sport than do non-disabled people. It has been seen that a conception of formal equality allows only consistent treatment and stops short of validating reverse discrimination, both limitations constricting any real expansion of the opportunities available for disabled people to do

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<sup>193</sup> *Shaw v Hunt* (1996) 517 US 899, 116 SC 1894.

<sup>194</sup> Scottish Disability Sport (SDS) recently considered the possibility of using a small submersible platform along the lines of a submersible floor to enable disabled people to enter and exit a pool independently and discreetly. (See Scottish Disability Sport (March 2006) *Written Evidence...*, above.)

<sup>195</sup> For discussion of equality as a concept the purpose of which is to regulate social competition, see Jacobs, L A (2004) *Pursuing Equal Opportunities: the Theory and Practice of Egalitarian Justice* Cambridge: Cambridge University Press.

sport; yet how far should discrimination law be used to create such opportunities? Talk of ‘equality of opportunity’ is perennially popular in the realm of contemporary social policy,<sup>196</sup> yet it is not clear that, for current purposes the concept of equality adds anything to the concept of opportunity.<sup>197</sup>

Fredman characterises the aims of equality of opportunity in terms of achieving an equal starting point in a race to access particular social goods (which might be assumed for present purposes to include access to sport).<sup>198</sup> The point of this concept is not to determine an outcome in which disabled people are necessarily equally represented in whichever area of life is at issue; instead, it may be said that “equality of opportunity implies that equal representation should not be precluded by social disadvantage.”<sup>199</sup> Unless the background of historical disadvantage suffered by disabled people is taken into account and suitably neutralized, they will not be provided with an equal starting point. Such neutralization may even involve positive measures such as providing sports training opportunities sufficient to raise the skill level of a disabled participant to that of a non-disabled participant. Under the social model, could such a participant still be regarded as ‘disabled’? A relevant example of an impaired athlete who outperforms non-disabled athletes is the paralympian Natalie Du Toit who lost her left leg in an accident in 2001. Unlike Pistorius, she uses no

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<sup>196</sup> For a discussion of the intuitive quality and popularity of the equality of opportunity argument, see Kymlicka, W (1990) *Contemporary Political Philosophy: An Introduction* Oxford: Oxford University Press, p.55.

<sup>197</sup> See further discussion of the identification of the conditions of opportunity and the view that equality as a concept adds nothing to these conditions, see Westen P (1990) *Speaking of Equality: an Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse* Princeton: Princeton University Press.

<sup>198</sup> Fredman, S (2002) *Discrimination Law*, pp.14-15.

prosthetics, yet she has qualified to compete in the Beijing 2008 Olympics, preferring to compete against non-disabled athletes, rather than other paralympians.<sup>200</sup>

To a degree, this approach accords with recent decisions by the Law Lords, who have shown some signs of moving beyond a traditional, formal equality approach to a more purposive approach to the legislation, in recognising the need to enhance protection against discrimination.<sup>201</sup> In the case of *Archibald v Fife County Council*,<sup>202</sup> the Lords held that the obligation in the DDA on employers to make reasonable adjustments could require them to waive standard selection procedures in order to accommodate a disabled job applicant.<sup>203</sup> This judicial recognition of the positive, anticipatory element in the provisions, which in some instances can require the alteration of a policy, practice or procedure,<sup>204</sup> suggests that the law might accommodate the concept that, in setting the starting point from which disabled people can strive to access sports, service providers should anticipate the specific needs of disabled people, arising from their backgrounds of past and structural discrimination, and that they should work to neutralize these.

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<sup>199</sup> Hepple, B (1990) 'Discrimination and Equality of Opportunity – Northern Irish Lessons' 10 Oxford Journal of Legal Studies 408, p.414.

<sup>200</sup> Timesonline, 5 May 2008, 'Oscar Pistorius left in the shade after Natalie Du Toit claims Olympic first'.

<sup>201</sup> O'Conneide, C (2006) 'Fumbling Towards Coherence: The Slow Evolution of Equality Law in England and Wales' 57 Northern Ireland Legal Quarterly 102, p.21. Finding evidence of a formal approach, but also of a purposive approach, Conneide also concludes that both the legislature and judicial decision-making have demonstrated an inconsistent and 'incoherent' history to the development of British discrimination law.

<sup>202</sup> [2004] UKHL 32.

<sup>203</sup> This judicial approach may be contrasted with the more traditional formal equality approach expressed in both *Matadeen* and *James*, noted above.

<sup>204</sup> Under the Part III Code of Practice.

Returning for a moment, however, to the portable pool lift example above, the point there was that, unlike the job market, there is no direct competition between the disabled swimmer and the non-disabled swimmer in accessing the social good of swimming (although, admittedly, there may be indirect competition concerning the allocation of resources). So, if there is no competition for the concept of equality of opportunity to regulate,<sup>205</sup> then does the concept retain any application? In other words, there might well be a 'race' between a disabled person and a non-disabled person to get the job of customer services assistant, or even lifeguard, but there is unlikely to be a race to get into the pool. If this is the case, it no longer seems as important to determine an equal starting point. True, there remains the question of how much of the pool's resources are spent on purchasing and maintaining the lift, as opposed to say extra swimming classes, but that is really a different issue. That is an issue about the fair or equal allocation of social goods, which is arguably a straightforward question of welfare and not of equal opportunities.<sup>206</sup>

What is attractive about equality of opportunity is arguably more to do with the 'opportunity' part of the concept, rather than the 'equality' part. It seems fair to both disabled and non-disabled people alike to think that they have the opportunity to participate in sport, and crucially that their level of participation is dictated by their personal choices rather than their circumstances.<sup>207</sup> So long as it is possible, however, for discrimination law to be used to ensure that there are genuine opportunities for disabled people, this does not entail that those opportunities also have to be equal.

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<sup>205</sup> See Jacobs, L A (2004) *Pursuing Equal Opportunities...*

<sup>206</sup> Macklem, T (2005) 'Equality and Opportunity: Reconciling the Irreconcilable' 68 *The Modern Law Review* 6, p.1020.

<sup>207</sup> Kymlicka, W (1990) *Contemporary Political Philosophy...*, p.56.

### *'Substantive' equality*

What the formal equality and equal opportunities approaches share is a disinterest in the end result of the various ways of treating individuals and groups that they advocate. Their emphasis is on fair procedures rather than fair results. In rejecting this disinterest in results, those liberal egalitarians who are politically committed to seeing through a diverse and equal representation in society across 'minority groups' tend to argue that the law must in some way reach further in attempting to achieve substantive social change.<sup>208</sup> This 'substantive' approach to equality requires the State to act positively to influence change and correct the results of discrimination.<sup>209</sup> Whereas the underlying approaches of British and US disability discrimination legislation have tended to follow the concept of formal equality,<sup>210</sup> there are aspects of the provisions where this substantive approach has evidently come to the fore.

In the US, both affirmative action programmes and contract compliance have been demonstrated at times to be effective mechanisms for achieving substantive equality;<sup>211</sup> and although these mechanisms have only had restricted use in Great

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<sup>208</sup> Caroline Gooding, for example, argues that in order to dismantle the structural discrimination experienced by disabled people, more proactive measures need to be taken, and that this involves an explicit emphasis on achieving substantive, rather than merely formal equality. See Gooding, C (2000) 'Disability Discrimination Act: From Statute to Practice' 20 *Critical Social Policy* 4.

<sup>209</sup> Fredman, S (2002) *Discrimination Law*, pp.11-14; note also that Fredman, and others, use the term 'equality of results', rather than 'substantive equality'.

<sup>210</sup> See the discussion above.

<sup>211</sup> Affirmative action programmes have, for example, been used to achieve fairer racial representation in US high schools and colleges.

Britain outside of Northern Ireland,<sup>212</sup> it is the substantive approach on which the general and specific equality duties under the Disability Discrimination Act 2005 are founded.<sup>213</sup> These aspects of the law have nonetheless proved to be very contentious across academic, judicial and political debate (and consequently their future may be uncertain).<sup>214</sup>

One of the main political reasons against substantive equality, argued by the concept's detractors, is that what it amounts to is no more than a quota system, and that this in turn is an undesirable form of 'social engineering'.<sup>215</sup> It is true that substantive equality does seem to share the features of distributive justice, rather than merely corrective justice: the emphasis is on achieving a fair distribution of benefits for a disadvantaged group, rather than on compensating individuals for wrongs. Arguably though, all law acts as a social determinant in one way or another – in fact all law engineers society. To single out disability discrimination as constituting undesirable social engineering merely begs the question – what is desirable social engineering?

The discussion about the purpose of disability discrimination legislation has now arrived at what might be described as a 'no man's land'. On one side, lie entrenched the conservative faction, keen to retain a procedural, formal approach to the law; on

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<sup>212</sup> Gooding, C (2000) 'Disability Discrimination Act...' p.11.

<sup>213</sup> In some respects, these duties under British law reflect the US methods.

<sup>214</sup> See discussion of the proposals for a Single Equality Bill in Chapter 4.

<sup>215</sup> See, for example, Abram, M.B. (1986) 'Affirmative Action: Fair Shakers and Social Engineers' 99 Harvard Law Review 1312. Abram believes that everybody should be given a 'fair shake', that is to say a fair opportunity, but he believes that it is both unnecessary and against the interests of society to seek to make amends for past disadvantages: "Once we have abandoned the principles of fair procedure, equal opportunity, and individual rights in favour of the advancement of a particular group, we have opened wide the door to future abuses of all kinds", p.1321.

the other side lie the more progressive or radical faction, aiming at a results-based, substantive approach.<sup>216</sup>

### ***Disability discrimination, sport and social inclusion***

There is a further distinction to be made between two moral and political norms which might be used to underpin disability discrimination law. There is, on the one hand, the concept of (broadly egalitarian) *redistribution*, as expressed by theorists such as Fredman and Dworkin.<sup>217</sup> Equality of opportunity and substantive equality are, arguably, two versions of redistribution theory.<sup>218</sup> Hence, it is along this redistributive theme that Wolff has argued that the real purpose of making ‘reasonable adjustments’ is to increase ‘targeted resource enhancement’ (see above).

On the other hand, there is the norm of *social inclusion*, which, as expressed by Collins, has subtle differences to redistribution.<sup>219</sup> At a nominal level, there is a

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<sup>216</sup> Collins summarises this position succinctly: “This problem arises because there is always a tension between the equal treatment principle and substantive conceptions of equality. Because equal treatment determines a procedure rather than an outcome, equal treatment can always be challenged as obstructing the achievement of a particular outcome”. (See Collins, H (2003) ‘Discrimination, Equality and Social Inclusion... p.17)

<sup>217</sup> See Fredman, S (2002) *Discrimination Law* (above); and also Dworkin, R (2000) *Sovereign Virtue* Cambridge, Massachusetts: Harvard University Press. (See, in particular, Chapter 1 ‘Equality of Welfare’ and Chapter 2 ‘Equality of Resources’.)

<sup>218</sup> See Anderson, E S (1999) ‘What is the Point of Equality?’ 109(2) *Ethics* 287. Anderson analyses the major modern egalitarian approaches to equality in relation to redistribution of resources. See also Cohen, G A (1989) ‘On the Currency of Egalitarian Justice’ 99(4) *Ethics* 906.

<sup>219</sup> Collins, H (2003) ‘Discrimination, Equality and Social Inclusion... (p. 22 distinguishes redistribution and social inclusion.) See also Holmes, E (2005) ‘Anti-Discrimination Rights Without Equality’ 68(2) *Modern Law Review* 175, which also seeks to distance discrimination law from egalitarian distributive equality principles.



political argument underlying this concept, in that society should be compelled to rid itself of highly damaging, irrational conceptions of disability, based on stigma, prejudice and ignorance, in order to counter social exclusion.<sup>220</sup> The current political emphasis placed on social inclusion may appear to justify this approach, but what exactly is meant by social inclusion?<sup>221</sup>

According to Collins, social inclusion, taken as a norm which underpins disability discrimination law, does not have as its objective a notion of equality of welfare, but instead it aims at securing a *minimum* level of welfare for every citizen.<sup>222</sup> Thus, the idea is not that the law should be used as a redistributive tool in creating entirely equal access to sport for disabled people, yet it still allows positive discrimination or favourable treatment of disabled people, at least to a certain extent.<sup>223</sup> The concept therefore fits, just as well as the concept of redistributive equality does, with the aims of the disability equality duties, discussed in Chapter 3. So, what are its advantages?

By following the principle of social inclusion, the law can be used to provide disabled people with at least a minimum level of participation in sport. One advantage of this concept over 'equality' is that it accords better with the idea of individual autonomy and integrity in choosing the extent to which people participate in sport.<sup>224</sup> A second

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<sup>220</sup> In Scotland, this political aim currently has wide support among disability organisations. See, for example, Inclusion Scotland (<http://www.inclusionscotland.org/>), which is a consortium of organisations of disabled people and disabled individuals. See Inclusion Scotland (2007) *Manifesto for Inclusion* (available on the Inclusion Scotland website).

<sup>221</sup> In other words, does it have any value beyond political assertions?

<sup>222</sup> Collins, H (2003) 'Discrimination, Equality and Social Inclusion...' p. 22.

<sup>223</sup> *Ibid.*, p.23.

<sup>224</sup> Concepts which Chapter 4 has demonstrated to be increasingly recognised in international human rights law.

advantage is that, unlike a substantive, redistributive project to create participation in sport by disabled people on an entirely equal basis with non-disabled people, social inclusion does not have the same controversial resource allocation or economic implications. Both these advantages help to side-step the criticism of substantive equality that it amounts to (undesirable) social engineering.

Ultimately, the root of the difficulties encountered in trying to uncover the purpose, or aim, behind disability discrimination law is that any aim depends on much wider political choices that need to be made. This is apparent in the criticism of the social inclusion approach made by O’Cinneide. He argues that a possible disadvantage of this approach is that, as a conceptual framework, it may not adequately capture the potential transformative effect of equality law, whereas “...the advantage of Fredman’s substantive equality approach is that it places the transformation of social structures front and centre in its account of what a coherent equality approach should aim to achieve”.<sup>225</sup> The ultimate question which society must somehow decide is to what extent it is desirable to transform the social structures of sport to enable greater (and better quality) participation in sport by disabled people.

### ***Conclusion***

Lastly, by way of some brief comparative academic evidence that identifying some sort of normative moral basis, or at least an identifiable social aim, is vital to the effectiveness of disability discrimination legislation – consider the position in Australia, as expressed by Tucker. She argues that, because there has been an absence

of a civil rights consciousness in Australia, this has meant that the Disability Discrimination Act 1992 was produced with very little attention from the media and the public of Australia and this in turn has caused the Act to have a relatively low impact.<sup>226</sup> In support of this point, Harris argues that the Australian federal legislation grew up in a completely different climate to that of the UK or the USA.<sup>227</sup>

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<sup>225</sup> O’Cinneide, C (2006) ‘Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain’ 57 Northern Ireland Legal Quarterly 102, p. 108.

<sup>226</sup> Tucker, B P (1995) ‘The Disability Discrimination Act: Ensuring Rights of Australians with Disabilities, Particularly Hearing Impairments’ 21 Monash University Law Review 15.

<sup>227</sup> Harris, L J (1999) ‘The Americans with Disabilities Act and Australia’s Disability Discrimination Act: Overcoming the Inadequacies’ 22 Loyola Los Angeles International and Comparative Law Review 52.

## *Chapter 3: A Right to Sport – the impact of human rights*

### *Introduction*

Minority or disadvantaged groups,<sup>228</sup> and the ethics and human rights concerning their participation in sport, have been the subject of recent academic discussion: including racial and ethnic minorities;<sup>229</sup> women;<sup>230</sup> and more recently, sexual-orientation minorities;<sup>231</sup> and transgender individuals.<sup>232</sup> The rights of disabled people to participate in sport have likewise been considered,<sup>233</sup> but that consideration has been almost invariably to do with domestic discrimination law,<sup>234</sup> which may be regarded as a specific application or controlling principle of particular rights, namely those of

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<sup>228</sup> The concept of ‘minority groups’ used in association with disabled people is arguably part of the American civil rights tradition, whereas British theorists have more often used the concept of ‘oppression’. Many disabled people do not identify themselves as belonging to a minority group. See Shakespeare, T (2006) *Disability Rights and Wrongs* London: Routledge (Chapter 5 in particular).

<sup>229</sup> Anderson, P M (1996) ‘Racism in Sport: A Question of Ethics’ 6 *Marquette Sports Law Journal* 357.

<sup>230</sup> Orleans, J H (1996) ‘An End to the Odyssey: Equal Athletic Opportunities for Women’ 3 *Duke Journal of Gender Law & Policy* 131.

<sup>231</sup> Osborne, B (2007) “‘No Drinking, No Drugs, No Lesbians’”: Sexual Orientation Discrimination in Intercollegiate Athletics’ 17 *Marquette Sports Law Review* 481.

<sup>232</sup> McArdle, D (2008) ‘Swallows and Amazons: Or the Sporting Exception to the Gender Recognition Act’ 17 *Social and Legal Studies* 1.

<sup>233</sup> Ham, E L (1998) ‘Disabled Athletes: A Last Vestige of Court Tolerated Discrimination?’ 8 *Seton Hall Journal of Sport Law* 741.

<sup>234</sup> The recent expansion of American scholarship in this area can be traced to the Supreme Court having considered the right, under the Americans With Disabilities Act 1990, of the disabled professional golfer Casey Martin to use a golf cart in competition: *PGA Tour Inc. v Martin* (2001) 532 U.S. 661. Amongst a multitude of papers on this case, one of the best analyses of its impact on sport is contained in Waterstone, M (2000) ‘Let’s Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports’ 2000 *Brigham Young University Law Review* 1490 (also comparing *Olinger v United States Golf Association* 205 F.3d 1001 (7<sup>th</sup> Cir. 2000)). For an interesting discussion of the impact on judicial decision-making of the expansion of law, via *Martin*, into the realms of rights and

equality and freedom from discrimination. The recent inclusion, however, of a provision relating to sport in the United Nations Convention on the Rights of Persons with Disabilities ('the Disabilities Convention') has contributed to what may in time herald a change of focus in scholarship and the study of the rights in this area.<sup>235</sup> The increasing, international recognition of the concept of a general right to sport has recently found cautious expression in Europe, within the Treaty of Lisbon which contains explicit reference to the Union's constitutional competencies, contributions and objectives in relation to sport, including the protection of the physical and moral integrity of sports participants.<sup>236</sup>

Such changes in focus are evidence of what may soon prove to be a shift in thinking away from a reliance on the widely construed group of equality and antidiscrimination rights to fundamental or substantive rights for disabled sportsmen and sportswomen.<sup>237</sup> These changes are also symptomatic of an expansion of rights into areas of life such as sport which have not previously been considered to be part of rights discourse, yet arguably have equally competent claims to be part of that

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sport see Schauer, F (2002) 'The Dilemma of Ignorance: PGA Tour, Inc. v Casey Martin' 2001 The Supreme Court Review. (See further discussion of this case in Chapter 4.)

<sup>235</sup> See for example, Roy, E C (2007) 'Aiming for Inclusive Sport: The Legal and Practical Implications of the United Nations' Disability Convention for Sport, Recreation and Leisure for People with Disabilities' 5 Entertainment and Sports Law Journal 1.

<sup>236</sup> Prior to this, the EU has given some more meagre indications that it regarded sport as an integral part of social, educational and cultural considerations: these indications have included Declaration 29 on Sport, annexed to the final Act of the Treaty of Amsterdam [1997] OJ C340/136; and a Declaration, annexed to the Conclusions of the Nice European Council, Bulletin EU, 12-2000, on the specific characteristics of sport and its social function in Europe.

<sup>237</sup> In this context, 'fundamental or substantive rights' means direct rights such as a right to sport in and of itself, rather than indirect rights, such as a right to sport by virtue of the right to equality or freedom from discrimination in, for example, the provision of sports facilities and services.

discourse.<sup>238</sup> In one sense, all that is essentially meant by ‘new’ human rights in the modern context is those rights that were not part of the original formulation of rights by the UN in the early 1950s. This more recent set of rights includes the right to development, which was the subject of a UN Declaration in 1986.<sup>239</sup> Without fully exploring the philosophical foundations of rights, but rather taking them as found in contemporary legal sources, it has been argued strongly that there is no inherent reason why new human rights should not be recognized along with existing rights in the overall body of international human rights law.<sup>240</sup>

The cultural and historic divorce of disabled people from many aspects of non-disabled society raises questions as to whether or not they are privy to the same rights as those belonging to the rest of humanity,<sup>241</sup> and whether this divorce necessitates a separate claim to disability-specific rights.<sup>242</sup> Similarly, if human rights to sport do

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<sup>238</sup> Naturally, the ‘creation’ of new human rights is a controversial endeavour. See discussion in Alston, P (1984) ‘Conjuring up New Human Rights: A Proposal for Quality Control’ 78 *American Journal of International Law* 607.

<sup>239</sup> UN Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986.

<sup>240</sup> See Alston, P (1988) ‘Making Space for New Human Rights: The Case of the Right to Development’ 1 *Harvard Human Rights Yearbook*, p. 39.

<sup>241</sup> In fact, of course, this is a profound and expansive, philosophical question, most of the content of which is beyond the scope of this discussion. For the ‘cutting edge’ of philosophical debate in this area see Nussbaum, M C and Faralli, C (2007) ‘On the New Frontiers of Justice. A Dialogue’ 20(2) *Ratio Juris* 145. A major part of Martha Nussbaum’s project is to attempt to interpret John Rawls’ theory of justice in a way that extends legal rights to disabled people.

<sup>242</sup> The political need to recognise fundamental rights specifically for disabled people was demonstrated by the very fact that the UN, prior to its new Disabilities Convention, deemed it necessary to create a Declaration on the Rights of Persons with Disabilities in 1975, specifically declaring that persons with disabilities enjoyed all the same rights as others (General Assembly Resolution 3447 of 9 December 1975) (see Quinn, G (2004) *Disability Rights: An American Invention – A Global Challenge* 11<sup>th</sup> Annual Valerie Gordon Human Rights Lecture at Northeastern University, p.14).

exist, disabled people are perhaps one of the last groups to claim them, which may be in part due to the enduring misperception of them as individuals with impairments which inevitably act to limit their ability to take part in physical activities.<sup>243</sup> Compared to other social groups recognised by law to suffer harmful discrimination in this context, disabled people may experience a different type of disadvantage because they are regarded from the outset as illegitimate claimants to any right people may otherwise have to participate in sport.<sup>244</sup> Society seems to ask: how can it make sense for an individual to be granted a right to do something which they are incapable of? Of course this makes no worldly sense, but since the question is founded on a gross misperception<sup>245</sup> it merely acts as a smokescreen, hiding what must be the correct approach. Hence, although freedom from discrimination is not the only right,

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<sup>243</sup> This is a misperception which arguably has its origins in the ‘individual’ or ‘medical’ model of disability, against which the sociology of disability of recent decades has reacted. For the classic account of this, see Oliver, M (1990) *The Politics of Disablement* Basingstoke: Macmillan and St Martin’s Press.

<sup>244</sup> Compare, for example, transgender individuals who are misperceived as prizewinning ‘amazons’, whose physical performance outperforms others (McArdle, D (2007) ‘Swallows and Amazons...’, p.9); there is evidence that gay people are discriminated against in sport because of homophobia and a belief that they will tarnish the ‘image’ of the sport in question, not because they are believed to be physically incapable (Osborne, B (2007) “No Drinking, No Drugs, No Lesbians”...’, p.486) ; racism against black athletes commonly involves the belief that they are physically *more* capable than whites (see Duru, N J (2007) ‘Friday Night ‘Lite’: How De-Racialization in the Motion Picture Friday Night Lights Disserves the Movement to Eradicate Racial Discrimination from American Sport’ 25 *Cardozo Arts & Entertainment Law Journal*). Perhaps the closest analogous group to disabled athletes is that of sportswomen who have also, at least in the past, suffered from the misperception that they are insufficiently robust to play sport. This may result more from the belief that women are ‘delicate, private and passive creatures’ (see Brake, D and Elizabeth Catlin (1996) ‘The Path of Most Resistance: The Long Road to Toward Gender Equity in Intercollegiate Athletics’ 3 *Duke Journal of Gender Law and Policy* 51) and *should not* subject themselves to the physical rigours of sport, rather than that they *cannot* do so.

<sup>245</sup> Needless to say that, any right to sport could not be an absolute right to any sport, so as to transcend all physical and economic limitations, but that would apply to any individual, disabled or non-disabled, since we are all subject to physical and economic limitations to varying degrees.

or part of a right, to sport that it is necessary to consider at the *primary* level, even at a *secondary* level disabled people may suffer discrimination in the very positing of that right.

This chapter makes a comparative examination of the respective strengths and weaknesses of some human rights that may have the potential to impact on participation in sport by disabled people, within three overlapping legal sources of rights, all of which contribute to the body of law in Scotland. The first source is bills of rights, exemplified by the European Convention on Human Rights (ECHR); the second is a constitutional model exemplified by the Treaty of Lisbon and other provisions such as the Canadian Charter of Rights and Freedoms; and the third is the model of international public law, focussing on the UN Disabilities Convention.<sup>246</sup>

### **Comparative Rights and the European Convention on Human Rights**

Unlike a right to a fair trial, a right to life, or a right to free speech, a legal right to sport may seem intuitively less convincing. This may partly be because sport has not played a prominent part in the modern history of human rights. At most, sport has been added as a fairly trivial afterthought in the body of international human rights

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<sup>246</sup> Two short points of clarification: firstly, the rights instruments under consideration in this chapter clearly do not fall under the traditional heading of ‘Scots law’ (primarily thought of as distinctively Scottish approaches to private and public law); nonetheless Scots law is best seen as a constantly evolving corpus, and historically it has regularly and consistently subsumed elements of the law of other jurisdictions; very soon these instruments may be regarded as much a part of Scots law as any other aspect. Secondly, the distinctions made between these different instruments, in construing them as separate ‘models’, is in many respects artificial and exaggerated for the purposes of the comparative discussion: all three models would be fairly regarded as an integral part of the law in Scotland, and probably as part of its modern-day constitution.



law which has grown up since the Second World War. The 1948 Universal Declaration of Human Rights does not specifically extend to sport, and this has set the trend which other provisions have followed.<sup>247</sup> The European offspring of the Declaration, the ECHR, similarly contains no direct right to sport.<sup>248</sup> It is only with the creation in 2007 of the UN Disabilities Convention<sup>249</sup> and the EU Treaty of Lisbon<sup>250</sup> that a direct right to sport (through a law which has the potential to be binding on states) has had any prospects of being realised. These provisions are

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<sup>247</sup> (See further discussion below.) By way of a brief review, it should also be noted that the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a right to rest and leisure and to take part in cultural life (which obviously relates indirectly to participation in sport); the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) contains antidiscrimination provisions to ensure that women are treated equally in relation to sport (Articles 10 and 13); the Convention on the Rights of the Child (CRC) contains provisions to protect the rights of children to rest, leisure, play and recreational activities (Article 31), including recreation for disabled children with special requirements (Article 23). There are also non-binding international provisions such as the UNESCO Charter of Physical Education and Sport 1978 which specifies a ‘fundamental right’ to physical education and sport (Article 1); the Olympic Charter also claims that the practice of sport is a human right (Fundamental Principle 4). Although these provisions all relate to sport, they either refer *indirectly*, by virtue of sport being a subgroup of ‘leisure’, or via antidiscrimination; or they are *non-binding*. For these reasons, they are of less interest to the discussion, as they have less legal application than do the UN Disabilities Convention or the ECHR (or other, constitutional, law).

<sup>248</sup> Throughout this chapter, the term ‘direct right’ is used to refer to a specific right to participate in sport; and ‘indirect right’ to refer to rights which may be indirectly related to participation in sport, such as the right to education or the right to life.

<sup>249</sup> Eighty-one Member States of the United Nations and the European Community signed the Convention on 30 March 2007. Although the UK has signed the Convention, it has not signed the Optional Protocol. The Convention received its twentieth ratification on 3 April 2008, triggering its entry into force. (See discussion below on these two points.)

<sup>250</sup> The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed in Lisbon on 13 December 2007 by representatives of the 27 Member States. In accordance with Article 6 of the Treaty, it will have to be ratified by the Member States in accordance with their respective constitutional requirements; subsequently it is expected to enter into force on 1 January 2009.

discussed later in the chapter. First, what other existing rights are applicable to the context of sport for disabled people (in the ECHR, in particular)?<sup>251</sup>

### ***Physical movement, development and personal integrity***

By contrast to a direct right to sport, a right to physical movement and physical development seems intuitively more akin to a fundamental right. Physical movement and physical development would be included in most definitions of sport – hence there may be a *prima facie* right to at least this element of sport. *Botta v Italy*<sup>252</sup> concerned a disabled man’s right to have physical barriers removed in order to access a beach and swim in the sea. Mr Botta argued that the barriers constituted an infringement of his right to respect for his private and family life, under Article 8 ECHR.<sup>253</sup> Although the court dismissed the application because Mr Botta resided far from the beach, and on these facts there was no conceivable direct link between the measures the state was urged to take and his private life, it held that ‘private life’

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<sup>251</sup> This part of the discussion will focus on the ECHR because of its applicability as a human rights convention in Scotland and the United Kingdom, through its incorporation via the Human Rights Act 1998 (HRA) (and the Scotland Act 1998, in Scotland). The HRA applies in Scotland in the same way that it does in the rest of the UK but the Scotland Act creates some differences (see below). For a general assessment of the impact of the ECHR in the Scottish courts, see Mullen, T et al (2005) ‘Human Rights in the Scottish Courts’ 32 *Journal of Law and Society* 1. It is important not to overestimate the direct impact of the ECHR in the Scottish courts. According to this assessment, in respect of civil law actions in the ordinary courts “... there were large areas of public administration, including education, health care, and social security, which experienced little impact from human rights litigation either in terms of numbers or the nature of the issues raised, although there were some challenges in each of these areas” (p.157). That is not to say, however, that the only impact of human rights can be observed via compliance mechanisms in the courts.

<sup>252</sup> (1998) 26 EHRR 241; [1998] HRC 301.

<sup>253</sup> Article 8(1) states that “everyone has the right to respect for his private and family life, his home and his correspondence”.

included a person's physical and psychological integrity. According to the court, respect for such 'integrity' is due in order to ensure the development, without interference, of the personality of each individual in his relations with other human beings.

This expansive interpretation of Article 8 was affirmed by *Mikulic v Croatia*<sup>254</sup> in which the court held that 'private life' includes aspects of an individual's physical and social integrity which can sometimes embrace aspects of an individual's physical and social identity. It is surely this element of the development of personality and identity, within a social context, which is central to sport. Following such a line of argument should be approached with some amount of caution, however, as the Lord Justice Clerk (Gill) asserted, in delivering the opinion of the Court in *Adams v Scottish Ministers*,<sup>255</sup> it is fallacious to argue that, because a certain activity establishes and develops relations with others, it is on that account within the scope of private life.<sup>256</sup>

It is plausible that Article 8 forms the basis of a European human right, however embryonic, to benefit from the physical, psychological and social aspects of sport. There is scope for legal arguments to be made for the right of disabled people to participate in sport by appealing to the concepts of autonomy and physical (or even psychological) integrity. On the other hand, the application of Article 8 does seem to be restricted, as in *Botta*, by the likelihood that sport often takes place some distance from the home. In the recent case *R (on the Application of Countryside Alliance and*

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<sup>254</sup> (2002) 46544/99; 26 February 2002. *Mikulic* concerned the right of the applicant to have her paternity established or refuted. The court reiterated that Article 8 protects not only 'family' but also 'private' life, which is seen as the domain of concepts including 'integrity'.

<sup>255</sup> 2004 SC 665.

*Others) v Attorney General and Another*,<sup>257</sup> the House of Lords considered whether the Hunting Act 2004<sup>258</sup> was incompatible with the ECHR. It was decided that fox hunting, as a very public activity, was far removed from the values that Article 8 existed to protect. Furthermore, the meaning of respect for ‘home’ in Article 8 could not cover land over which the owner permitted a sport to be conducted that would never in any ordinary usage be described as ‘home’. Nonetheless, these aspects of the location and the public nature of the activity obviously depend on the sport in question – fox hunting has characteristics which could be distinguished from those of many other sports. Lord Bingham was dismissive of any material proximity between the activity of fox hunting and any notions, developed in decided cases, of privacy, personal autonomy and choice and the private sphere reserved to the individual.<sup>259</sup> On the other hand, the Court in *Adams* was persuaded that “...certain aspects of foxhunting support the view that it forms part of private life; for example, the fact that it is the principal leisure pursuit for many people and is therefore an aspect of the development and fulfilment of their personalities; and the fact that it affords them the opportunity of forming social relationships...”<sup>260</sup> There are, no doubt, many examples of disabled athletes, in a variety of disciplines, for whom their chosen sports form these aspects of their private lives, and this potentially opens up the possibility of utilising such arguments in establishing their rights.

Almost simultaneously with the judgment in the *Countryside Alliance* case, the positive interpretation of the right to private life, as it might be applied to sport,

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<sup>256</sup> *Ibid.* para 63.

<sup>257</sup> [2007] UKHL.

<sup>258</sup> This Act prohibits the hunting with dogs of certain wild mammals including foxes and hares.

<sup>259</sup> Lord Bingham, para 15.

appears to have been reflected in the Treaty of Lisbon: the amended, ex Article 149 of the EC Treaty now provides a duty for Member States to protect "...the physical and moral integrity of sportsmen and sportswomen..." It remains to be seen exactly how this provision will be interpreted, but it does seem that both European Human Rights Law and European Community Law now contain a general duty to protect the rights of participants (including disabled participants) in sport, at least in terms of the concept of integrity (see below).<sup>261</sup>

### ***The right to education***

Perhaps a case could also be made that sport, as an integral part of standard school and college curricula, is included in the right to education. At first sight, this approach seems on firm ground, as the right to education is widely recognised in public international law, as well as constitutional and domestic law.<sup>262</sup> On closer

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<sup>260</sup> Lord Justice Clerk, para 65.

<sup>261</sup> It may also be possible to combine the 'integrity' aspect of Article 8 with the right to freedom of association in Article 11, ECHR, for example in arguing for inclusive education and environmental accessibility in the context of sport. Though there does not yet appear to be disability rights case law which attempts this, the combination of these rights was included in the submissions in the *Countryside Alliance* case, above.

<sup>262</sup> In terms of public law, Protocol 1, Article 2 ECHR states that "no person shall be denied the right to education"; see also the right to education in Articles 28 and 29 of the United Nations Convention on the Rights of the Child 1989 (CRC) (Article 28(1) requires States Parties to "recognize the right of the child to education"); Article 13 UN Convention on Economic, Social and Cultural Rights 1966. In terms of constitutional law, a number of state courts in the USA have found a 'fundamental right' to education in state constitutions (for an analysis of the history of a state constitutional right to education, see Eastman, J C (2006) 'Adequacy and the Rights Revolution: Reinterpreting the Education Clauses in State Constitutions' in West, M R and Peters, P E (eds) *School Money Trials: the Legal Pursuit of Educational Adequacy* Washington DC: Brookings)). For rights to education in Scottish domestic law see the discussion in Chapter 6 (and for an interesting comparison of the rights in the CRC with

examination, however, the law hesitates to specify particular aspects of education, such as sport, as the subject of legal rights.

As noted in Chapter 1, in the USA there is a uniquely highly-developed system of interscholastic sports, regulated at college-level by the National Collegiate Athletic Association (NCAA). At high school level, State sports associations exercise individual control. In *Mississippi High School Activities Association, Inc. v Coleman*,<sup>263</sup> one such association excluded a student athlete from participating in sport.<sup>264</sup> The question arose as to whether there was a constitutional right to participate in athletics. It was held that there was no such right. Instead, the courts appear to view participation in interscholastic athletics as no more than a ‘unilateral expectation’ on the part of the student athlete.<sup>265</sup> Accordingly, the details of participation in sport are often left to be worked out by the associations and other regulatory bodies.

In Europe, where there is a much less well developed framework of sport in education through sports associations than there is in the USA, it also appears hard to extract an indirect right to sport from the right to education. The requirement under Article 2

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domestic provisions in the USA see American Bar Association (1998) ‘State Education Law Compared to the UN Convention on the Rights of the Child’ 5 *Georgetown Journal on Fighting Poverty* 241.

<sup>263</sup> 631 So. 2d 768 (Miss. 1994).

<sup>264</sup> The grounds for the exclusion were to do with the Association’s policy to prevent ‘school shopping’, in which a student athlete determines which school they will attend based on the positive effect the athletics programme at that school will have on his or her career. This helps create competition by ensuring sporting talent is spread across different schools.

<sup>265</sup> See the earlier case, *Mississippi High School Activities Association, Inc. v Farris* 501 So. 2d 393 (Miss. 1987). See further discussion of *Coleman* and *Farris* and the right to sport more generally in Chango, W N (1996) ‘The Right to Participate in Interscholastic High School Athletics’ 6 *Seton Hall Journal of Sport Law* 251.

Protocol 1, ECHR that “no person shall be denied the right to education”, has been construed broadly to ensure that there is wide discretion provided to EU Member States as to exactly how they provide education.<sup>266</sup> Although the UK Government accepts that the right includes access to existing state educational institutions, *McIntyre v UK*<sup>267</sup> demonstrated that it is not taken to be an absolute right, and does not require access to be made available to every classroom. This approach suggests that the right also stops short of requiring access to particular sports.<sup>268</sup>

### ***Healthcare and the right to life***

As discussed in Chapter 1, policies and laws which control and regulate the participation of disabled people in sport are motivated by potential health benefits. The close link between sport and health suggests a possible connection between a legal right to life (which is often expressed in terms of right to ‘health’ or even ‘healthcare’) and a right to sport, particularly in cases where participation in sport has been shown to be therapeutic (such as the case of therapeutic horse-riding for people with cerebral palsy, see Chapter 1), or where there is another strong public health or preventative aspect. Article 2, ECHR provides a right to life.<sup>269</sup> This right is well established as including an obligation not simply to refrain from taking life, but to take appropriate steps to safeguard life.<sup>270</sup> It may be possible to utilise Article 2 arguments to support arguments for the provision of sport for disabled people.

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<sup>266</sup> The ECHR is incorporated in UK law by the Human Rights Act 1998.

<sup>267</sup> (1995) 29046/95; 21 October 1998.

<sup>268</sup> This will be discussed in more depth in Chapter 5.

<sup>269</sup> Article 2, ECHR provides that “Everyone’s right to life shall be protected by law”.

The extent of the Article 2 obligation to take preventative steps was recognised in *Osman v UK*<sup>271</sup> to increase in relation to the immediacy of the risk to life. This relationship between the right to life and the risk to life is a potential stumbling block for any project to extend the right to sport, because (normally) the health benefits of sport are not especially immediate. A second potential stumbling block is that the scope of the positive obligation under Article 2 has been found, in the case of *Edwards v UK*,<sup>272</sup> to require to be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. It is not completely inconceivable that the immediacy of particular health benefits to a disabled person would be significant enough to satisfy the right to health (and given that the burden to the authorities of providing the sport was proportionate). For example, his or her doctor might advise an individual with a heart-related disability, or a stroke survivor, that they should urgently take part in an exercise-based risk reduction programme. This might lead to an argument for a right to access sports facilities. Nonetheless, in the majority of instances, it may be difficult to persuade the courts that both the immediacy of the risk to life through lack of participation, and the proportionality in terms of the costs of providing access to sport, is sufficient to give rise to a right to sport via the right to life under the ECHR. Furthermore, those in such a position are unlikely to absolutely require access to any specialist facilities in order to enjoy the immediate health benefits of exercise.

One further point is that Article 12 of the International Covenant on Economic, Social and Civil Rights (ICESCR) states that the right to health includes "... the enjoyment

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<sup>270</sup> See *Association X v UK* (1978) 14 DR 31.

<sup>271</sup> (1998) EHRR 245.

<sup>272</sup> (2002) *The Times*, 1 April.



of the highest attainable standard of physical and mental health”.<sup>273</sup> A possible line of argument following this provision is this. The ICESCR recognises a right to the *highest attainable* standard of physical and mental health. It is generally considered that participation in sport (or at least physical exercise) plays an important part in raising and maintaining a high standard of health (and athletes are often considered amongst the healthiest people in society). Thus, there could be a claim to an indirect right to participate in sport, in the pursuit of the highest attainable standard of physical and mental health. Of course, this is an inherently weaker right, because unlike the ECHR, the ICESCR is not enforceable either through ‘vertical’ or ‘horizontal’ effect in the Scottish courts, but it could be woven into a wider argument about access to sport.

### ***Social life, association and segregation***

One of the major social barriers faced by disabled people is created by the impact of segregation.<sup>274</sup> Article 11, ECHR, provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others.<sup>275</sup> The *Countryside Alliance* case, however, does not provide much hope for an application to sport of the right to freedom of assembly, since the House of Lords made it clear that the

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<sup>273</sup> See further discussion of this right in Kinney, E D (2001) ‘The International Human Right to Health: What Does This Mean for Our Nation and World?’ 34 *Indiana Law Review* 1457.

<sup>274</sup> See discussion of segregation in the context of disability rights in Clements, L and Read, J (2003) *Disabled People and European Human Rights: a Review of the Implications of the 1998 Human Rights Act for Disabled Children and Adults in the UK* Bristol: The Policy Press, pp.38-39. Also, see later chapters.

<sup>275</sup> These rights are qualified by Article 11(2) which allows only restrictions on the exercise of these rights that “... are prescribed by law and are necessary in a democratic society in the interests of... public safety... for the protection of health... or for the protection of the rights and freedoms of others.

appellants' position was the same as that of other people who wish to assemble in a public space for sporting or recreational purposes – it fell short of the kind of assembly whose protection was fundamental to the proper functioning of a modern democracy.<sup>276</sup> Although the right to freedom of association with others has not been interpreted by the courts to include simply enjoying the company of others (at least in the setting of prisoners' rights),<sup>277</sup> it is qualified by the right to form or be affiliated with a group or organisation pursuing particular aims.<sup>278</sup> Such groups or organisations would probably include sports organisations, which means that there is at least a limited right for disabled people to freely associate in that context. This is, however, more identifiable as a right to be free *from* state or other interference, rather than a right which imposes obligations to provide sport for disabled people (and as such it has more limited application).

### ***The right to be free from discrimination***

There are a variety of antidiscrimination provisions contained in public international law, constitutional law<sup>279</sup> and domestic law (the major discrimination legislation will be considered in following chapters).<sup>280</sup> In terms of the public law with the most

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<sup>276</sup> Lord Hope, para 58.

<sup>277</sup> See *Bollan v UK* (2000) 42117/98; 4 May 2000; *McFeely v UK* (1980) 20 DR 44.

<sup>278</sup> See *McFeely*.

<sup>279</sup> See, for example, the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution.

<sup>280</sup> The focus of the balance of this thesis is on aspects of the right to be free from discrimination, mainly as expressed through national legislation. This focus is justified for a number of reasons. Firstly, disability rights law at the state level has traditionally been manifest primarily through specific discrimination law measures. Secondly, the complexity, scope and detail contained in disability discrimination legislation generally exceed other disability rights provisions (and merit particularly close study). Thirdly, although major international instruments, such as those considered in this

forceful application in Scotland, the antidiscrimination provision in Article 14, ECHR, can be utilised in conjunction with any of the other Convention rights.<sup>281</sup> Although Article 14 provides no freestanding protection of discrimination, it is important to recognise that it is not entirely unsubstantive and does not serve simply to ‘inform’ or ‘expand on’ the meaning of other ECHR rights.<sup>282</sup> Hence, for example, if Scotland decided to promote one of the Convention rights, discussed above, beyond the requirements of the ECHR (perhaps to create a substantive right to participate in sport), it would still have to do so *equally*.<sup>283</sup> In this way, any substantive right to sport at a *primary* level would entail a right, at the *secondary* level, not to be discriminated against. Another important point, which distinguishes the Article 14 right from other, domestic, discrimination law, is that what constitutes unlawful discrimination is fundamentally defined by the European jurisprudential concept of ‘proportionality’.<sup>284</sup> One way of thinking of European antidiscrimination rights, as

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chapter, are arguably beginning to place disability rights within the framework of a wider human rights ‘paradigm’ (rather than within the framework of disability discrimination) (see the development of such a paradigm in Stein, M A (2007) ‘Disability Human Rights’ 95 California Law Review 75), this evolution has yet to be completed.

<sup>281</sup> Article 14 requires that the “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Although ‘disability’ is not included in this list of grounds for unlawful discrimination, and there has yet to be a case concerning disability discrimination under Article 14, it is generally considered that ‘disability’ would constitute a ‘status’ protected by this provision (See Clements, L and Read, J (2003) *Disabled People and European Human Rights*, p.73).

<sup>282</sup> Baker, A (2006) ‘The Enjoyment of Rights and Freedoms: A New Conception of the ‘Ambit’ Under Article 14 ECHR’ 69 *Modern Law Review* 714, p.2.

<sup>283</sup> *Ibid.* p.3. See also *Abdulaziz v United Kingdom* [1985] ECHR 7, 82.

<sup>284</sup> ‘Proportionality’ is a concept which has evolved in European jurisprudence to recognise the need for a balance between the normative value of fundamental rights and competing public policy claims. For an analysis of the principle of proportionality as applied by courts in the UK, comparing prior standards of review in domestic administrative law, see Elliott, M (2001) ‘The Human Rights Act 1998 and the Standard of Substantive Review’ 60 *Cambridge Law Journal* 301. See also the seminal Case

opposed to the other, perhaps more substantive, rights also considered in this chapter, is in terms of a ‘controlling principle’.<sup>285</sup> They act as a regulator, to ensure formal equality; they do not necessarily, however, recognise ‘positive discrimination’ rights or ‘reasonable adjustments’, stopping short of the rights in domestic legislation (see the next chapter).<sup>286</sup> (Protocol 12, ECHR creates a ‘freestanding right’ to equality, but it has yet to be ratified by the UK.)<sup>287</sup>

Lastly, it should be remembered that the antidiscrimination and other rights under the ECHR (and other conventions) do not exist in a ‘vacuum’. From the point of view of a potential litigant, there is no reason why human rights arguments cannot be combined with reference to, for example, the disability equality duty under the Disability Discrimination Act 2005<sup>288</sup> in establishing rights for disabled people to take part in sport.<sup>289</sup>

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120/78, *Rewe Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (“*Cassis de Dijon*”); and Article 5, EC Treaty, which contains a statement of the importance of proportionality. (Proportionality is also in some respects, and in different contexts, analogous to the US public law concepts of ‘rational basis’ and ‘strict scrutiny’ review. Strict scrutiny requires that a discriminatory law or administrative act has to further a compelling state interest, according to the most narrowly tailored means possible, see *Korematsu v United States* (1994) 323 US 214.)

<sup>285</sup> See Quinn, G (2004) ‘Disability Rights – An American Invention – a Global Challenge’ 11<sup>th</sup> Annual Valerie Gordan Human Rights Lecture at Northeastern University Law School, USA, p.21.

<sup>286</sup> The effect of Article 14, ECHR is generally recognised to be relatively weak (see Allen, R and Crasnow, R (2002) *Employment Law and Human Rights* Oxford: Oxford University Press, p.193).

<sup>287</sup> Protocol 12 states: “(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”.

<sup>288</sup> See Chapter 4.

<sup>289</sup> The greater use of combined disability human rights arguments in British courts has been advocated by the prominent human rights barrister Helen Mountfield of Matrix Chambers, London (Mountfield, H (2006) ‘Human Rights and Disability Discrimination’, presentation at the ‘DDA Masterclass’, 4 May

### *Towards a British Bill of Rights*

Developments in recent years have given rise to demonstrable political support in the UK for the creation of a British Bill of Rights.<sup>290</sup> It is not yet clear which rights this bill would encompass but there have been calls in some quarters to create further economic, social and cultural rights (similar to those contained in the ECHR) which may turn out to be a richer source of rights relevant to sport for disabled people.<sup>291</sup>

As Allen argues, if it were easy to identify ‘fitting’ or ‘appropriate’ rights then there would be little cause to hesitate in casting them in stone.<sup>292</sup> He observes: “Why not bind future legislatures and generations by an entrenched and overriding list of rights when the appropriateness of one list, over others, is evident?” For example, although it is admittedly unlikely that either the Scottish or UK Parliament will create such a

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2006, organised jointly by the Disability Rights Commission and Matrix Chambers. (See the explanation of the ‘horizontal’ effect of human rights in Chapter 1.)

<sup>290</sup> In July 2007 the British Government published the Green Paper *The Governance of Britain* London: HMSO. Paragraphs 209-210 discuss proposals for what the Paper calls a ‘British Bill of Rights and Duties’. To this end the Joint Committee on Human Rights of the House of Lords and the House of Commons has been receiving expert written and oral evidence on the proposals (at the time of writing, most recently on 3 December 2007.) The influential independent law reform organisation ‘JUSTICE’ is also consulting on the proposals (see its website for further information: [www.justice.org.uk](http://www.justice.org.uk)). The Government is expected to be guided by the views of this process of scrutiny and consultation; however, the relatively strong cross-party support suggests that such a Bill has reasonable prospects of success.

<sup>291</sup> British Institute of Human Rights (2007) *Joint Committee on Human Rights British Bill of Rights Inquiry – Call for Evidence* (Response of 31 August), pp.6-7.

<sup>292</sup> Allan, J (1996) ‘Bills of Rights...’

right in the near future, would it be possible for us to choose as appropriate an entrenched right to participate in sport for disabled people?<sup>293</sup> This leads to further difficult questions. Are rights to participate in sport the sort of rights that we would wish to entrench? How would such a right, as entrenched in a constitution rank; and to who would it apply? (The difficulties experienced in answering these questions are also probably one of the reasons for the judicial caution exercised in interpreting the ECHR, which is noted above.) Judges may well be right to construe such rights narrowly – in terms of policy it is probably better to experience cautious judicial interpretation than create a binding right.

But what lessons can be learned from other jurisdictions in this regard? Penney suggests that the worth of the constitutional approach encapsulated by the Canadian Charter of Rights and Freedoms<sup>294</sup> is in the saturating effect of provisions, such as the section 15 right to equality, in that they are able to soak into mainstream structural and institutional barriers, rather than make individual accommodations on a case-by-case basis.<sup>295</sup> Arguably, it is the general nature of these constitutional rights which allows them to have this effect – make the rights too specific and they lose this value.

This is not mere futuristic speculation as the focus of the rights contained in the HRA on civil and political rights, to the neglect of economic, social and cultural rights, has led commentators to describe the Act as only ‘half built’.<sup>296</sup> What sort of rights should

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<sup>293</sup> *Ibid.*, p.8.

<sup>294</sup> See below.

<sup>295</sup> Penney, J (2002) ‘A Constitution for the Disabled or a Disabled Constitution? Toward a New Approach to Disability for the Purposes of Section 15(1)’ 1 *Journal of Law and Equality* 1.

<sup>296</sup> A phrase attributed to Stuart Weir, in British Institute of Human Rights (2007) *Joint Committee on Human Rights British Bill of Rights Inquiry – Call for Evidence* (Response of 31 August).

be included in a new bill of rights? It is by no means easy to obtain consensus in answering this question, even amongst disability rights organisations, and it is unlikely that such organisations would wish to include a right to sport in any shape or form.<sup>297</sup> Disabled Scots may have to look further afield for such a right.

### **Constitutional rights**

There is a strong historical link between the human rights tradition of economic, social and political rights and constitutional law.<sup>298</sup> The Constitution of the United States (in particular, Article XIV) is an obvious example of this link.<sup>299</sup> Although amended on a number of occasions over the years, the protections in the US Constitution are far from anything as specific as a right to sport. The Canadian Charter of Rights and Freedoms (1982) is one of the key modern examples of the

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<sup>297</sup> For example, the United Kingdom's Disabled People's Council produced a draft Disabled People's Rights and Freedoms Bill (proposing to replace the Disability Discrimination Act 1995) which included no mention of sport in its provisions.

<sup>298</sup> The concept of a 'constitution' will be only loosely defined for the purposes of this chapter (which is to highlight the approaches and use of a number of instruments), without entering into general debate as to the exact nature of constitutions, whether written or unwritten. For example, the ECHR is arguably now part of the constitution in Scotland (by incorporation via the enactment of the Scotland Act 1998), and the UK more widely (with the enactment of the Human Rights Act 1998) (see Brazier, R (2001) 'How Near is a Written Constitution?' 52 Northern Ireland Legal Quarterly); there is also considerable overlap between international human rights law and constitutional law, largely by virtue of their sharing similar social functions and goals (see discussion of the common features of constitutional and human rights norms in Neuman, G L (2003) 'Human Rights and Constitutional Rights: Harmony and Dissonance' 55 Stanford Law Review 1866). There is also a strong argument to be made that American constitutional law is the primary model for international human rights law (see Henkin, L (1979) 'Rights: American and Human' 79 Columbia Law Review 405).

<sup>299</sup> The US Constitution 1781 was amended to include Article XIV, which was declared in force 28 July 1868. Article XIV protects the 'privileges' and 'immunities' of US citizens. It also protects the right to life, liberty and property (against undue process of law) and the right of any person to equal protection under the law.

constitutional protection of human rights.<sup>300</sup> By this stage in the history of human rights, the impact of the American civil rights movement and the (then) recent emergence of discrimination law meant that the aspects of the Canadian model, which are most relevant to this discussion, were centred on the concept of 'equality'.<sup>301</sup> The political popularity of a constitutional approach has endured and, closer to home; the Scotland Act 1998 now ensures that all new legislation passed by the Scottish Ministers has to be compatible with the ECHR, and also compatible with rights contained in European Community law.<sup>302</sup> Meanwhile, the Treaty of Lisbon was signed on 13 December 2007 and it arguably introduces what amounts to a new constitution for the European Union. There are specific provisions on sport which have implications for the law and sport for disabled people. In this brief narrative it may be possible to identify an evolution into a body of constitutional law that is increasingly receptive to the sort of rights under consideration.

### *The Treaty of Lisbon and the European constitution*

Despite a strong degree of political reluctance in the UK, the European Union is forging ahead with the development of its own written constitution. The Treaty of Lisbon is the latest significant European development with particular implications for

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<sup>300</sup> The Charter was enacted as Schedule B to the Canada Act 1982, coming into force on 17 April, 1982.

<sup>301</sup> For an assessment of the various political perspectives on the introduction of the equality rights in the Charter see Herman, D (1994) 'The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms' 14 Oxford Journal of Legal Studies 4.

<sup>302</sup> Section 29 provides that an Act of the Scottish Parliament may not include provisions which are incompatible with Convention rights, as they are defined in the Human Rights Act 1998. Section 57(2), Scotland Act 1998, states: "A member of the Scottish Executive has no power to make any subordinate



equality rights;<sup>303</sup> however the Treaty also introduces a number of constitutional policy provisions specifically relating to sport. Firstly, it should be noted that the EU has provided sport as one of its policy ‘competencies’, but in what sense can it be said that European constitutional law now contains a right to sport for disabled people?

In political terms, it is possible to identify a shift over recent years in the EU’s approach to sport from what was a concentration on Single Market concerns, focussing almost exclusively on economic aspects of sport and the laws of the Single Market, to increased socio-cultural considerations.<sup>304</sup> Some European institutions now look to sport as a tool for specific policy areas such as health or social inclusion.<sup>305</sup> This trend can be seen clearly in the Commission’s recent White Paper on Sport.<sup>306</sup> The Paper says that the “...European institutions have recognised the specificity of the role sport plays in European society, based on volunteer driven structures, in terms of health education, social integration, and culture”.<sup>307</sup> The Action Plan accompanying the Commission’s White Paper on Sport specifically addresses action to be taken in respect of sport for disabled people under the heading “Social inclusion in and through sport”: “(16) In the Action Plan on the European Union Disability Strategy, take into account the importance of sport for disabled people and support

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legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law”.

<sup>303</sup> See discussion of equality rights in this context in Bell, M (2004) ‘Equality and the European Union Constitution’ 33 *Industrial Law Journal* 3. Also note that Bell was writing before political pressures meant that the constitution text was revised into a draft Reform Treaty, after signing now also known as the Treaty of Lisbon.

<sup>304</sup> See Parrish, R (2003) ‘The Politics of Sports Regulation in the European Union’ 10(2) *Journal of European Public Policy*.

<sup>305</sup> Garcia, B (2007) ‘From Regulation to Governance and Representation: Agenda-Setting and the EU’s Involvement in Sport’ 5(1) *Entertainment and Sports Law Journal*, paragraph 38.

<sup>306</sup> Commission of the European Communities (2007) *White Paper on Sport* Brussels.

Member State action in this field”.<sup>308</sup> While these ‘soft law’ statements are perhaps little more than indications of the current direction of European sports policy, they are beginning to be ‘hardened’ into legally substantive treaty provisions which may be seen to contribute to the collection of rights to sport for disabled people. The Treaty on the Functioning of the European Union, Article 2(6) states: “The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level [include] education, vocational training, youth and sport...”

Furthermore, there is a new set of insertions in ex Article 149 of the Treaty establishing the European Community, now Article 165 of the Consolidated Version of the Treaty on the Functioning of the European Union, which introduce the following policy duties:

*The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function...*

*...Union action shall be aimed at... developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.*

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<sup>307</sup> *Ibid.*, p.3.

<sup>308</sup> Commission of the European Communities (2007) *Action Plan “Pierre de Coubertin” Accompanying Document to the White Paper on Sport* Brussels, p.3.

These amendments, however, come under the heading: “Education, vocational training, youth and sport”. This suggests the legislative intention that, insofar as sport has a new socio-cultural, legal status identifiable in EU law, that status may be restricted to the learning environment and the development of young people.

Perhaps crucially, Article 165 now imposes an obligation on the Union to aim to act to protect the physical and moral integrity of sportsmen and sportswomen. This positive obligation seems to parallel the emergence in European Human Rights case law of the concept of integrity, which has been applied to sports and leisure scenarios in cases such as *Botta* (above), although it does not amount to a human right in the traditional sense. It is hard to see how this provision alone might be justiciable, but reference to it may nonetheless help to add depth to a rights-based argument in a court, or in a campaigning or advocacy context.

Van den Bogaert has argued that the potential importance of such Treaty provisions remains primarily in their usefulness in clarifying the ‘legal environment’ of sport, rather than providing specific protections.<sup>309</sup> So far, the European Commission and the Court of First Instance have generally only dealt with sports cases on the grounds of aspects of competition law,<sup>310</sup> it is however possible that the introduction of these new provisions will open up another dimension to sports litigation at European level,

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<sup>309</sup> Van den Bogaert, S (2006) ‘Sport in the European Constitution: All Sound and No Fury?’ Masstricht Faculty of Law Working Paper No. 2005-8 (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=977456](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977456)).

<sup>310</sup> For example, the ‘Bosman ruling’, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* (1995) ECJ Case C-415/93.

at least in the context of education (once the Treaty's amendments come into force in 2009).<sup>311</sup> It may be too early to tell what the impact of these constitutional provisions would be on sport for disabled people in Scotland, although it is likely to be a broad impact, in terms of EU-backed policy rather than readily accessible legal arguments. Nonetheless, in an admittedly limited way, sport is now enshrined as part of the European constitution, in provisions by which disabled sportsmen and sportswomen can claim a right to have their 'physical and moral integrity' protected.

### *The Canadian perspective*

The Canadian Charter of Rights and Freedoms enshrines a number of 'fundamental freedoms' and 'equality rights' which extend to people with mental or physical disabilities.<sup>312</sup> There is no specific right to sport; nevertheless, is such a constitutional structure, which involves an entrenched charter (or bill of rights), amenable to disability rights and participation in sport?

There are two related characteristics of the Canadian Charter which are immediately noticeable. One characteristic is that it tends to be very general in the terms of its provisions, focussing on fundamental rights and not detailing how these rights should

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<sup>311</sup> *Ibid.*, p.13.

<sup>312</sup> Article 2 provides that everyone has the following fundamental freedoms: "a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedoms of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association". In terms of 'equality rights', Article 15 provides that: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on... mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of

work.<sup>313</sup> Another characteristic is that the Charter effectively hands a massive amount of power over social policy to an unrepresentative judiciary.<sup>314</sup> Allan has identified these characteristics as part of the ‘liberal’s quandary’ – how to entrench fundamental rights without surrendering crucial control over the content, scope and relative ranking of these rights.<sup>315</sup> Even in cases where there is a relevant statutory process,<sup>316</sup> which governs the particular social, economic, or cultural rights at issue, the courts can exercise their control by utilising the constitutional rights in the Charter to override statute where there is conflict.<sup>317</sup> A relevant example of this is *Eaton v Brant Co. Board of Education*,<sup>318</sup> which concerned the decision of the Ontario Special Education Tribunal confirming the special education placement of a disabled child, contrary to the parents’ wishes. The Supreme Court of Canada considered whether the equality guarantee in section 15 of the Charter overrides this decision.<sup>319</sup> As will become apparent in subsequent chapters, ‘equality’ or discrimination law, as applied

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conditions of disadvantaged individuals or groups including those that are disadvantaged because of... mental or physical disability.”

<sup>313</sup> The fundamental freedoms, for example, are only asserted and not further defined. These rights are less specified than the rights contained in the ECHR, above.

<sup>314</sup> Allan, J (1996) ‘Bills of Rights and Judicial Power – a Liberal’s Quandary’ 16 *Oxford Journal of Legal Studies* 2, p.338.

<sup>315</sup> *Ibid*, p.352

<sup>316</sup> (Over which the electorate arguably has finer control, through its power to vote for the legislature; which influences in turn the legislation produced.)

<sup>317</sup> See *Andrews v Law Society of British Columbia* [1989] 1 SCR 143. *Andrews* concerned a successful challenge to the statutory citizenship requirement for entry into the legal profession in British Columbia and it secured an interpretive framework by which the equality rights contained in subsection 15 (1) of the Charter should be applied to determinations of whether legislative distinctions (or other government action) violate the subsection. See also *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, which builds on this framework, introducing for example a determining role of a human dignity concept for the purposes of section 15.

<sup>318</sup> [1997] 1 SCR 241.

<sup>319</sup> (In this case it was held that the placement was consistent with the section 15 rights in terms of the child’s educational interests and needs and that no burden was imposed, or benefit withheld.)

to the issue of integration or segregation in education, is of significance to opportunities for Scottish disabled students to participate in sport, where analogous scenarios to the one in *Eaton* can occur.<sup>320</sup> As noted above, if Scotland were to be subject to a constitutional bill of rights it is not at all clear that sport and disability rights would easily fit into such an instrument.

The next point to make is that the most powerful provision for present purposes is the ‘equality’ provision contained in section 15 of the Charter. Arguably, such guarantees can never be as useful as the equivalent domestic provisions, such as the DDA, because, due to the characteristics noted above, they are insufficiently specific. (In fact, this is also the argument the UK Government has used for failing to ratify Protocol 12, ECHR – see above.)

### **The UN Convention on the Rights of Persons with Disabilities**

The United Kingdom is one of the first countries to have signed the UN Disabilities Convention in March 2007 (though not the Optional Protocol),<sup>321</sup> although it is not yet

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<sup>320</sup> See the case further discussion of *Eaton* and analogous cases in Scotland in Chapter 5.

<sup>321</sup> The Optional Protocol is important in terms of enforcement. Article 1 determines that: “1. A State Party to the present Protocol... recognizes the competence of the Committee on the Rights of Persons with Disabilities... to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention. 2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.” It is not clear whether the UK will sign this Protocol in the future, but until then a route is closed off for any disabled athletes who might wish to complain, for example, if they believe Scotland is violating the provisions in the Convention pertaining to sport.

clear how soon the UK will ratify it.<sup>322</sup> The Convention has reasonable prospects to be an effective legal tool at a national level. In spite of the existence of national legislation which is stronger than it, such as the DDA, the worth of the Convention may prove to be in non-traditional legal procedures which could be used as a catalyst for policy change and monitoring by non-governmental organisations (NGOs). Unfortunately, the utility of the Convention may be limited by inherent difficulties of monitoring and enforcement, which are problems associated with other international instruments, and also by potential flaws in the way it is drafted. Nonetheless, through the creation of Article 30.5, the Convention has gone some way to creating a new right to sport for disabled people.<sup>323</sup>

### ***Why have another Convention?***

It might be asked why there needs to be a UN Convention specifically for disabled people – after all, disabled people’s rights have been protected by the previous seven UN treaties.<sup>324</sup> One reason is that what has gone before has largely amounted to

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<sup>322</sup> Ratification by a country is a step further than signing, which amounts to an endorsement of the terms of the Convention, and countries that ratify the Convention will need to introduce laws in accordance with the Convention rights and will have to report regularly on their progress to a specific UN Committee. Some countries undertake an extensive examination and scrutiny of convention texts before proceeding to ratify. This examination, which may include an evaluation of the degree of compliance with existing law and practise in the country at state and federal or regional levels, can take several years – or even longer if the convention is portrayed as being controversial, or if the process is politicised.

<sup>323</sup> Note that the USA has not signed the Convention.

<sup>324</sup> The International Convention on the Elimination of All Forms of Racial Discrimination 1965; the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); the International Covenant on Civil and Political Rights 1966 (ICCPR); the Convention on the Elimination of All Forms of Discrimination against Women 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; the Convention on the Rights of the Child 1989; and the

indirect protection, by virtue of disabled people enjoying the universal rights applicable to all humanity. In fact, it is only the most recent of the UN treaties, the Convention on the Rights of the Child (CRC), which contains a specific provision (Article 23) dealing with the rights of disabled people.<sup>325</sup> The purpose of the Disability Convention is therefore not to grant new rights to disabled people as such; rather, its aim is to increase the likelihood of disabled people benefiting in practice from the rights which have already been conferred on them by existing UN human rights instruments.<sup>326</sup> Two broad arguments have been advanced for creating the Convention. Firstly, it has been argued that its purpose is to increase the visibility of disabled people in the human rights arena.<sup>327</sup> The Convention should encourage societies to associate disabled people with human rights and to disassociate them from the negative, demeaning stereotype of being the mere recipients of welfare or charity. Secondly, it has been argued that the Convention will provide necessary clarity and focus in relation to how existing international human rights are conferred in the context of disability. To a certain extent, the Convention consolidates the rights in the previous UN treaties, but it also goes further, by establishing disability-specific rights. One of these is Article 30.5.

***Does Article 30.5 contain a new right to sport for disabled people?***

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International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.

<sup>325</sup> Disabled people are also specifically listed in the equality clause (Article 2) as a group who must not be discriminated against in their enjoyment of the rights in question.

<sup>326</sup> See Lawson, A (2005) 'The UN Draft Disability Convention: Turning Rights into Realities?', p.7. (Presented at the Commonwealth Law Association Conference, 13 September 2005.)

<sup>327</sup> Quinn, G and Degener, T et al (2002) *Human Rights and Disability: The Current Use and Future Potential of UN Human Rights Instruments in the Context of Disability* New York: United Nations, paragraph 13.2.



Although there are a number of Articles in the Convention which indirectly relate to rights to sport,<sup>328</sup> Article 30.5 is specifically devoted to physical activity and makes explicit reference to sport. Its significance at national level is that countries which ratify the Convention will be obliged to ensure there are national measures taken to satisfy the terms of this Article, or to provide evidence that its requirements are already met. Article 30.5 reads as follows:

*5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:*

*(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;*

*(b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;*

*(c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;*

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<sup>328</sup> Other relevant provisions include obligations on States Parties to recognise: "... the right of persons with disabilities to education" (Article 24); "... persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability" (Article 25). (See the discussion above, which focuses on the equivalent rights in the ECHR.)

*(d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;*

*(e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.*

In relation to Article 30.5 (a) there is no further explanation of what the words ‘encourage and promote’ mean in practice and this part of the Article could be immediately criticised for being indeterminate. How might it apply to Scotland?

Firstly, one of the ways in which participation in sport could be encouraged and promoted in Scotland is through anticipating the specific needs of disabled individuals and translating those needs into practical steps. Two of the major barriers to participating in sport faced by people with a disability are the fear of suffering discrimination and the lack of appropriate facilities.<sup>329</sup> These may be well-founded fears as research suggests that societies routinely stigmatise disabled sports participants, whereas, conversely, participation in sport can play an important role in overcoming social stigmas associated with disabilities.<sup>330</sup> So long as sports providers successfully communicate that they have anticipated and met specific needs, they could potentially go some way to removing barriers and consequently act to encourage and promote participation.

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<sup>329</sup> sportscotland (2001) *Sport and People with a Disability: Aiming at Social Inclusion* Edinburgh: sportscotland. See further discussion of barriers to participation in Chapter 6.

Secondly, the wording ‘...to the fullest extent possible,’ bears some comparison with the concepts of ‘reasonable adjustment’ or ‘reasonable accommodation’ found in the Disability Discrimination Act 1995 and the Americans with Disabilities Act 1990, respectively.<sup>331</sup> It allows the body making the changes and allowing participation, to act within reasonable parameters of cost, time and effort. However, the positive action element in the DED may even exceed this requirement of the Convention. The spirit of the underpinning principle in the DED is characterised by the need to make adjustments and to take steps which go beyond the ordinary provision of services.<sup>332</sup> The requirement to encourage and promote participation ‘to the fullest extent possible’ may be a weakness in the drafting of the Convention in that it could be used by States Parties as a ‘get-out clause’, who might plead, for example, lack of funding. By comparison, the wide application of the DED introduced by the 2005 Act helps meet this requirement by transferring responsibility to the sub-State level and placing it on a statutory footing. In terms of *impact* then, the Article 30.5 ‘right’ to sport may be weaker than these general statutory rights.

Article 7(1) of the Convention determines that: “States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children”. However, a question arises as to whether this covers participation in sport. As a result of a

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<sup>330</sup> See discussion in Taub D et al (1999) ‘Stigma Management Through Participation in Sport and Physical Activity: Experiences of Male College Students with Physical Disabilities’ 52 *Human Relations* 1469. Also, see further discussion of ‘stigma’ in Chapter 2.

<sup>331</sup> See Chapter 4 for a fuller discussion of these concepts, as they arise in domestic legislation.

<sup>332</sup> See Disability Rights Commission *The Duty to Promote Disability Equality: Code of Practice for Scotland*, London: TSO, Paragraph 1.10.

comment made by the European Union during the Sixth Ad Hoc Session,<sup>333</sup> the preamble to Article 30 was changed from “States Parties recognize the right of persons with disabilities, on an equal basis with others...” to “With a view to enabling persons with disabilities to participate on an equal basis with others...”<sup>334</sup> This suggests that it was the intention of the drafters to ensure that there is no fundamental ‘right’ to participate in sport in the Convention. Thus, read in conjunction with each other, these articles entail, not only that States Parties are not under a fundamental obligation to provide sports, but that they need not even take all necessary measures to ensure that children participate in sport on an *equal* basis with others.

### ***Drafting Weaknesses in the Convention***

One weakness in the Convention is the possibility of States Parties to amend the Convention, under Article 47, and also to ‘opt out’ of certain provisions of the Convention, potentially enabling States to ‘pick and choose’.<sup>335</sup> An example of this is

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<sup>333</sup> See Roy, Elise C (2007) ‘The Legal and Practical...’, p.8

<sup>334</sup> See the Report of the Sixth Adhoc Session, available at <http://www.un.org/esa/socdev/enable/rights/ahc6docs/ahc6reporte.pdf>. This records, at Paragraph 143: “143. There was general support to amend the chapeau to make it clear that the paragraph does not refer to an existing right to participate in sport and leisure activities. It now reads: “4. With a view to enabling persons with disabilities to participate on an equal basis as others in recreational, leisure and sporting activities, States Parties shall take appropriate measures to:”

<sup>335</sup> On the one hand, this is a drawback, which is very hard to overcome, and may be seen as a generic difficulty encountered by most international conventions. For example, the UN Optional Protocol to the CRC requires States Parties to set a higher minimum age for recruitment than the age of fifteen set in the Convention and to “take all feasible measures to ensure that under 18s do not take a direct part in hostilities” (Article 1). On signing the Optional Protocol on 7 September 2000, the UK government entered a declaration that it would retain the right to send under eighteens into frontline battle where “there is a genuine military need,” or if “it is not practicable to withdraw such persons before deployment” (see Foreign and Commonwealth Office (2003) *Explanatory Memorandum on the Optional Protocol to the United Nations Convention on the Rights of the Child* London: Foreign and

the ‘opt out’ by the UK of the Optional Protocol, which has some implications for enforcement (see above).

Perhaps one of the greatest weaknesses in the Convention, however, resides in conceptual definitions. At the centre of any disability rights law is the question of how disability is defined. From a Scottish perspective, the definition of disability in the Convention is problematic and may even be seriously flawed. One aspect of this criticism is that the Convention fails to sufficiently recognise the distinction to be made between those disabled persons who have legal capacity and those who do not have legal capacity. Article 12(2) concerns equal recognition before the law and says that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. This is discordant with domestic legislation – in fact Scotland has an entire Act devoted to implications of the distinction between adults who have legal capacity and those who do not: the Adults with Incapacity (Scotland) Act 2000. In Section 1(6) of the 2000 Act, “incapable” means incapable of acting; or making decisions; or communicating decisions; or understanding decisions; or retaining the memory of decisions. Article 12(2) of the Convention whitewashes this issue with a universal statement that all persons with disabilities enjoy legal capacity.

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Commonwealth Office.) Arguably, this effectively amounts to a unilateral opt out to principles of the Protocol. On the other hand, it might be argued that providing a facility to opt out partially defeats the purpose of this particular Convention which is to provide a comprehensive set of disability rights and not a menu of options from which states may pick and choose. Once again, the impact of this can be related to the effective dissemination of information in terms of reports and would need to be considered in light of the relative impact of civil society in different states. If the Convention is administered effectively by the UN, it should be apparent to all which parts of the Convention a state has opted out of and this could act as a deterrent through force of public opinion.

The terms of the 2000 Act apply to the essential administrative matters of an adult's life (financial arrangements, welfare provisions, medical treatment etc.) rather than the current concern with participation in sport. Nonetheless, this inability to achieve a coherent definition of disability in the Convention betrays a further potential weakness – namely, that there is insufficient recognition that in reality there is not one type of disability but manifold disabilities discernible across the spectrum of individuals. All of these need be taken into account it is especially important to recognise that there are crucial differences in the needs and requirements of physically disabled individuals and those who have mental disabilities. The definition of disability is fundamental throughout all aspects of disability law – this is one area in which the Convention might have taken the opportunity to lay down one rule for all to follow – so, in that, it may have failed. One reason which might have influenced the decision not to include such a definition, is that it could be extremely difficult to reach sufficient consensus on what amounts to a disability. At its 8th Session, the Ad Hoc Committee considered a paper detailing different legal definitions of disability in some forty states and organisations.<sup>336</sup> One option to deal with this would have been to include a relatively open definition of disability, but this option appears to have been rejected in favour of a more demanding definition, which does not accord with domestic law. It remains to be seen whether the UK will ratify the Convention in spite of these problems with the definition, although arguably Scotland should at least opt out of Article 12(2).

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<sup>336</sup> Eighth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities 14 - 25 August and 5 December 2006 – Definition of Disability in Selected National Legislation

*To what extent could disabled sports participants in Scotland make use of the Convention?*

The Convention is the first disability-specific international convention which is legally binding.<sup>337</sup> The goals of such a human rights convention are, however, in many respects distinct from the formal legal systems of States Parties.<sup>338</sup> The Convention is an example of an area of international law the effectiveness of which could be realised by ‘campaigning organisations’, such as disability rights NGOs and charities, rather than being limited to enforcement through national courts.<sup>339</sup> According to Moore, a characteristic of the international human rights system that is supported by the UN is its four-way relationship between individuals (whose interest the system protects), states, the UN, and NGOs.<sup>340</sup>

*The Convention as a catalyst*

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<sup>337</sup> There has, however, been a series of earlier international provisions concerning disability rights, dating from 1971 – most recently, The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules). In order of date, these include: The United Nations Declaration on the Rights of Mentally Retarded Persons (1971); United Nations Declaration on the Rights of Disabled Persons (1975); World Program for Action Concerning Disabled Persons (1982); Tallin Guidelines for Action on Human Resources Development in the Field of Disability (1990); Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991); and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) (1993).

<sup>338</sup> Roy, Elise C (2007) ‘The Legal and Practical Implications...’

<sup>339</sup> For example, the Edinburgh-based charity for physically disabled people, ‘ecas’, has been campaigning (since its foundation in 1902) for better rights and access to various areas of life, including sport. See its website <http://www.ecas-edinburgh.org/>.

<sup>340</sup> This model is developed and explored further in Moore, D H (2004) ‘Agency Costs in International Human Rights’ 42 Columbia Journal of Transnational Law 491.

One of the less formal ways in which a human rights Convention can be an effective legal tool is in acting as a catalyst to state action,<sup>341</sup> for example in developing national ‘benchmarks’ – this involves building an awareness of disability sports participation practices in different countries, identifying best practice, and implementing change. This means that Scotland can both benefit from and contribute to the practices of other States Parties. For example, as detailed in Chapter 1, sportscotland<sup>342</sup> is the government agency for sport in Scotland. Its Single Equity Scheme<sup>343</sup> could be used as a benchmark for promoting the participation of disabled people in sport.

Sportscotland’s Single Equity Scheme<sup>344</sup> incorporates a disability equality policy, in accordance with the requirements of the Disability Discrimination Act 2005. The Scheme reports on how advisory groups of disabled persons have been set up to inform policy and procedural change. This is in accordance with the philosophy of the ‘disability movement’ to involve disabled people in law reform and policy formulation, encapsulated by the slogan ‘nothing about us, without us’,<sup>345</sup> which was reaffirmed throughout the drafting process of the Convention. It is this sort of

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<sup>341</sup> For an explanation of the CRC can act as a ‘catalyst’ to state action, see Davis, M F and Powell, R (2003) ‘The International Convention on the Rights of the Child: a Catalyst for Innovative Childcare Policies’ 25 Human Rights Quarterly 689.

<sup>342</sup> See an explanation of sportscotland in Chapter 1.

<sup>343</sup> sportscotland (2006) *Single Equity Scheme: Promoting Equality of Opportunity in Sport* Edinburgh: sportscotland. Public authorities are required to produce and publish a Disability Equality Scheme under the Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) Regulations 2005 SI No 565 (Regulations 2, 4 and 5).

<sup>344</sup> See the Appendix.

<sup>345</sup> See, for example, the Department of Health Strategy for Learning Disability  
<<http://www.publications.doh.gov.uk/learningdisabilities/access/nothingabout/nothing2.htm>>



document that could feasibly be referred to when, and if, the UK reports to the UN Committee (see below). Although this policy ‘benchmark’ was in any event reached as a result of domestic legislation, the Convention, as another legal frame of reference, could also act as a catalyst to this type of national policy scheme.

### *The reporting process*

Fundamental to the effectiveness of using the Convention as a catalyst, however, is the ability not only to easily share information but also to accurately report on and evaluate the current provisions for participation in sport in each of the States Parties. Like other UN instruments, the Convention can also hold states accountable at the international level through committee scrutiny of reports.<sup>346</sup>

The UN has learnt from the experiences of other UN Committees such as the Committee on the Rights of the Child (CRC Committee) and has subsequently produced a handbook to States Party reporting.<sup>347</sup> The CRC Committee’s effectiveness was initially plagued by severe problems of information management,

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<sup>346</sup> Article 34 establishes a Committee on the Rights of Persons with Disabilities. At entry into force of the Convention (when it has been ratified by twenty states) the Committee is composed of twelve experts, and, when the Convention is ratified by a further sixty states, this number increases to eighteen. Under Article 34 (3), they “... shall be of high moral standing and recognized competence and experience in the field...” and they are elected by States Parties for a term of four years. Of course, a Committee is only as effective as its membership composition permits – and allowing election of the members by States Parties could be a weakness as much as it could be one of its strengths – but this procedure is not without precedent in the UN, and has been used to enforce, for example, the CRC.

<sup>347</sup> United Nations (1997) *Manual on Human Rights Reporting* (HRI/PUB/91/1 (Rev.1), Geneva.)

compounded by generic UN under-funding.<sup>348</sup> Very large volumes of information were submitted by States Parties. These factors meant that the CRC Committee was limited to considering six or seven States Parties' reports at any one session, with sessions initially scheduled merely twice annually. A slow rate of report analysis combined with inadequate information management obviously has the potential to hamstring the effectiveness of the reporting system. The answer to these difficulties may lie in the rapid and well-documented improvements in information technology over the intervening years and in particular the availability of information on the internet.<sup>349</sup> Access to authoritative report information, by not just government bodies and NGOs but also members of the public of States Parties, is arguably one of the most powerful aspects of the Convention. Article 4.3 says that States Parties must closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations. Article 36(4) dictates that 'States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports'. Examples of relevant NGOs in Scotland, which might contribute to this process, include the disability charity Ecas, which campaigns for higher levels of participation for disabled people in activities such as sport.<sup>350</sup>

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<sup>348</sup> Cohen, C P, Hart, S N and Kosloske, S M (1996) 'Monitoring the United Nations Convention on the Rights of the Child: the Challenge of Information Management' 18 Human Rights Quarterly 445.

<sup>349</sup> See, for example, the United Nations website 'enable' <http://www.un.org/esa/socdev/enable/>; and the International Disability and Development Consortium <http://www.iddc.org.uk/cdrom/index.htm>.

<sup>350</sup> For further information see the organisation's websites: <http://www.ecas-edinburgh.org/>. ecas sponsors research reports in a number of areas, which examine the 'state of play' in respect of, for example, service provision and access issues.

If the Committee does succeed in direct communication with NGOs and the wider public, the effectiveness of its reporting function in influencing the governments of States Parties could be substantially amplified. The reporting process of the CRC Committee has received criticism on this point. For example, Woll argues that “the process... has generally not been used as an opportunity to raise awareness about children and their rights, to further understanding of the responsibilities for implementation of the CRC, to create more ownership of the CRC throughout government, and to engage with civil society”.<sup>351</sup> If governments consequently fail to make use of the concluding observations in the reports, opportunities for policy change will inevitably be lost. Therefore, promoting joint ownership of the reporting process between governments and non-governmental parties is one of the aims that the Committee must have.

### ***Non-governmental organisations***

The Committee will have to consider not only the submitted material itself but also the accuracy and honesty of the reports. NGOs should be given the opportunity to take part in the preparation of reports and may introduce a welcome element of independence in reporting. Article 36(5) concerns the consideration of reports and allows the Committee to transmit reports to other bodies such as specialized agencies for technical advice and assistance. Another tool with which the accuracy and or honesty of the reports may be ascertained, and through which the Convention may be

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<sup>351</sup> Woll, Lisa (2002) ‘Reporting to the UN Committee on the Rights of the Child A Catalyst for Domestic Debate and Policy Change’ 8 *International Journal of Children’s Rights* 73.

enforced, is the use of ‘shadow reports’.<sup>352</sup> These are reports compiled and written by campaigning organisations and may be used to influence public opinion and instigate change in their own right. There are pitfalls, however, and NGOs should be aware of the potential to be “co-opted”.<sup>353</sup> In order to preserve their voice independent of government, NGOs must avoid the danger of exchanging the opportunity to take part in compiling a government report for the ability to prepare their own report. To this extent, the effectiveness of the Convention depends on the presence and power of relevant NGOs in each country.

In conclusion to this chapter, it is probably too early to posit an enforceable legal right to sport for disabled people, but the combined impact of other human rights may have some impact. One of these is the right to be free from discrimination, and it is to this particular right that the next chapter turns.

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<sup>352</sup> For example, International Disability Rights Monitor (2003) *International Disability Rights Compendium* Washington DC: Center for International Rehabilitation.

<sup>353</sup> *Ibid.*

## *Chapter 4: Equal Participation – disability discrimination legislation and sport*

### *Introduction*

As a detailed, domestic application of human rights law, antidiscrimination legislation is perhaps the most powerful aspect of the law in Scotland – and indeed in other jurisdictions – relating to disability and sport. The legislative provisions which are the focus of this chapter include the Disability Discrimination Act 1995 (DDA),<sup>354</sup> as amended by the Disability Discrimination Act 2005, and, by way of comparison, the Americans with Disabilities Act 1990 (ADA).<sup>355</sup> Unlike the majority of research on disability discrimination law, which deals with employment provisions, this chapter concentrates on the provision of facilities and services – a focus which has been dubbed ‘the untold story’ of disability discrimination legislation.<sup>356</sup>

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<sup>354</sup> Part 3, DDA, concerns the provision of goods, facilities and services. It relates directly to opportunities, in terms of facilities such as sports grounds and services such as coaching, for disabled people to participate by doing sports. Part 1 concerns the meaning and definition of ‘disability’ (see Chapter 2). Part 2 concerns employment, which impacts on indirect participation in sport, through, for example, management or the provision of sports services, and direct participation in professional sport (see the distinctions in Chapter 1). Part 4 concerns education (the subject of Chapter 6). Part 5 concerns transport (the availability of adequate transport is certainly an issue which impacts on opportunities to play sport – it is, however, a general issue, arising in very many areas of the lives of disabled people, which raises limited questions that are specific to sport, and for these reasons is not considered in this thesis.)

<sup>355</sup> Title II applies to ‘public programs’ and services; and Title III applies to private entities which constitute places of ‘public accommodation’. Between them, these two titles are roughly the equivalent of Part 3, DDA.

<sup>356</sup> See Waterstone, M (2005) ‘The Untold Story of the Rest of the Americans With Disabilities Act’ 58 *Vanderbilt Law Review* 6. Waterstone notes the lack of American research in this area, compared to a large body of scholarship on the employment law aspects of disability discrimination law.

The chapter first reviews the fundamental characteristics of disability discrimination rights contained in domestic legislation.<sup>357</sup> It examines the main concepts of ‘discrimination’ and ‘adjustments’ (accommodations) in the context of sport. Enforcement mechanisms and ‘fourth generation’ equality law are then considered – specifically through a comparative analysis of the possible impact on sport of the disability equality duties, introduced by the 2005 Act. The chapter concludes by considering how this area of the law may evolve in the light of current reforms.

### **Discrimination, reasonable adjustments and sport**

#### ***Two types of unlawful discrimination***

Firstly, it is possible to identify two main types of unlawful disability discrimination<sup>358</sup> which are tackled by disability discrimination legislation – and it is helpful to separate these out conceptually.<sup>359</sup> One type of unlawful discrimination

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<sup>357</sup> Other important features of disability discrimination law are examined in the following chapters – including the definition of ‘disability’ (Chapter 2); the education provisions (Chapter 5); the impact on the physical environment and elements of the ‘health and safety justification’ defence (Chapter 6).

<sup>358</sup> Note also that ‘victimisation’ is a special form of unlawful disability discrimination recognised by section 55, DDA, in the context of employment and in goods, facilities and services. Essentially, this provision entails that a service provider (or employer) unlawfully discriminates against a disabled person if he treats them less favourably due to that person having brought proceedings under the DDA against him (or having given evidence or information in connection with such proceedings; or done anything under the Act in relation to him; or alleged that he has contravened the Act; or that he believes or suspects that the disabled person has done or intends to do any of those things, section 55(2)).

<sup>359</sup> Separating out these concepts has been a long-standing project in the literature on the ADA. With reference to the ensuing discussion, above, see: Karlan, P and Rutherglen, G (1996) ‘Disabilities, Discrimination and Reasonable Accommodation’ 46 Duke Law Journal 1, p.9 (arguing that ‘reasonable accommodation’ (the American equivalent of ‘adjustments’) is a ‘separate species’ of discrimination); and Kelman, M (2001) ‘Market Discrimination and Groups’ 53 Stanford Law Review 833, p.852 (arguing that it is appropriate to think that those seeking protection from simple discrimination possess

arises where, although there may be no adjustment necessary for a disabled person to be able to take part in sport, she suffers direct discrimination through being treated differently from a non-disabled person, for a reason related to her disability (and in circumstances where this treatment cannot be justified). A second type of unlawful discrimination occurs when the would-be sports participant requires reasonable adjustments to be made to the service or facilities in question and the provider of these has failed, without justification, to make them.

Examples of these types of discrimination are most commonly revealed through litigation in the field of employment. The first sort is a form of ‘direct discrimination’ and claims can arise where a disabled employee is dismissed from work. Hence, in *Goodwin v The Patent Office*,<sup>360</sup> *the appellant had been dismissed following complaints from fellow employees about his behaviour (the appeal then turned on whether or not he was disabled for the purposes of the DDA). This act of excluding from employment, for a reason which may relate to a person’s disability, has its equivalent in the exclusion of disabled people from sport, which also may amount to unlawful discrimination.*

The second type of unlawful discrimination<sup>361</sup> arose in *Archibald v Fife Council*,<sup>361</sup> *where the Law Lords ruled that Fife Council had been under a duty to make reasonable adjustments to Mrs Archibald’s employment, when she could no longer*

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‘rights’ claims, while those seeking accommodations are making ‘distributive’ claims). Note also that this project is inextricably linked to the theoretical purpose of discrimination law. Roughly speaking, discrimination can be aligned with more traditional ‘formal equality’ approaches; whereas adjustments can be aligned with more a more ‘substantive’ approach (see Chapter 2 for a fuller discussion).

<sup>360</sup> [1999] ICR 302.

<sup>361</sup> [2004] UKHL 32; [2004] 4 All ER 303.

*perform the duties in her present job, on account of disability. A similar duty might arise in the context of sport, on the part of a service provider, to offer an alternative sports programme to a disabled athlete if his current programme were no longer suitable. More commonly, however, necessary adjustments may simply require physical alterations to the playing environment.*

It is also illustrative to fit these two types of discrimination into ‘sameness’ and ‘difference’ models of discrimination.<sup>362</sup> For a disabled sportsperson who has fundamentally the *same* requirements as a non-disabled sportsperson in order to take part in a specific sport, unlawful discrimination of the first type occurs when he is, unjustifiably, treated differently. (As in the case example below, this can occur when there is a misperception about the impact of his impairment.) Conversely, for a disabled sportsperson who has *different* requirements (an additional aid, for example) in order to participate in a specific sport, unlawful discrimination occurs when she is treated the same as a non-disabled person, but her difference is not taken account of by making adjustments.

Whereas the layman and lawyer alike often find the sameness model relatively easy to comprehend – perhaps due to its simple appeal to the principle of treating ‘likes alike’<sup>363</sup> – the difference model is much more controversial and some have argued that its requirement to provide ‘special treatment’ to disabled people marks it out as the antithesis of other discrimination statutes (such as those for race and sex).<sup>364</sup>

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<sup>362</sup> Karlan, P and Rutherglen, G (1996) ‘Disabilities, Discrimination...’ p.10.

<sup>363</sup> See the discussion of ‘formal equality’ in Chapter 2.

<sup>364</sup> See discussion in Crossley, M (2004) ‘Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project’ 35 Rutgers Law Journal 861, pp.872-873. (Broadly speaking,



Nonetheless, there is judicial recognition of the difference model in both US and Scottish caselaw. In the US case *Regents of California v Bakke*, Blackmun, J said a difference model requires that “[i]n order to get beyond [an individual’s disability], we must first take account of [that disability]. There is no other way. And in order to treat some persons equally, we must treat them differently.”<sup>365</sup> In the Scottish case *Archibald v Fife Council*, Hale, LJ took this idea even further:

*The 1995 Act...does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.*<sup>366</sup>

Hence, fully taking account of a disabled sportsperson’s ‘differences’, in order to treat her equally, involves not simply treating her *differently* from a non-disabled person, but also *more favourably*.<sup>367</sup> As will become apparent, the disability discrimination legislation incorporates the two types of discrimination outlined above; and it embraces both the sameness and difference models.

### ***White v Clitheroe Royal Grammar School***<sup>368</sup>

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discrimination based on other grounds, such as race or sex, is premised on the idea that difference should be ignored.)

<sup>365</sup> (1978) 438 US 265, paragraph 407. (Quoted in Karlan, P and Rutherglen, G (1996) ‘Disabilities, Discrimination...’ p.10.)

<sup>366</sup> *Ibid.* Paragraph 47.

<sup>367</sup> The concept of more favourable treatment has since been incorporated into the DDA by the amending 2005 Act (see below).

<sup>368</sup> (2002) in the Preston County Court, Claim No. BB 002640 (unreported).

The English county court case *White v Clitheroe Royal Grammar School* is an illustration of how the first type of unlawful discrimination can arise when a disabled person wishes to participate in sport (in this case, mainstream amateur sport) and is treated less favourably than a non-disabled person on grounds related to his disability.

In this case it was held that Tom White was discriminated against by his school, for reasons related to his diabetes, in being refused permission to go on a water sports holiday. The school was unable to justify this treatment on grounds of health and safety.<sup>369</sup> The facts were that Tom was an insulin dependent diabetic of Type 1; this meant that he was at continued risk of suffering a hypoglycaemic coma if the level of glucose in his blood fell too low.<sup>370</sup> To ensure this did not happen, he had to regularly monitor his glucose levels. It was agreed by both sides that, on a previous sports trip organised by the school, Tom had irresponsibly failed to take proper readings and, his glucose level having lowered, had fallen into a coma.

In terms of the school's refusal to provide a service under section 20, DDA (see below), Ashton, J identified three questions to ask in this case:

*(a) was the decision to exclude Tom from the planned watersports holiday for a reason that related to his disability; and if so*

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<sup>369</sup> See the comparative discussion of health and safety justification defences in Chapter 6.

<sup>370</sup> Insulin dependent diabetics control their condition by regularly injecting insulin which reduces the level of glucose in their blood stream (the diabetes being manifest in an imbalance in the level of glucose). Diabetics require to lower the level because if it is allowed to remain too high, there can be long-term damage to their health.

*(b) was he treated less favourably than others without diabetes in the refusal to allow him to participate in that holiday; and if so*

*(c) can the School show that this treatment was justified at the time the decision was made by the reasonably held opinion that it was necessary in order not to endanger the health or safety of Tom or any other person?*<sup>371</sup>

In relation to question (a), the school argued that they had based their decision to exclude Tom on his prior irresponsible behaviour, which provided evidence as to the level of risk posed, were he allowed on this latest trip; and that this decision was unrelated to his disability. Ashton, J was unconvinced by this argument – Tom’s irresponsibility only arose in the context of diabetes management and the feared consequence would be another coma, “...so the exclusion decision was inextricably related to the disability”.<sup>372</sup>

The connection between an individual’s disability and the reason for his treatment has since been examined in detail in *Mayor and Burgesses of the London Borough of Lewisham (Appellants) v Malcolm (Respondent)*.<sup>373</sup> Although this case concerned the housing provisions in the DDA, it is also likely to stand as authority for interpreting other parts of the legislation, because the relevant provisions use virtually identical language. Mr Malcolm (M), who was schizophrenic, sublet his property, in breach of covenant, which would ordinarily entitle Lewisham (L) to take possession. The question was whether the DDA offered M a defence.

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<sup>371</sup> Ashton, J at paragraph 34.

<sup>372</sup> Ashton, J at paragraph 35.

<sup>373</sup> [2008] UKHL 43.

*Section 24(1)*, DDA provided that L would have unlawfully discriminated against M, on the basis that “for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply”. The parallel provision for goods, facilities and services is contained in section 21(b) (set out below). The language of this section is ambiguous, because it can be read either one of two ways. Either, ‘the reason’ referred to means a reason for the treatment in question, which may or may not separately be related to disability (as argued by M); or, “that reason” refers back to the “reason which relates to the disabled person’s disability” (as argued by L).<sup>374</sup> Those two options for interpretation can be transposed to the context of sport. Would a disabled person, who has been excluded from sport for a particular reason, be found to suffer unlawful discrimination only if the seemingly neutral reason for the exclusion happened to be sufficiently closely causally linked to his disability; or would unlawful discrimination only arise if the reason for exclusion was a reason that directly related to his disability? It was held in *Malcolm* that the latter interpretation was correct, and the Court subsequently found for the appellants.

On the basis of this finding, *White* may have been incorrectly decided, as the reason Tom was excluded was his prior irresponsible behaviour, just as a non-disabled boy would have been excluded had he behaved in a similar way. Arguably, he was not excluded on account of a ‘reason which related to his disability’. It is immediately apparent that this turns on how the question in (b), above, is interpreted, therefore the task of identifying the correct ‘comparator’ was given close attention in *Malcolm*.

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<sup>374</sup> Lady Hale, at paragraphs 136-139.

In common with the concept of a comparator in other areas of discrimination law, the test to establish disability discrimination involves a comparison with the treatment the disabled sportsperson receives with the treatment another person would receive. The question is – who is the correct comparator? In relation to question (b), it was held that the correct comparator in this case was a non-disabled schoolchild who was permitted to go on the holiday. This approach followed *Clark v TDG Ltd (trading as Novacold)*.<sup>375</sup> Thus a disabled sportsman or woman, in assessing whether or not they have received lawful treatment at the hands of providers of sports services, should be in a position to compare themselves with a non-disabled sportsman or woman, rather than, for instance, another disabled person. The practical significance of this approach to the appropriate comparator is that it is not necessary to undertake the difficult task of casting around for real or hypothetical disabled people in establishing what would be reasonable in terms of adjustments or accommodations required. Thus, in cases where disabled people are competing, or otherwise participating, in sport with non-disabled people, they can use this latter class as a comparator. A similar line of argument contributed to the success of Casey Martin in arguing that his accommodations were reasonable.

The decision in *Malcolm*, however, substantially changes the necessary approach and significantly restricts the use of a hypothetical comparator in disability discrimination cases. The Lords held that the phrase “others to whom that reason does not or would not apply”, i.e. referring to the relevant comparators, must be construed narrowly and

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<sup>375</sup> [1999] 2 All ER 977; [1999] IRLR 318. In *Clark v Novacold* at issue was alleged employment discrimination but the court also considered the meaning of ‘that reason’ in section 20(1) (a), set out below (also finding that the wording in this section was similar enough to the ‘employment’ equivalent, section 5(1) make the same interpretation).

the appropriate hypothetical comparator, in that case, was a tenant who was not disabled, but who sublet the property, in breach of covenant. In *White*, therefore, the appropriate comparator might be a boy without diabetes who behaved similarly irresponsibly – it is likely he would also have been excluded from the trip. In light of this, could unlawful discrimination still be found to have existed? *White* can be distinguished from the facts in *Malcolm* because the teachers knew of Tom's disability, whereas M's disability was not known about, at least when the decision to repossess the property was taken. *Malcolm* has in effect established that the defendant's knowledge of a complainant's disability is inextricably linked with the causality of the reason for excluding a disabled person from participating in sport. Lord Scott stated in his opinion that:

*...a "reason" does not "relate to" a disability for section 24(1)(a) purposes unless the fact of the physical or mental condition in question has played some causative part in the decision-making process of the alleged discriminator. A "reason" could not, in my opinion, "relate to" a physical or mental condition of the person in question of which the alleged discriminator is unaware.*<sup>376</sup>

It is, however, possible that this knowledge requirement might affect sports claims less than other sorts of claims because the disabled sports participant might be more likely to have brought a disability to the attention of the defendant, especially if adjustments are required. Nonetheless, following this development in the law, it will be undoubtedly harder for claimants to establish that they have been subjected to unlawful disability discrimination – perhaps especially in cases of potential indirect

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<sup>376</sup> Paragraph 28.

discrimination where the disabled sportsperson has been excluded as a result of seemingly ‘neutral’ criteria, as discussed below.

***PGA Tour, Inc. v Martin***<sup>377</sup>

The US Supreme Court case *PGA Tour, Inc. v Martin* illustrates how the concept of adjustments can arise when disabled people wish to participate in sport – in this case, professional mainstream sport. (This is a comparative illustration and it is important to note that this action involved the concept of ‘reasonable accommodation’ in the ADA, which is only approximately equivalent to the concept of ‘reasonable adjustment’ under the DDA, both concepts having been refined by subsequent caselaw.)<sup>378</sup>

Casey Martin was a disabled professional golfer who was denied the opportunity to take part in golf competitions with the aid of a golf cart, which he required to use due to a degenerative circulatory disorder<sup>379</sup> that prevented him from being able to walk the golf course on foot like other, non-disabled competitors. He sued the relevant regulatory body, the Professional Golf Association (PGA), which had made the

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<sup>377</sup> (2001) 532 US 661.

<sup>378</sup> See sections 20-21, DDA, detailed below. Note also that reasonable adjustments in goods, facilities and services, under Part 3 of the DDA, are different from in the Part 2 context of employment law, in a number of key respects. The Part 3 duty is to disabled people as a group, as opposed to individual disabled people in the context of employment; the Part 3 duty is anticipatory in nature, in employment it is merely responsive; it is also a continuing and evolving duty.

<sup>379</sup> Martin suffered from Klippel-Trenaunay-Weber Syndrome which leads to bone deterioration and atrophy. This put him at a heightened risk of fracturing his leg.

decision, alleging unlawful discrimination in its failure to provide reasonable accommodation in accordance with the ADA.<sup>380</sup>

That Martin was disabled was never at issue. Instead, the PGA argued that the ADA does not apply to professional golf tournaments; its fall-back position being that walking is an essential, substantive element of golf and that any modification would fundamentally alter the nature of the competition. It was held that the ADA did apply to professional golf tournaments as they count as places of public accommodation.<sup>381</sup> Hence, the Court focussed on the question of whether modifying the no-cart rule during professional golf competitions was reasonable or would fundamentally alter the nature of the game. More specifically, the question was how far did the concept of ‘reasonable accommodation’ extend to the rules of competitive play? It was held that the use of a golf cart was a reasonable accommodation and should be permitted as it would not fundamentally alter the nature of tour events, or give Martin an advantage over other golfers.

In the case of the DDA, how is the extent of the duty to make ‘reasonable adjustments’ determined? For example, does this duty extend to making adjustments to the rules of a game? In employment law, the duty to make adjustments has been shown to be quite broad and often extends to matters such as altering a disabled employee’s responsibilities – there are also specific examples provided in the relevant guidance and codes of practice for employers. In determining the scope of this duty, a

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<sup>380</sup> Title III, ADA, requires private entities that are considered places of public accommodation to provide reasonable modifications or accommodations for disabled persons (section 12182(b) (2) (A)).

<sup>381</sup> In fact, the ADA specifically lists the private entities that count as places of public accommodations and these include “a...golf course...” (section 12181(7) (L)).



vital question to address is who is responsible for identifying which adjustments are required? Employment cases have established that employers must take a relatively proactive approach. In *Mid Staffordshire General Hospital NHS Trust v Cambridge*,<sup>382</sup> the court held that the Trust was under a duty to make a proper assessment of what Mrs Cambridge's disability required to be done by way of adjustments. It is likely that the courts would expect providers of sports facilities and services to take a similarly proactive approach. But, even assuming this proactive approach is followed – in practical terms, what is the likely result?

In *Roads v Central Trains*,<sup>383</sup> the Court of Appeal considered the extent of the duty to make reasonable adjustments in relation to goods, facilities and services. Utilising a purposive approach, the court found that the DDA is intended to “provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large”.<sup>384</sup> In fact, service providers must strive to provide, as far as possible, parallel services, because the purpose of the legislation “is not a minimalist policy of simply ensuring that some access is available to the disabled: it is, so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public”.<sup>385</sup> This is a high bar to reach for service providers, yet it probably would not entail changes to the rules of mainstream sport, at least in the majority of cases. So long as there are disability specific facilities, sports and competitions, these may well be enough to ‘approximate’ equal access, without the need to ‘overburden’ mainstream sport with requirements to change rules.

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<sup>382</sup> [2003] IRLR 566.

<sup>383</sup> [2004] EWCA Civ 1541.

<sup>384</sup> Sedley, LJ at paragraph 13.

<sup>385</sup> Sedley, LJ at paragraph 30.

### *The cases of White and Martin compared*

As in *White*, the barrier to participation in *Martin* was not a physical one, but it effectively subsisted in the minds and cultural attitudes of the decision-makers, i.e. those in the PGA.<sup>386</sup> In *White*, Tom was perceived as a threat to himself (in terms of the risk to his health), but he was also perceived as a threat to the smooth-running of the activity itself (presumably in terms of the potential worry, time, expense, and general disruption caused were he to suffer adverse effects of his impairment). In *Martin* it was also this latter perceived threat *to sport itself* which was considered problematic. Ultimately, the Supreme Court decided that this threat was non-existent, in part because the Rules of Golf did not even need to be altered for Martin to play.<sup>387</sup> It remains a moot point whether, and in what circumstances, disability discrimination law could demand that the rules of a sport should be changed.

Another key difference between *White* and *Martin* is that, although in both cases the decisions taken by the respective service providers acted to exclude each individual from taking part in sport, in *White* the decision was taken due to a misconception about the medical implications of the individual's disability; whereas in *Martin*, the

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<sup>386</sup> In Chapter 6 the idea that the disabled athlete can be perceived as a 'threat' is developed, and the problems in both these cases may be seen to stem from different aspects of this societal attitude.

<sup>387</sup> For a comparison with another case, closely analogous to *Martin* on the facts, see Tierney, C E (2001) 'Casey Martin, Ford Olinger and the Struggle to Define the Limits of the Americans with Disabilities Act in Professional Golf' 51 *Catholic University Law Review* 335. See also *Olinger v United States Golf Association*, (2000) 205 F.3d 1001, in which the 7<sup>th</sup> Circuit found the opposite conclusion to that in *Martin*, namely that while the game of golf does not forbid the use of golf carts, allowing Olinger to use one would give him an unfair advantage over the rest of the field (prior to the issue being decided in *Martin* in the Supreme Court).

decision was made purely on the grounds of what were perceived to be the rules of the sport itself – essentially a factor of the social environment.<sup>388</sup>

Nonetheless, these differences should not be over-emphasised as both cases essentially involved a policy decision that a disabled person could not be provided for within the parameters of the sport, and in this respect the concepts of discrimination and adjustments may be seen to be similar (see the discussion below). The courts have therefore been cautiously aware of their undesirable potential to encroach on policy-making decisions that perhaps could not be reconciled with legal obligations.

#### ***A ‘Royal and Ancient’ approach?***

*Martin* raises challenging theoretical questions: how far can, or should, rules in competitive sport be modified to accommodate disabled athletes, without such changes being deemed unreasonable under the law? In Scotland, the Royal and Ancient Golf Club at St Andrews regulates the Rules of Golf, not only in this jurisdiction but across the world.<sup>389</sup> In recent years, it has also produced modified rules for golfers with disabilities, which consider some interesting scenarios.<sup>390</sup> These

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<sup>388</sup> In the following chapter it will be seen how there has been a theoretical struggle to conceptualise the meaning of disability, based on differing ‘medical’ and ‘social’ models.

<sup>389</sup> The Royal and Ancient Golf Club is golf’s world rules and development body and its Rules of Golf are approved by The United States Golf Association (the Rules used in *Martin*). See Royal and Ancient Golf Club (2007) *Rules of Golf: as approved by R&A Rules Limited and The United States Golf Association* (31<sup>st</sup> Edition) St Andrews: The Royal and Ancient Golf Club of St Andrews (Effective worldwide from 1 January 2008), available from <http://www.randa.org/>.

<sup>390</sup> See Royal and Ancient Golf Club (2003) *A Modification of the Rules of Golf for Golfers with Disabilities* St Andrews: The Royal and Ancient Golf Club of St Andrews, available from <http://www.randa.org/>. (It may be speculated that the Club produced these modified rules partly in response to the issues arising in *Martin*.)

modified rules are not intended to apply automatically for disabled golfers in any competition – instead they are essentially suggestions for committees which oversee individual competitions.<sup>391</sup> The rules include an Exception to Rule 14-3, which permits an individual to approach a committee in charge of a competition to ask them to make an exception to the rules about the use of equipment – this rule stipulates the circumstances in which (what are rather archaically called) “artificial devices, unusual equipment and unusual use of equipment” may be utilised.

One of the scenarios envisaged by the modified rules is where a physically disabled golfer in a wheelchair (which counts as ‘unusual equipment’) is unable to access a bunker to play the ball, and he deems the ball ‘unplayable’.<sup>392</sup> In such a case, he would be entitled to play a ball outside the bunker, incurring a penalty of one extra stroke. Similarly, “[a] potential issue for some lower extremity amputee golfers who wear a prosthesis is their inability to climb into or out of bunkers, a situation that probably occurs rather infrequently. On that basis Rule 28 (Unplayable Ball) should apply without further modification.”<sup>393</sup> On the face of it, this may seem reasonable, but a look at Rule 28 reveals otherwise. In fact, even worse than the penalty for the

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<sup>391</sup> The preface to the modified rules states: “This publication contains permissible modifications to the Rules of Golf for use by disabled golfers. This is not intended to be a revision of the Rules of Golf as they apply to able-bodied players. As is the case for the Rules of Golf themselves, these modifications, along with the philosophy expressed herein, have been agreed upon by R&A Rules Limited and the United States Golf Association. It is important to stress that these Rules modifications only apply if they have been introduced by the Committee in charge of a competition. These modifications do not apply automatically to a competition involving disabled golfers”.

<sup>392</sup> *Ibid.* p.16.

<sup>393</sup> *Ibid.* p.7. It may well be difficult to accurately assess exactly how often a lower extremity amputee golfer would struggle to climb in or out of bunkers, but it is not entirely facetious to observe that the author of the modified rules seems to be forgetting the infamous Hell Bunker at the 14<sup>th</sup> hole on the Old

wheelchair golfer, the amputee golfer ends up having no alternative but to play the ball from where he or she took the original shot *as well as* incurring a stroke penalty (with the net effect of a two-stroke penalty).<sup>394</sup> Depending on the lie of the ball, an able-bodied golfer might easily play a good shot, incurring no stroke penalty at all (having had no problem climbing in and out of the bunker).

The disparate impact on disabled people of this interpretation of the Rules (and it is important to bear in mind that it is an interpretation of the Rules which purports to modify them in the interests of disabled golfers), reveals at least two things. Firstly, it demonstrates what appears to be a real, and persistent, reluctance to change the Rules to fit the requirements of, and to accommodate on an equal basis, a disabled golfer. It is hard to think of another area of the provision of facilities or services to disabled people in which an entirely easy and expense-free, and ultimately trivial, adjustment or modification could be justifiably refused. Secondly, to a certain extent the very idea of a bunker on a golf course affirms the view that the sporting environment, like most of the physical environment, has been designed exclusively for the able-bodied,

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Course at St Andrews (ironically, the Royal and Ancient's flagship course) which is hard enough for able-bodied players to access. Every round on the Old Course could cause such a problem.

<sup>394</sup> Rule 28 reads: "If the player deems his ball to be unplayable, he must under penalty of one stroke: a. Play a ball as nearly as possible at the spot from which the original ball was last played (see Rule 20-5); or b. Drop a ball behind the point where the ball lay, keeping that point directly between the hole and the spot on which the ball is dropped, with no limit to how far behind that point the ball may be dropped; or c. Drop a ball within two club-lengths of the spot where the ball lay, but not nearer the hole. If the unplayable ball is in a bunker, the player may proceed under Clause a, b or c. If he elects to proceed under Clause b or c, a ball must be dropped in the bunker". Quite obviously, if the player "deemed his ball to be unplayable" because the limitations of his impairment meant that he was physically unable to access the bunker, his only option is 'a', because options 'b' or 'c' require the ball to be dropped in the bunker (which he cannot access).

often to the cost of the physically disabled – and that design includes the design of how the Rules interact with the course.<sup>395</sup>

### ***Types of discrimination law challenges by disabled sports participants***

Within the jurisdiction of the USA, Weston has identified three main types of legal challenges which can arise in respect of disability discrimination and sport.<sup>396</sup> The first type of challenge occurs where participants with a high medical risk seek to take part in sport. In some cases they obtain medical clearance but subsequently die or are injured whilst playing, giving rise to liability and safety concerns for the service provider; in other cases they are denied medical clearance to play and subsequently sue the provider on the grounds of unlawful discrimination.<sup>397</sup> The second type she identifies occurs when disabled athletes are excluded from sport because they fail to meet a ‘neutral’ eligibility requirement, such as age or academic standards. The third type involves participants who require accommodations (adjustments), including modifications to the rules.<sup>398</sup>

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<sup>395</sup> Crossley discusses this idea in relation to what she calls the ‘minority group’ model of disability, attributing it to writers such as Anita Silvers and Harlan Hahn (Crossley, M (2004) ‘Reasonable Accommodation...’ pp.880-881). See also discussion of the ‘social model’ in Chapter 2.

<sup>396</sup> Weston, M A (2005) ‘The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities’ 50 St Louis University Law Journal 137, p.147.

<sup>397</sup> See, for example *Knapp v Northwestern University* 101 F.3d 473 (7<sup>th</sup> Cir. 1996), in which Knapp had a sudden cardiac arrest during a basketball game; thereafter the issue of his exclusion on medical grounds arose – there is further discussion of these sorts of cases in Chapter 6.

<sup>398</sup> In reverse order, the third type of challenge has just been considered, above; Chapter 5 considers the second type in the context of education; and the first type is discussed in Chapter 6, in the context of the health and safety justification.

The exclusive nature of elite sport might suggest that the issues arising in *Martin* are unlikely to crop up in the lives of the average disabled sportsperson and that the scenario arising in *White* is generally more likely. The issues in *Martin* are not as obscure as they may at first seem, however, and they are instructive on a number of levels about wider instances of how society and the law treats issues of discrimination in a context such as sport. It is possible to speculate that, if they experience circumstances similar to Casey Martin, recreational sports participants are more likely simply to accept unfair discrimination and drop out of the activity. Hence, these cases are less likely to be drawn to our attention.

As discrimination legislation has developed over recent years, it has become increasingly apparent that there are some fundamental tensions in the way that discrimination law interacts with certain areas of life, the distinctive features of which were previously taken for granted – to pick a couple of current examples, there is a much-reported tension between certain religious beliefs and sexual-orientation discrimination issues such as civil partnerships; and there is also a tension between age discrimination and pensions provisions.<sup>399</sup> The examination so far suggests that there may be a fundamental tension between the concept of disability discrimination and many of the features of sport that were previously taken for granted by society (and probably still are taken for granted). Disability in sport and the cultural emphasis that is placed, from an early age, on *ability* in sport are not mutually exclusive,<sup>400</sup> but

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<sup>399</sup> The British Government recognises that there is a potential fundamental tension between the terms of Schedule 2 (concerning pensions) of the Employment Equality (Age) Regulations 2006 and the rules on flexible retirement which, prior to the introduction of age discrimination law, had not previously had cause to be questioned. See Department for Work and Pensions (2007) *Flexible Retirement and Pension Provision: Consultation Document* London: DWP.

<sup>400</sup> See Chapter 1.

this emphasis does mean that it is necessary to think very carefully about the implications of how both the disabled, and non-disabled, body and mind can be adapted, modified and potentially enhanced to increase sporting performance, and how such changes relate to disability discrimination.

*From disability to ‘super-ability’*

It is a trite point that we live in a rapidly changing world in terms of technology and innovation, and recent developments highlighted by Casey Martin and Oscar Pistorius indicate that as time goes by such innovations will increasingly help to allow disabled people to participate in sport – and to compete both in disability sport and mainstream sport, at all levels. Such innovations could impact on all three of the types of discrimination law challenges identified above. This possibility raises a number of difficult questions. What judgements should we make about the bodies and minds of sportsmen and women being adapted and changed to enhance their levels of participation and performance?<sup>401</sup> In which circumstances should such modifications be permitted? In which circumstances are these questions for sports regulators; and in which circumstances are they questions for disability discrimination (and other aspects of the) law to resolve? These issues are not as speculative as they might at first appear. Furthermore, they do not begin and end with disabled people. There are two very important scientific developments which impact on disabled athletes and non-disabled athletes alike – genetic technologies,<sup>402</sup> such as ‘gene doping’,<sup>403</sup> and

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<sup>401</sup> See Chapter 1, which notes how the issue of enhancements affects all athletes, disabled and non-disabled.

<sup>402</sup> There is a burgeoning literature on genetic enhancements and in recent years scholars have been anticipating their impact on sport. See, for example, Miah, A (2007) ‘Genetic Selection for Human



cyborg enhancements.<sup>404</sup> Both of these developments have the potential to create what might be called ‘super-abilities’ in disabled athletes.

The pace at which these developments have occurred means that they appear to have crept up on sports regulators, lawyers and the general public alike. As Abrams observes: “It is uncertain how we will respond as the line between equalizing athletes – as was Casey Martin’s claim for fairness – and enhancing the athletes continues to blur. The next generation of technology-and-sports cases will be far more difficult to address than a dispute over a golfer’s use of a cart”.<sup>405</sup>

### ***Oscar Pistorius – from disabled athlete to cyborg***

Although the extent to which genetic technologies have already penetrated sport may be unclear, what is clear is that cyborgs no longer simply belong in science fiction. The recent media storm over the South African elite disabled runner, Oscar Pistorius,

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Enhancement’ 4 *Journal of International Biotechnology Law* 6; Baylis, F and Robert, J S (2004) ‘The Inevitability of Genetic Enhancement Technologies’ 18 *Bioethics* 1 (arguing generally that the inevitability of genetic enhancement technologies means points to new directions for ethical thinking in this area); Abrams, R I (2003) ‘Sports Law Issues Just Over the Horizon’ 3 *Virginia Sports and Entertainment Law Journal* 49 (arguing that “...Casey Martin’s case foreshadows the problems that will occur when genetic engineering and bionic transplants are able to transmute athletes into super-athletes.” (p.51)); Menge, S K (2007) ‘Should Players Have to Pass to Play?: A Legal Analysis of Implementing Genetic Testing in the National Basketball Association’ 17 *Marquette Sports Law Review* 459.

<sup>403</sup> Gene doping is a spin-off of gene therapy. It typically alters a person’s DNA to fight diseases like muscular dystrophy and cystic fibrosis. It has obvious applications to athletes with various disabilities.

<sup>404</sup> According to the Oxford online dictionary, a ‘cyborg’ is: “a fictional or hypothetical person whose physical abilities are extended beyond human limitations by mechanical elements built into the body.” (See [http://www.askoxford.com/concise\\_oed/cyborg?view=uk](http://www.askoxford.com/concise_oed/cyborg?view=uk).)

<sup>405</sup> Abrams (2003) ‘Sports Law...’ p.51.

demonstrates how shocking it can be to the public to realise that there already exists the physical embodiment of a cyborg athlete.<sup>406</sup> Pistorius is a double amputee and uses specially adapted prosthetic legs to compete in running events. Having won gold in the 200 metres at the 2004 Paralympics, he began to compete successfully in able-bodied races.<sup>407</sup> Since then, his progress in mainstream sport appears to have been blocked by the International Association of Athletics Federations (IAAF) amending its competition rules to ban the "...use of any technical device that incorporates springs, wheels or any other element that provides a user with an advantage over another athlete not using such a device".<sup>408</sup> Whether Pistorius' prosthetic limbs provide an artificial advantage over and above another athlete's legs is currently in dispute.<sup>409</sup> Whatever the outcome, it is perhaps inevitable that disabled athletes will soon have the potential to have 'super-abilities', through the use of enhancements such as prosthetic limbs, which are of course considered legal in the ordinary run of events. In terms of the law, the question would then become: are organisations like the IAAF exercising unlawful disability discrimination by insisting that paralympic athletes conform to 'normal' human morphology?<sup>410</sup> Disabled athletes such as Casey Martin and Oscar Pistorius operate at the boundaries of mainstream sports, but their

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<sup>406</sup> See, for example, 'Oscar Pistorius is put through his paces to justify right to run' *The Times*, 20 November 2007; 'Furious Pistorius Blade Runner slams IAAF' *The Guardian*, 16 July 2007.

<sup>407</sup> For example, he took second place in the 400 metres at the South African National Championships in March 2007.

<sup>408</sup> Rule 144(2) (e), IAAF Competition Rules 2008.

<sup>409</sup> As noted in the Introduction, the IAAF ruled on 14 January 2008 that Pistorius' prosthetics gave him an unfair advantage. The suggestion is that the prosthetics allow him to run faster during the second 200 metres, rather than the first 200 metres, of the 400 metre race – something which no non-disabled athlete has achieved and which raises suspicions about the performance of the prosthetics. Pistorius appealed this decision to the Court of Arbitration for Sport in Lausanne and the appeal hearing was on 29 and 30 April 2008.

cases cause us to question what the limits are of discrimination or reasonable accommodations/adjustments.

Arguably, it is only a matter of time before the legal issues in *Martin* arise in the context of elite sport in Scotland and comparable issues have already arisen in the context of education.<sup>411</sup> In the light of the recent CAS ruling,<sup>412</sup> it is entirely possible that Oscar Pistorius will compete in the 2014 Commonwealth Games in Glasgow.<sup>413</sup> Whether, and when, these high-profile issues will reach the courts in Scotland remains to be seen, but they certainly have the *potential* to do so.

It may well be that disability discrimination law as it stands is insufficient to cope with such developments. Returning to Lord Justice Hale's assessment that disability discrimination law requires *favourable treatment* for disabled people, in light of the subsequent discussion – could this feasibly extend to sport, or must the provision of sport be an exception to this doctrine? The problem seems to be that the DDA has been founded on the implicit assumption that disabled people may require favourable treatment to bring them up to the same level of performance as that of non-disabled people. That assumption does not take account of instances in areas such as sport, in which the disabled person might end up with a 'super-ability', which surpasses that of non-disabled people, as it might turn out to be in the case of Pistorius.

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<sup>410</sup> Dvorsky, G (2007) 'Is the World Ready for Cyborg Athletes?' (article posted on the website of the Institute for Ethics and Emerging Technologies, 25 April 2007, [www.ieet.org](http://www.ieet.org)).

<sup>411</sup> See Chapter 5.

<sup>412</sup> On 16 May 2008, the CAS published its ruling allowing Pistorius' appeal against the IAAF. See CAS 2008/A/1480 Pistorius v/IAAF.

<sup>413</sup> On 9 November 2007 it was announced that Glasgow had won its bid to host the 2014 Commonwealth Games. (See <http://www.glasgow2014.com/default.aspx> for more details.)

As technology progresses it may no longer be possible to argue that a technological enhancement such as Pistorius' prosthetics amount to reasonable adjustments as these enhancements go beyond what 'reasonableness' requires. There is still debate on the facts as to whether or not his prosthetics give Pistorius an advantage by making him quicker as the race progresses (something which no organic legs can achieve), but better technology will eventually put this beyond debate. One way forward may be to accept that in the future humanity will have to take account of genetic engineering and to look at ways of uniting disability discrimination laws with emerging genetic discrimination law; however, that is a project which may still be some way off in the future.<sup>414</sup> As the identities of athletes become more complex, transhumanist aspects to identity can no longer be ignored. These aspects of identity also have parallels in other minority groups such as transgender individuals.<sup>415</sup>

### ***Part 3, Disability Discrimination Act 1995 – goods, facilities and services***

Having introduced some of the main themes in disability discrimination and sport, the following legislative summary picks out the relevant provisions in the DDA. Section 19(1), DDA establishes liability for providers of sports facilities and services as follows:

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<sup>414</sup> See the discussion in Macintosh, K L (2005) *Illegal Beings: Human Clones and the Law*. Cambridge: Cambridge University Press.

<sup>415</sup> See McArdle, D (2008) 'Swallows and Amazons: Or the Sporting Exception to the Gender Recognition Act' 17 *Social and Legal Studies* 1.

*It is unlawful for a provider of services to discriminate against a disabled person:*

*(a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;*

*(b) in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service.*

Section 20 lays out the two types of discrimination discussed above:

*(1) ...a provider of services discriminates against a disabled person if:*

*(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and*

*(b) he cannot show that the treatment in question is justified.*

*(2)...a provider of services also discriminates against a disabled person if:*

*(a) he fails to comply with a section 21 duty imposed on him in relation to the disabled person; and*

*(b) he cannot show that his failure to comply with that duty is justified.*

Detailing the second type of discrimination, section 21 determines the provider's duties to make adjustments:

*(1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.*

One of the principles of disability discrimination that sets it apart from other sorts of discrimination legislation is the relatively substantial (and complex) justification defences available to service providers. In relation to the justification defences at sections 20(1) (b) and 20(2) (b), above, the provider must demonstrate that, in his *opinion*,<sup>416</sup> one of five conditions apply (section 20(3) (a)), and that it is reasonable in all the circumstances for him to hold that opinion (section 20(3) (b)).

Those conditions, laid out in section 20(4), allow justifications where: (a) the treatment is justified on grounds of health or safety; (b) the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent; (c) (in circumstances in which the provider refuses to provide or deliberately does not provide a service which he provides or is prepared to provide to members of the public) the treatment is necessary because the provider would otherwise be unable to provide the service to members of the public; (d) (in the standard, manner, or terms

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<sup>416</sup> See discussion in Chapter 6 of subjectivity and objectivity in justification decision-making.

on which the services is provided) the treatment is necessary in order for the provider to be able to provide the service to the disabled person or to other members of the public; (e) (in the terms on which he provides a service) the difference in the terms on which the service is provided to the disabled person and those on which it is provided to other members of the public reflects the greater cost to the provider of services in providing the service to the disabled person.

Hence, in summary, there is a ‘health and safety’ defence (this is one of the defences most relevant to sport and will be focussed on in Chapter 6); an ‘incapacity’ defence; two defences where the justification depends on the impact of the treatment on the provider’s ability to serve; and one defence based on cost.

### ***The rightful place of disability in the discrimination canon***

It is possible to identify four main factors common to the concept of adjustments in disability discrimination legislation and these can be applied to sport.<sup>417</sup> The first factor is the requirements of the individual’s particular disability. This factor is covered by section 19(1) (b), above, but it is also implicit in section 21, in that the provider’s duty is to make adjustments ‘in all the circumstances of the case’. The second factor is the essential aspects of the sports role she seeks to perform. Arguably, this factor impacts on the provider’s approach to all the sections listed above – sections 19(1), 20 and 21. The third factor is any possible adjustments that would enable her to participate. This is the subject of section 21. Finally, the fourth factor is

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<sup>417</sup> These factors are adapted from Karlan, P and Rutherglen, G (1996) ‘Disabilities, Discrimination...’ p.13. (Karlan and Rutherglen identify the interaction of these factors in the context of employment.)

the burden that those adjustments would impose on the provider of facilities or services. This can be related to the defences above.

Returning to the distinction made above between the two types of discrimination – although it was constructive to make this in order to bring out some of the nuances in the issues arising, in light of the above discussion, it might be argued that this distinction in fact has limited application in the context of sport. American scholarship in recent years has argued that there are, at the very least, limits to this distinction. For example, Jolls argues that the ‘disparate impact’, or ‘indirect discrimination’ aspect (in which an apparently neutral policy or procedure of a service provider has a disparate, or indirectly discriminatory effect on disabled people) is arguably difficult to distinguish, in terms of its specified aspects, from the requirements of adjustments.<sup>418</sup> This can be illustrated by the case of *White*, above. In fact, although for the sake of illustration the above discussion of the case concentrated on the concept of adjustments, *White* considered *both* types of disability discrimination, as laid out in sections 19(1), 20 and 21 of the DDA, above. The reason why the school was held to have acted unlawfully in respect of the reasonable adjustments required, was in effect the same reason why it was held to have acted unlawfully in respect of the requirement not to treat Tom less favourably, without justification – namely it had failed in terms of its policy to undertake a proper health and safety assessment.<sup>419</sup>

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<sup>418</sup> Jolls, C (2001) ‘Antidiscrimination and Accommodation’ 115 Harvard Law Review 642, p.651. See also Colker, R (2000) ‘ADA Title III: A Fragile Compromise’ 21 Berkeley Journal of Employment & Labor Law 377; Stein, M A (2004) ‘Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination’ 153 University of Pennsylvania Law Review 579.



Another reason why the differences between the two types of discrimination should not be over-emphasized may be drawn from the Oscar Pistorius example, above. Having briefly discussed the future impact of genetic and cyborg technology in the world of sport for disabled people, it may be seen that the adjustments that have to be made in order for Pistorius to compete may soon no longer be regarded as a form of ‘special favour’ – a kind of reluctant favouritism towards disabled people only.<sup>420</sup> If the future of sport holds the possibility of genetic or cyborg technological enhancements which can be utilized by all, disabled and non-disabled alike, then the disability-specific nature of ‘adjustments’ begins to fade into a continuum of requirements which exist irrespective of whether the athlete is disabled or not. In that case, an adjustment would simply be made according to the requirements of the individual, treating disabled athletes and non-disabled athletes alike. Judicial interpretation of what is ‘reasonable’ may adjust accordingly.

### ***Two interim conclusions***

There are two conclusions to make about disability discrimination legislation, at this stage of the chapter, – one positive and the other negative. The first, positive, conclusion is that disability discrimination law viewed through the prism of sport is illustrative of the extent to which the legislation may in fact function in a way more similar to other types of discrimination law than is commonly acknowledged – in that the distinction between the requirements of the ‘traditional’, antidiscrimination provisions and the adjustment provisions are, in practical terms, reasonably artificial. This is a positive conclusion on the one hand because it counters the common implied

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<sup>419</sup> Ashton, J at paragraphs 42 and 46, respectively.

criticism that disability discrimination extends beyond the terms of fair treatment; and on the other hand because it recognizes the parallel nature of the goals behind antidiscrimination and adjustments.<sup>421</sup> The second, negative, conclusion is that the disability discrimination legislation as it stands, may no longer be adequate to fully comprehend the future transition of disabled athletes from being people who are a *not as able* to those who (with the benefit of enhancements) are ‘super-enabled’.

### **How can the legislation prevent disability discrimination in sport?**

At this point the chapter changes tack. Despite the fact that the case examples above demonstrate that unlawful discrimination can easily occur in the context of disabled people participating in sport, it is less clear that enforcement by individuals is the best means to tackle this.<sup>422</sup> As the DDA fell into a familiar pattern of litigation, it soon became striking how many more cases concerned Part 2 (relating to employment) than Part 3 (goods, facilities and services). In the first few years of its enactment, in comparable periods between 1996 and 2001, there were 8,908 Part 2 cases compared to only 53 Part 3 cases.<sup>423</sup> Following the findings of the MacPherson Commission in the context of race discrimination, it was found that the impact of discrimination legislation must be increased by creating positive duties, and one way that the

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<sup>420</sup> Crossley, M (2004) ‘Reasonable Accommodation...’ (See above.)

<sup>421</sup> Bagenstos, S R (2003) ‘Rational Discrimination’, Accommodation, and the Politics of (Disability) Civil Rights’ 89 Virginia Law Review 5, p.859 (Bagenstos argues that ‘antidiscrimination’ and ‘accommodation’ are normatively equivalent provisions – clearly the goals are parallel “...for both seek to dismantle a system of group-based subordination and the patterns of occupational segregation that support that system”).

<sup>422</sup> See discussion of the purpose of the legislation in Chapter 2.

<sup>423</sup> See Leverton, S (2002) *Monitoring the Disability Discrimination Act 1995 (Phase 2)* London: HMSO, pp.139-150.

Government found to do this was to introduce ‘equality duties’ for public authorities.<sup>424</sup> In recognition that this idea may constitute the birth of a substantially new approach to enforcement, Fredman calls such duties ‘fourth generation’ equality.<sup>425</sup>

### ***The Disability Discrimination Act 2005 – the disability equality duty***

One of the key amendments which the 2005 Act introduced was to provide that, as of 4 December 2006, part 3 of the 1995 Act would apply to the functions carried out by a public authority.<sup>426</sup> This is potentially a very significant development for the provision of sport for disabled people due to the scale on which public authorities in Scotland are the providers of sports facilities and services.<sup>427</sup>

### ***The general duty***

The 2005 Act introduced a ‘general duty’ on the part of public authorities to have regard to disability discrimination issues.<sup>428</sup> The terms of the general duty are as follows:

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<sup>424</sup> See discussion of the background to the introduction of the equality duties in Fredman, S (2001) ‘Equality: A New Generation?’ 30 *Industrial Law Journal* 2.

<sup>425</sup> Fredman, S (2002) *Discrimination Law* Oxford: Oxford University Press.

<sup>426</sup> Section 2, Disability Discrimination Act 2005.

<sup>427</sup> For example, sportscotland provides the substantial share of funding for sport for people with disabilities, see Chapter 1.

<sup>428</sup> The DDA is amended by section 3 of the 2005 Act to include a new section 49A which contains the ‘general duty’, above.

*(1) Every public authority shall in carrying out its functions have due regard to-*

*(a) the need to eliminate discrimination that is unlawful under this Act;*

*(b) the need to eliminate harassment of disabled persons that is related to their disabilities;*

*(c) the need to promote equality of opportunity between disabled persons and other persons;*

*(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;*

*(e) the need to promote positive attitudes towards disabled persons; and*

*(f) the need to encourage participation by disabled persons in public life.*

Unlike the UN Convention for the Rights of Persons with Disabilities, the Treaty of Lisbon or even domestic legislation from other jurisdictions such as the (Australian) Disability Discrimination Act 1992,<sup>429</sup> there is no specific reference to sport in the Act, but these all-encompassing duties will potentially have a significant impact on disability sport in Scotland. The 'disability equality duty' (DED) is laid out in far greater detail than it is in the Act, in a Statutory Code of Practice for Scotland, which is enforceable by way of judicial review in the Court of Session, or by way of a compliance notice.<sup>430</sup>

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<sup>429</sup> Section 28 of the Disability Discrimination Act 1992 states that: "Sport (1) It is unlawful for a person to discriminate against another person on the ground of the other person's disability or a disability of any of the other person's associates by excluding that other person from a sporting activity..."

<sup>430</sup> Disability Rights Commission (2006) *The Duty to Promote Disability Equality: Statutory Code of Practice Scotland*, paragraph 6.5; and Section 49E of the 2005 Act, respectively.

An underpinning principle of the DED is the need to take steps to take account of people's disabilities, even where that involves treating disabled people more favourably than others.<sup>431</sup> Provisions relating to participation in sport (those relating to the provision of goods, facilities and services, the exercise of a function, the use of transport vehicles, private clubs, and education) contain an 'anticipatory' duty to make adjustments to take account of disabled people's specific needs.<sup>432</sup> An anticipatory approach requires adjustments to be made in advance of individual disabled people attempting to use the service desired or to access education. In this respect, although the 2005 Act retains the discrimination provisions of the earlier Disability Discrimination Act 1995, which it amends, the introduction of this anticipatory element may be an important step forward in using law to encourage disabled people to participate in sport by providing a more inviting environment, rather than only responding to the needs of disabled people once challenged. This approach also allows for additional sports services to be provided alongside a 'mainstream' approach. The Statutory Code of Practice for Scotland gives a useful example of this in which a local authority leisure centre provides swimming lessons every week, which are only open to disabled adults in order to allow disabled people to learn to swim in what might be a more comfortable and confidence-building environment.<sup>433</sup> However, in this example, disabled people are also able to attend those sessions aimed at the general public and support is provided to do so where necessary. This offers a choice over and above that open to non-disabled people and

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<sup>431</sup> Disability Rights Commission (2006) *Statutory Code of Practice*, paragraph 2.6.

<sup>432</sup> *Ibid.* Paragraph 2.20.

<sup>433</sup> *Ibid.* Paragraph 2.17.

in this respect arguably amounts to positive discrimination, although the Government would rather term this ‘positive action’<sup>434</sup> – perhaps a somewhat artificial distinction.

Such an approach can only impact on the whole disabled population in Scotland if it has near universal application, and the legislation looks as though it could go some way to achieving this. The 2005 Act applies to public authorities in Scotland.<sup>435</sup> The definition of ‘public authority’ is wide and includes education authorities and the managers of a grant-aided school (within the meaning of section 135 of the Education (Scotland) Act 1980). As noted in Chapter 1, fairly importantly for participation in sport, private clubs are also covered, in section 12 (on the satisfaction of certain conditions, including membership of twenty-five people or over). This was the result of a policy initiative of the current Government to address a number of omissions in the 1995 Act and to bring private clubs into line with other service providers.<sup>436</sup> Subsequent regulations have also ensured that private clubs have a duty to make reasonable adjustments, as that duty was not on the face of the 2005 Act.<sup>437</sup>

### ***Three key features of the disability equality duty***

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<sup>434</sup> Department for Communities and Local Government (2007) *Discrimination Law Review A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, p.61 (“Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably...”).

<sup>435</sup> As determined by The Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) Regulations 2005 SI No.565 (for Scottish public authorities); and The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (for British public authorities).

<sup>436</sup> See Department for Work and Pensions Explanatory Memorandum 2005 No. 3258.

<sup>437</sup> The Disability Discrimination (Private Clubs etc.) Regulations 2005.

The 2005 Act therefore has three notable features encapsulated in the DED, which may have a good claim to change the nature of UK discrimination legislation which has gone before: it is anticipatory; it allows for positive action to be taken; and it has wide application.

### *The specific disability equality duties*

The 2005 Act also provides the Scottish Ministers with the power to introduce regulations setting out specific duties which might assist public authorities in meeting their general duty.<sup>438</sup> These specific duties are set out in regulations<sup>439</sup> in which there is a list of the authorities to which the duties apply.<sup>440</sup> This list explicitly includes sportscotland, which is the ultimate governing body for sport in Scotland.<sup>441</sup>

The main specific duty in the regulations is the requirement to produce a Disability Equality Scheme.<sup>442</sup> The purpose of such a Scheme is to show how the authority intends to fulfil its general duty and its other specific duties. All affected public authorities were required to publish their initial Schemes by 4 December 2006<sup>443</sup> and a revised Scheme within every three years thereafter.<sup>444</sup>

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<sup>438</sup> Section 49D(3).

<sup>439</sup> The Disability Discrimination (Public Authorities) (Statutory Duty) (Scotland) Regulations 2005 (SI 2005 No. 565).

<sup>440</sup> *Ibid.* Schedule 1, Part 1.

<sup>441</sup> See Chapter 1.

<sup>442</sup> *Ibid.* Regulation 2.

<sup>443</sup> *Ibid.* Regulation 2(6).

<sup>444</sup> *Ibid.* Regulation 2(4).

The Disability Equality Scheme should include a statement of: how disabled people have been involved in its development; the steps which the authority will take to fulfil its general duty; arrangements for assessing the impact of the activities of the body on disability equality; arrangements for gathering information about performance of the public body on disability equality.<sup>445</sup> The information gathered by the authority should include the effect of its policies and practices on: recruitment, development and retention of its disabled employees; their effect, in the case of an authority specified in Parts II or III of the Schedule,<sup>446</sup> on the educational opportunities available to, and on the achievements of, disabled pupils and students; and the extent to which, in the case of an authority other than one specified in Parts II or III of the Schedule, the services it provides and those other functions it performs take account of the needs of disabled persons.<sup>447</sup>

### ***An example of public authority sports provision and disability equality duties***

One example of Scottish public authority involvement in sports schemes is the City of Edinburgh Council Community Education Department's 'Play4It' and 'Go4It' schemes.<sup>448</sup>

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<sup>445</sup> *Ibid.* Regulation 2(3)(a)-(d).

<sup>446</sup> *Ibid.* The Schedule, Part II lists education authorities and the managers of a grant-aided school (within the meaning of section 135 of the Education (Scotland) Act 1980); Part III lists fundable bodies as defined in schedule 2 to the Further and Higher Education (Scotland) Act 2005 and the managers of a central institution (within the meaning of section 135 of the Education (Scotland) Act 1980).

<sup>447</sup> *Ibid.* Regulation 2(3)(d)(i)-(iii).

<sup>448</sup> These schemes, for children aged eight to twelve years old and twelve to eighteen years old respectively, are organised activity programmes for children to take part in during their school holidays, which include participation in sports.



The Council is a public authority under the Regulations; consequently it has been obliged to publish a Multi-Equalities Scheme (MES), incorporating a Disability Equality Scheme. The Council is also an education authority, as defined by section 135 of the Education (Scotland) Act 1980 which means that, under the specific duties requirements detailed above, the MES must identify information gathered under its policies and procedures on the educational opportunities available to, and on the achievements of, disabled pupils and students. The MES ‘delegates’ this task by detailing that “Each Council department will be required to produce a three yearly Mainstreaming Equalities Action Plan (MEAP)... Yearly monitoring, evaluation and reporting of progress against targets described within the MEAPs will form part of the MES annual report”.

Turning to the relevant MEAP, this task is implemented in part by two paragraphs. Paragraph 7.10 requires that “[i]nformation will be gathered on support services for people with disabilities, including learning disabilities who wish to participate in Community Learning and Development activities. This will then be distributed to key staff to promote participation”. The responsibility for gathering this information falls to the Accessibility Strategy Manager and the Principal Officer Equalities. Paragraph 7.11 requires that “Young disabled people will be given appropriate support to participate fully in informal learning opportunities and extracurricular activities”. This requirement is the responsibility of the Community Learning and Development Policy Officer and the Community Learning and Development Managers.

A disabled child wishing to take part in either the Play4It or the Go4It scheme might therefore expect to benefit from these specific tasks in the MEAP. The Accessibility

Strategy Manager and the Principal Equalities Officer can be expected to have gathered information on support services for disabled children in these schemes and the staff running the scheme can be expected to have been made aware of this information and to act on it to promote participation by disabled children. Under the general duty, they would be able to treat disabled children more favourably than non-disabled children in providing, for example, individual instruction or assistance in the kayaking activities listed. This example would also meet the above requirement in paragraph 7.11 of the MEAP to provide appropriate support to participate fully in informal learning opportunities and extracurricular activities (the kayaking activity available in the schemes' programmes is likely to be construed as an 'informal learning opportunity', or alternatively it is an 'extracurricular activity').

In *R (on the application of Chavda and others) v Harrow London Borough Council*,<sup>449</sup> local Harrow residents brought a challenge by way of judicial review to the Council's decision to restrict adult care services to people with critical needs only. One of the grounds for the challenge was that the Council's decision making process did not comply with the DED, which provided an opportunity for the court to examine the requirements of section 49A, DDA. It was held that the requirement in this section to give "due regard" to the DED, involved more than simply giving 'consideration' to disability equality. One way to satisfy this requirement is to undertake a full impact assessment of the relevant policy decision. The court found that the decision had been unlawful and the judicial review was successful. The main reason provided was that the decision was unlawful because "it was taken without the decision-makers having had sufficiently drawn to their attention the seriousness and extent of the duties which

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<sup>449</sup> [2007] EWHC 3064 (Admin).

the Defendant owed under the Disability Discrimination Act 2005”.<sup>450</sup> Therefore, sports policies which have the potential to impact on disabled people must be adequately assessed for their impact and decision makers must be appropriately informed. This requirement should ideally help to ‘mainstream’ disability equality for public authority decision makers in relation to sports policy and governance.

What happens if an act of potential discrimination against a disabled participant arises? In terms of enforcement, of course the option to bring an action under the general Part 3 service provisions is still available, but what the 2005 Act adds is a further set of duties under the new ‘public authorities’ (sections 21B-E) with which the Council must comply, and which the court may take account of in assessing a claim of discrimination under Part 3.

Under the amended provisions, there is a questionnaire procedure, similar to the employment provisions. At this point, both the Council’s MES and MEAP can be brought into play. Copies of these could be requested and scrutinised and any relevant steps in the action plan which might not have been taken by the Council might be brought to light. For example, it might be shown that in fact insufficient information has been gathered by the Council on support services in the Play4It or Go4It scheme; or that staff running the scheme were not made aware of any necessary information and/or did not act on it to promote participation in the scheme by disabled children.

Questions might also be asked whether the Council should have treated the child more favourably, as permitted under the general duty, perhaps by providing an instructor or

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<sup>450</sup> Mackie, J at paragraph 46.

an extra member of staff trained in working with people with disabilities. In ways such as this, the DED has the potential to be used as an effective tool in claims against a public authority for a breach of a statutory duty, where the authority has failed to promote the duty.

### ***The Equality and Human Rights Commission***

The Equality Act 2006 established a new Equality and Human Rights Commission<sup>451</sup> which subsumes the previous equality commissions in Britain: the former Commission for Racial Equality (CRE); Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC). In relation to disability rights and discrimination, the new Commission performs similar functions to those of the former DRC. One of the notable developments in the functions of the new Commission is the creation of a ‘general duty’ to use its powers and functions to work towards developing a society in which equality and rights principles may become rooted.<sup>452</sup> One, fairly obvious, but major criticism which has been made is that by centralising all the strands of discrimination in one Commission some of the equality grounds may be submerged or overlooked (disability is at risk of being one such victim).<sup>453</sup> O’Cinneide also notes that there is a current ideological dispute as to the appropriate

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<sup>451</sup> The Commission began to operate on 1 October 2007. The website, for further details, is <http://www.equalityhumanrights.com/en/Pages/default.aspx>.

<sup>452</sup> Section 3, Equality Act 2006 states: “(a) people’s ability to achieve their potential is not limited by prejudice or discrimination, (b) there is respect for and protection of each individual’s human rights (including respect for the dignity and worth of each individual), (c) each person has an equal opportunity to participate in society, and (d) there is mutual respect between communities based on understanding and valuing of diversity and on shared respect for equality and human rights”.

<sup>453</sup> See O’Cinneide, C (2006) ‘Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain’ 57 Northern Ireland Legal Quarterly 102.

aims for the Commission: “should its primary focus be on combating discrimination, denial of rights and social exclusion, or should it also be expected to play a major role in representing the needs of particular communities?”<sup>454</sup>

### *Other means of enforcement*

There are a limited number of other means of enforcing the disability equality duties. The general duty has no specific enforcement method, but since it constitutes a set of statutory duties, a public authority may be judicially reviewed in the same way it would be for breach of any statutory duty. In *Elias v Secretary of State*<sup>455</sup> the equivalent ‘race equality duty’ under section 71 of the Race Relations Act 1976<sup>456</sup> was examined by the courts.<sup>457</sup> (See also *R (on the application of Chavda and others)*, above.) As noted previously, however, the high cost of judicial review actions means that this is an impractical and unrealistic means of enforcement for most individuals and its impact may therefore be seen to be limited. Individuals have a more secure means of enforcement retrospectively, only after they have suffered discrimination in a personal capacity.

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<sup>454</sup> *Ibid.*, p.71. A possible answer to this question is addressed in more general terms in Chapter 2.

<sup>455</sup> [2005] IRLR 788.

<sup>456</sup> As amended by the Race Relations (Amendment) Act 2000.

<sup>457</sup> Mrs Elias was a British subject, born in Hong Kong, who had been interned by the Japanese during the Second World War, and wished to benefit from a government non-statutory compensation scheme. For former civilian internees to qualify for compensation from the scheme they either had to have been born in the UK or have a parent or grandparent born in the UK. Mrs Elias brought proceedings for judicial review and claimed that the criteria adopted operated as direct discrimination on grounds of national origins or, alternatively, that they were indirectly discriminatory and could not be justified.

As well as judicial review as a means of enforcement, the Equality and Human Rights Commission (formerly the DRC) is able to issue a compliance notice, stating that the public authority must meet its duties and must inform the Commission of the action it has taken to comply with its duties.<sup>458</sup> The notice can also request information regarding the authority's performance.<sup>459</sup> A compliance notice can be enforced in the sheriff court.<sup>460</sup>

### *The future of disability discrimination law*

The government published a Green Paper in June 2007 proposing to untangle Great Britain's complex tapestry of discrimination legislation by drafting a new Single Equality Bill.<sup>461</sup> A number of commentators have suggested that the proposals in the Green Paper do not, however, sufficiently address the issue of access to justice in goods, facilities and services discrimination cases, and that this area of law remains in need of effective reform.<sup>462</sup> Another key issue in any prospective Bill will be whether the equality duties will remain largely intact, be weakened or strengthened.

Lastly, drawing the law in this chapter and the chapter 1 together, it should be borne in mind that the greatest effect of the law may be achieved by taking it as a cohesive whole. For example, Bamforth has argued that discrimination law must be put in its

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<sup>458</sup> Section 49E.

<sup>459</sup> Section 49E (4).

<sup>460</sup> Section 49F.

<sup>461</sup> Department for Communities and Local Government (2007) *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, London: HMSO

<sup>462</sup> See for example, The Discrimination Law Association's Submission for the Discrimination Law Review (available at: [www.discrimination-law.org.uk](http://www.discrimination-law.org.uk)).

constitutional context, with reference to EU Law and also the ECHR.<sup>463</sup> This is a strong argument when it comes to ECHR rights, as the above consideration shows. As regards EU Law, the Framework Employment Directive may have some limited application to this context,<sup>464</sup> but until the European Commission extends the jurisdiction of its discrimination law provisions to areas outside employment, EU disability discrimination law is less relevant to the aspects of sport under consideration.<sup>465</sup>

In the next chapter, which considers disability, sport and education law, it will become apparent that the law must be permitted a level of certainty as to its underlying aims and purposes, and that concepts such as social inclusion are of great importance for the law's interpretation of debates such as whether to 'integrate' or 'segregate' disabled school children and students.

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<sup>463</sup> See Bamforth, N (2004) 'Conceptions of Anti-Discrimination Law' 24 *Oxford Journal of Legal Studies* 4, pp.697-698.

<sup>464</sup> For example, in relation to definitions of disability.

<sup>465</sup> See Council Directive 2000/78/EC. Over recent years, the Commission has been tentatively considering the possibility of extending antidiscrimination protections beyond the focus on employment – see European Commission (2004) *Equality and Non-Discrimination in an Enlarged European Union* Brussels. See also European Disability Forum (2007) *Promoting Equality and Combating Disability Discrimination: The Need for a Disability Specific Non-Discrimination Directive Going Beyond Employment*.





## *Chapter 5: Learning Participation – disability, sport and education law*

### ***Introduction***

This chapter considers freedom from discrimination and other rights of disabled children and young people in the context of sport in education.<sup>466</sup> The first section is a review of the main legislative provisions relevant to Scotland, against which the provisions of other jurisdictions are later compared. Thereafter, the chapter examines how the concept of social inclusion, introduced in Chapter 4, illuminates the central social and political debates about the integration of disabled children and young people in sport in education; considering how the courts have dealt with this debate in practice.

### **The Legislative Framework**

#### ***The Disability Discrimination Act, Part 4***

Education is uniformly regarded as a vital aspect of social inclusion, something which made it all the more controversial that the Disability Discrimination Act 1995 (DDA) as originally enacted did not include education in its antidiscrimination provisions.<sup>467</sup>

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<sup>466</sup> This chapter should be read in conjunction with the comments on the right to education in Chapter 3.

<sup>467</sup> See Doyle, B J (2005) *Disability Discrimination: Law and Practice* (5<sup>th</sup> Ed.) Bristol: Jordan Publishing Limited, p.207. Section 19(5), DDA excluded education, before it was repealed by the Special Educational Needs and Disability Act 2001, sections 38(1), 38(5) (a)-(b), 42(6) and schedule 9. Doyle provides a concise account of the legislative development in Chapter 9. It is also important to note that there was a lacuna in the old provisions in that the exclusion of 'education' did not extend to

The Special Educational Needs and Disability Act 2001 (SENDA), however, has amended Part 4 of the DDA to cover discrimination in education from 1 September 2002 onwards. Within Part 4, section 28A now prohibits discrimination by bodies responsible for schools<sup>468</sup> against disabled pupils and prospective pupils in relation to: admission (section 28A(1)); “education” and “associated services” provided for, or offered to, pupils (section 28A(2)); and permanent or temporary exclusions from the school (section 28A(4)).

The ‘antidiscrimination’ provision contained in section 28(B)(1) is the same as in relation to the provision of goods, facilities and services in Part 3, namely that for the purposes of section 28A, a responsible body discriminates against a person if – a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply and b) it cannot show that the treatment in question is “justified”.

The ‘adjustments’ provision in section 28C requires that responsible bodies take reasonable steps to ensure that disabled pupils are not substantially disadvantaged in relation to admissions or in relation to the education or associated services provided for, or offered to, them. Section 28C(2)(b) states that the section 28C duty does not require the responsible body to provide “auxiliary aids or services”.

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non-educational facilities or services such as sports facilities. (Hence the application of Part 3, DDA in *White*.)

<sup>468</sup> ‘Bodies responsible’ in Scotland refers to: an ‘education authority’ in the case of schools managed by the same; the ‘proprietor’ of the school in the case of independent schools; the ‘board of management’ of the school in the case of a self-governing school; and the ‘managers’ of the school in the case of a grant-maintained school (all terms as defined by section 135(1) of the Education (Scotland) Act 1980).

There are two main defences available to a responsible body – ‘lack of knowledge’ and ‘justification’. First, if the responsible body can show that, at the time in question, it did not know and could not reasonably have been expected to know that a person was disabled, it will not have discriminated against them in cases either where its failure to take a particular step was attributable to that lack of knowledge or where it took a particular step which would otherwise amount to ‘less favourable treatment’ (section 28B(4)). Second, less favourable treatment or the failure to comply with the duty to make reasonable adjustments can be justified if the reason for it is both material to the circumstances of the case and substantial (section 28B(7); 28B(5)). Less favourable treatment may also be justified if it is the result of a ‘permitted form of selection’ (sections 28B(6); 28B(5)).

As regards Further Education (FE) and Higher Education (HE), there are analogous provisions to those above, which apply to schools – sections 28R, 28S and 28T correspond to sections 28A, 28B and 28C. An important difference, however, is that section 28T allows FE/HE institutions no exception for auxiliary aids, services or physical features,<sup>469</sup> by contrast to the exception for schools contained in section 28C(2) (b), above.

### ***The Disability Discrimination Act, Part 3***

Although Part 4 of the DDA is the main legislative provision which tackles discrimination and disadvantage experienced by disabled children and students in an

educational setting, there are other provisions to take into account. Because the education exemption in Part 3 was repealed in its entirety from 1 September 2002, institutions not covered by the amended Part 4 will be covered by the goods, facilities and services provisions in Part 3.<sup>470</sup> This safety net is particularly important for younger children as Part 4 duties do not cover day nurseries and family centres, private and voluntary playgroups and pre-schools, and accredited childminders.<sup>471</sup>

### ***The Education (Additional Support for Learning) (Scotland) Act 2004***

The Education (Additional Support for Learning) (Scotland) Act 2004, (the 2004 Act) avoided the term ‘special educational needs’ and introduced the concept of ‘additional support needs’ (ASN).<sup>472</sup> Such factors do of course include disabilities, but they are also intended to encompass bullying, behavioural difficulties, being a parent, bereavement, or being at risk.<sup>473</sup> Hence, children with ASN are not necessarily disabled; conversely, disabled children do not necessarily have ASN.

### ***Education (Disability Strategies and Pupil’s Records) (Scotland) Act 2002***

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<sup>469</sup> Duties to provide these aids, services and adjustments came into force later than the rest of Part 4: 1 September 2003 for auxiliary aids and services and 1 September 2005 for physical adjustments.

<sup>470</sup> See Chapter 4.

<sup>471</sup> See the Disability Discrimination Act 1995 Part 4 Code of Practice for Schools, paragraphs 10.7-10.9.

<sup>472</sup> It will be considered further in the context of case-law, in the section below on mainstream and special education, but it is important to note that ASN can arise from any factor or factors which cause a barrier to learning.

<sup>473</sup> See *Education: A Guide for Parents – Scotland*, published by the former Disability Rights Commission but available from Enquire, the Scottish advice service for additional support for learning: [www.enquire.org.uk](http://www.enquire.org.uk).

Section 1 of the Education (Disability Strategies and Pupil's Records) (Scotland) Act 2002 (the 2002 Act)<sup>474</sup> introduced, from October 2002 onwards, a requirement for responsible bodies to prepare and implement accessibility strategies to improve access to education for disabled pupils.<sup>475</sup> Such strategies include improving access to the curriculum (section 1(2) (a)); improving the physical environment of the school to increase access to education and associated services (section 1(2) (b) and (6));<sup>476</sup> and by section 1(2) (c), improving communication with disabled pupils by, for example, producing school information in a range of formats such as Braille, audiotape or large print.<sup>477</sup>

### **Social inclusion and sport in education law**

The underlying purpose of education law and policy in the UK relating to disabled children may be identified with the concept of social inclusion.<sup>478</sup> This purpose has important implications for the opportunities of disabled children to be involved in sport, because of the varying levels of sports provisions in different types of schools. What is meant by social inclusion and how this meets the aims of integration has no doubt been made significantly more complex by the comparatively recent political and legal empowerment of young people and their parents and carers. The notion of

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<sup>474</sup> Provisions for England and Wales broadly corresponding to this Act are to be found in SENDA, which also applies to Scotland insofar as it amends the DDA (see above).

<sup>475</sup> Section 2 extends these responsibilities to the education of children under school age, or children of school age who are travelling people.

<sup>476</sup> These sections allow regulations to specify associated services. See Education (Disability Strategies) (Scotland) Regulations 2002, SSI 2002/391.

<sup>477</sup> The implications of this Act for the physical environment are considered further in Chapter 6.

the empowerment of citizens as users of public services first gained political currency in the UK in the 1980s.<sup>479</sup> Since then, much of the education law affecting disabled young people has been concerned with arguments arising as a result of what young people (and usually their parents or carers on their behalf) believe to be within their interests and within the scope of their legal rights, and any conflicting beliefs which the authorities responsible for their education hold about those interests and rights. These arguments are of profound importance because, as with all children and young people, choices about where they should be educated and their school environment can be enormously influential factors in the lives of disabled children. Needless to say, schools are a different environment from the institutions of adult life. Non-disabled children's attitudes to disabled children are often negative.<sup>480</sup> A Disability Rights Commission survey in 2002<sup>481</sup> of the views and ambitions of 305 young disabled people aged 16–24 demonstrated the barriers to social inclusion (and entry into adult life and employment) experienced by young disabled people. How young disabled people end up perceiving their school environment influences their subject selection, aspirations and career decisions.<sup>482</sup> From a policy perspective, this is one of

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<sup>478</sup> Russell, P (2003) "Access and Achievement or Social Exclusion?" Are the Government's Policies Working for Disabled Children and Their Families' 17 *Children & Society* 215. See the theoretical discussion of this concept in Chapter 2.

<sup>479</sup> Harris, N (2005) 'Empowerment and State Education: Rights of Choice and Participation' 68 *Modern Law Review* 6.

<sup>480</sup> See Nowicki, E A (2006) 'A Cross Sectional Multivariate Analysis of Children's Attitudes to Disability' 50 *Journal of Intellectual Disability Research* 5.

<sup>481</sup> Disability Rights Commission (2002) *Survey of Young Disabled People Aged 16–24* DRC Research and Evaluation Unit. See Nowicki, E A (2006) 'A Cross Sectional Multivariate Analysis of Children's Attitudes to Disability' 50 *Journal of Intellectual Disability Research* 5. See also P. Munn et al, 'Schools for the 21st century: the national debate on education in Scotland' (2004) 19(4) *Research Papers in Education* 433, 446.

<sup>482</sup> Shah, S (2005) 'Voices and Choices: How Education Influences the Career Choices of Young Disabled People' 5 *Journal of Research in Special Educational Needs* 3.

the major reasons why educational settings for sport are so important. In order to avoid disabled children being ‘turned off’ sport for life, law can be instrumental in reversing a negative perception of sport by ensuring that the correct checks and balances are in place.

So what are the relevant legal rights available to young people? It should be clear from what has just been said that an important aspect of the concept of inclusion is the ability of disabled people to have a part in their own educational futures by allowing their voices to be heard. Accordingly, the law does contain a right for disabled children to be heard and to express their wishes to, for example, take part in sport. Article 10 of the Human Rights Act 1998 requires central and local government to uphold a right to freedom of expression. It has been argued that this right complements comparable rights in some domestic legislation such as the Children Act 1989 (applying to England and Wales – the Scottish equivalent is the Children (Scotland) Act 1995) which requires local authorities to ascertain the wishes of children they look after or are about to look after, and to give these due considerations, subject to practicability and the child’s age and understanding.<sup>483</sup>

By contrast to ECHR rights and those found in domestic legislation, however, the UN Convention on the Rights of the Child (CRC) appears to legitimise what may be regarded as principles of formal non-discrimination rather than more substantive social inclusion. Article 23(1) of the CRC prescribes that: “States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child’s active

participation in the community.” Additional paragraphs emphasise the right to special care and assistance (Article 23(2)) and recognise that such assistance should be free (Article 23(3)). There is an emphasis on education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities “in a manner conducive to the child’s achieving the fullest possible social integration and individual development” (Article 23(3)). In emphasising such concepts as individual development, special care and assistance and the fullest *possible* integration in these rights, however, it is arguable that these Articles suggest a model of disability which promotes non-discrimination only insofar as it supports parallel education provisions for disabled children, rather than fuller social inclusion.<sup>484</sup> The danger is that by using the language of antidiscrimination rather than inclusion, these rights at least permit, and possibly promote, the harmful segregation of disabled children.

In Chapter 4 it was seen that social inclusion as a concept may well be regarded as the underpinning purpose or aim of disability discrimination law, but in areas such as education the emphasis of the law sometimes appears to be more to do with the sort of inclusion in society which is manifest in, at best, parallel education and sports programmes – segregated disability sports. As the concept drifts further away from inclusion in mainstream social activities, to inclusion in activities specifically designed for disabled people, antidiscrimination measures may in fact have the effect of promoting discrimination.<sup>485</sup>

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<sup>483</sup> Cavet, J and Sloper, P (2004) ‘Participation of Disabled Children in Individual Decisions About Their Lives and in Public Decisions about Service Development’ 18 *Children & Society* 278.

<sup>484</sup> Freeman, M (2000) ‘The Future of Children’s Rights’ 14 *Children & Society* 277.

<sup>485</sup> Jones, M and Marks, L A B (1997) ‘Beyond the Convention on the Rights of the Child: The Rights of Children with Disabilities in International Law’ 5 *International Journal of Children’s Rights* 177, p.183.



*A and Others v Essex County Council and Others*<sup>486</sup>

Returning to human rights law, in the recent English case *A and Others v Essex County Council and Others*, the right to education under the First Protocol, Article 2, ECHR,<sup>487</sup> was considered in the context of four claimants who have “special educational needs” under section 312 of the Education Act 1996. The issue raised in this case, which is relevant for current purposes, is the extent to which there is a right for disabled students to education in a particular school or of a particular type. In the process of dismissing the claims for a declaration and damages, Field, J fairly comprehensively discussed the limits of the ECHR right to education. Citing the recent House of Lords judgment in *A v Head Teacher and Governors of Lord Grey School*,<sup>488</sup> the judge affirmed “...that a person of compulsory school age who has special educational needs has no right under [Article 2, First Protocol] to be provided with an education of any particular type or in any particular school”.<sup>489</sup> All that the local education authority requires is to provide a minimum standard of education.<sup>490</sup> In fact this minimum standard is relatively easy to satisfy and might encompass no more than the offer of part-time education and a limited range of subjects.<sup>491</sup> Another case raised in the judge’s discussion is *Yasanik v Turkey*,<sup>492</sup> concerning an applicant who had been expelled from a military academy, the Commission holding that there

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<sup>486</sup> [2007] EWHC 1652 (QB).

<sup>487</sup> Which reads: “Right to education – No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.

<sup>488</sup> [2006] UKHL 14, [2006] 2AC 363, [2006] 2 All ER 457.

<sup>489</sup> Paragraph 81.

<sup>490</sup> Paragraph 71, referring to Lord Hoffman’s judgment in *Lord Grey*.

<sup>491</sup> Paragraph 109.

<sup>492</sup> (1993) 74 DR 14, referred to at Paragraph 71.

was no denial of the right to education because the Turkish education system also included civilian establishments in which he could enrol.

Picking out two aspects of this judgment – the limited range of subjects being sufficient to satisfy the minimum standard required by the law; and the lack of a legal right to be educated at a particular institution, such as an academy – it seems apparent that we might struggle to argue that a disabled student has an ECHR right to be provided with sufficient opportunities to take part in sports, or indeed in any named activity. For example, there would be no right to choose to be educated at any special type of sports academy;<sup>493</sup> there may not even be much scope in arguing that sport should be included in the limited range of subjects to which the disabled student was entitled.

There is a detectable public policy trend in the UK in recent years to allow parents more input in the specifics of what is to be included, or excluded, in the school curriculum, and the political claim is that this supposed element of choice specially protects State school systems.<sup>494</sup> If such a policy were to be effectively carried through into enforceable law, it might be possible for the parents of disabled students to choose and demand greater access to sport on behalf of their children. As in the USA, however, the law falls short of this. Harris argues that European human rights provisions have failed to substantially protect parental choice and empowerment in terms of education.<sup>495</sup>

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<sup>493</sup> See the brief discussion of sports schools and ‘academies’ in Scotland, below.

<sup>494</sup> See further discussion in Harris N (2005) ‘Empowerment and State Education: Rights of Choice and Participation’ 68 *Modern Law Review* 6.

Perhaps mindful of such policy concerns, courts in Europe have recently tried to find a balance, in the right to education, between safeguarding parental choice and protecting decisions taken by schools themselves. In *Folgerø (and Others) v Norway*,<sup>496</sup> the European Court of Human Rights examined Article 2 of Protocol 1, ECHR, and found that the element of individual choice inherent in the ability of parents to have their children educated in private schools did not dispense the State from its obligation to safeguard pluralism in State schools which are open to everyone. On the other hand, the House of Lords has demonstrated that there is judicial reluctance to overrule the experienced and informed decisions of head teachers, staff and school governors in sensitive matters of choice in education; this deferential approach was recently followed in *R (on the Application of Begum) v Denbigh High School Governors*.<sup>497</sup> These cases suggest that, whilst there may be an obligation on schools to provide an even provision of sport in education across the population (including disabled students), they would also be permitted fairly wide discretion as to how they go about this.

The wide discretion allowed decision-makers in interpreting the right to education no doubt stems, at least in part, from concerns about resources. This means that those seeking rights to sport for disabled students in Scottish education probably find a

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<sup>495</sup> See Harris N (2005) "Empowerment..." pp.948-951.

<sup>496</sup> (1992) 15472/02; 29 June 2007. This case concerned parental choice in terms of religious education for their child, rather than participation in sport. The parents wished to exclude their child from participating in a subject covering Christianity, religion and philosophy, on grounds of their humanist beliefs.

<sup>497</sup> [2006] UKHL 15; [2006] 2 WLR 719. This case concerned the right of a girl to wear a jilbab to school, contrary to the uniform policy; at issue was the right to religious freedom under Article 9(2), but also whether the girl had been excluded from school, in breach of the right to education.

better resource in the education provisions of the DDA and in the additional support needs legislation.

### ***Models of disability and education***

Childhood has recently been theorised as a variable of social analysis, along with other categories, including disability.<sup>498</sup> This accords with the social model of disability which regards disability as resulting from the interaction between individuals and their respective environments. ‘Disability’ can be caused by aspects of the institutional environment such as segregated schooling.<sup>499</sup>

In the Canadian case *Eaton v Brant County Board of Education*,<sup>500</sup> the question of integration – where a disabled child with cerebral palsy, Emily, should be educated – was examined by the Special Education Tribunal, the Ontario Court of Appeal and, subsequently, the Supreme Court of Canada. The question specific to Canada was whether the domestic education legislation in Ontario was unconstitutional under the equality rights provisions of section 15 of the Canadian Charter of Rights and Freedoms (see Chapter 2); the general debate, however, was about integration – whether or not Emily could be integrated in a mainstream school. In overturning the Tribunal’s decision, the Court of Appeal found that Emily could be included in the main school population and that, despite various pedagogical arguments for the merits of segregated special education, the Charter meant that to non-consensually exclude

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<sup>498</sup> Colver, Allan (2005) ‘A Shared Framework and Language for Childhood Disability’ 47 *Developmental Medicine & Child Neurology* 780, p.780.

<sup>499</sup> *Ibid.*, p.780.

<sup>500</sup> (1995), 22 O.R. (3d) 1, at 21 (Court of Appeal).

her from this population was discriminatory and should not be resorted to unless alternatives were proven to be inadequate.

By contrast, and in overturning this decision, the Supreme Court found that integration can either be a benefit or a burden, depending on whether or not the individual can profit from the advantages that integration provides. The main themes identifiable in the Tribunal's argument, which was allowed by the Supreme Court, were that: Emily was not benefiting by being in main school population; she was isolated in such a setting; consequently, integration was in fact harmful to her; and, it was in her own best interests to be in a special class.<sup>501</sup>

Stepping back to consider for a moment, it is possible to align the contrasting approaches of these two courts with the social and medical models of disability, respectively (see Chapter 4).<sup>502</sup> The Supreme Court appeared to follow the medical model in focussing on the apparent inevitability of Emily's impairments as the causal root of her isolation and the supposed harm of integration. On the other hand, the Court of Appeal appeared to follow the social model in acknowledging that the discrimination against Emily was the result of assumptions of pedagogical theory, statutory law and social constructs of disability.<sup>503</sup>

What this case demonstrates is that the law concerned with the integration of young people in education cannot be easily separated from the wider educational, social and

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<sup>501</sup> These themes are identified by Rioux, M (1999) 'Inclusive Education in Canada: A Piece in the Equality Puzzle' in Armstrong, F and Barton, L *Disability, Human Rights and Education: Cross Cultural Perspectives* Buckingham: Open University Press, pp. 92-95.

<sup>502</sup> *Ibid.* pp. 93-94.

political debates. The uncertainties created by the cross-currents of such debates have the potential to result in fundamentally contradictory views at judicial level on what the law prescribes about issues of integration. Add to this the factor of participation in sport, which occurs perhaps at the very boundaries of such debates, in terms of the uncertainty as to whether sport constitutes essential education, and it is hardly surprising that judicial opinion shows signs of fundamental division.

Furthermore, there is an even greater uncertainty created by adding the factor of disability. Then there is the added dimension as to how in specific cases the rules of sport at the micro level relate to the rules of law at the macro level. It soon becomes apparent that models of disability and how these relate to education, and specifically to sport, rapidly lead us into the uncomfortable realm of ‘non-law’ with which judicial decision-making often has to contend.<sup>504</sup>

### *‘Mainstream’ and ‘special’ education*

This is also a debate that is being fought closer to home, in the forum of the Additional Support Needs Tribunal for Scotland (ASNTS). Within the context of the ongoing debate as to the most appropriate forum for educating children with disabilities, at issue is whether ‘mainstream’ or ‘special’ education best serves disabled children.<sup>505</sup> Access to ‘mainstream’ education is closely linked to access to ‘mainstream’ sport in the context of education. If disabled children and students

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<sup>503</sup> *Ibid.* p. 94.

<sup>504</sup> Schauer, F (2002) ‘The Dilemma of Ignorance: PGA Tour, Inc. v Casey Martin’ 2001 The Supreme Court Review.

experience separate educational arrangements as a whole this is likely to reduce the opportunities to participate in mainstream sport.

One way in which Scotland, and the rest of Great Britain, has attempted to enable the integration of disabled children in mainstream schools is by introducing law to prescribe when and by what means disabled children should receive extra support and assistance. In Scotland the 2004 Act, and in England and Wales the SENDA, allow cases to be assessed at tribunal.

Cases at the ASNTS have involved the question of the degree to which a particular child requires additional support, for example by means of a “co-ordinated support plan” (CSP).<sup>506</sup> What is apparent from the cases brought to date, is that the parents and carers of children and the Education Authority do not take consistent or predictable sides in the ‘integration in mainstream education, or segregation in special education’ debate. In ASNTS D-01-2006, for example, the appellant, who was the father of the child concerned, had made a ‘placing request’ to the Education Authority with the intention that the child should be placed in a special school. The child was in a mainstream class where he received additional support. He had been assessed at a prior medical examination at which it was concluded that his needs were generalised developmental delay, significant speech and language difficulties, fine motor difficulties and emotional immaturities.<sup>507</sup> The Tribunal agreed that the Education Authority did not, however, agree that these were sufficient impairments to merit his

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<sup>505</sup> Shah, S et al (2004) ‘Disabled and Successful: Education in the Life Stories of Disabled High Achievers’ 4 *Journal of Research in Special Educational Needs* 3.

<sup>506</sup> The duty to prepare a CSP is contained in section 9 of the 2004 Act.

being placed in a special school – instead it was sufficient for his needs to attend his local Primary School with an Additional Support Plan.<sup>508</sup>

In the case reference ASNTS D-02-2006, the mother of the child concerned obviously wished her child to be educated in a mainstream school and had requested, and been refused, a CSP. The child had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and was on medication, but was attending the local Primary School. The Tribunal found that his Individualised Educational Programme (IEP) and a Record of Needs (under the Education (Scotland) Act 1980)<sup>509</sup> was sufficient for the child’s requirements. The Tribunal took account of and agreed with the school’s view that given appropriate support the child could sustain mainstream education and access the curriculum (paragraph 11).

Under section 2(1) (d) of the 2004 Act, a CSP is only required to be made when “significant” additional support is provided by *both* the Education Authority and by other agencies. In the recent Court of Session decision *JT v Stirling*,<sup>510</sup> the meaning of “significant” was examined and it was held that it imports more than “not insignificant” and relates to the support “to be provided” rather than to the needs themselves.

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<sup>507</sup> It is not clear from the case report whether or not these impairments would have met the definition of disability in the DDA.

<sup>508</sup> An Additional Support Plan differs from a CSP in that it is non-statutory and a simpler document. It outlines the nature of the pupil’s additional support needs, the factors affecting learning, the approaches to be used and the learning outcomes to be achieved. It can be used by school staff to ensure consistency of approach in meeting the needs of individual pupils.

<sup>509</sup> All Records of Needs were finally transferred to CSPs by 14 November 2007.

<sup>510</sup> [2007] CSIH 52; [2007] CSOH 67.



The 2004 Act tries to take a relatively progressive approach to ensuring that disabled children receive the education that is of most benefit to them. There are a number of features which set it apart from other sorts of individually enforceable civil law, such as the discrimination provisions in the DDA. Firstly, the Tribunal is intended to be fairly inquisitorial, rather than adversarial, in nature. In *SM v City of Edinburgh Council*,<sup>511</sup> it was held that the duty of the Tribunal is to make investigations. Secondly, there is an obvious attempt to move away from the adversarial approach in features such as the requirement under section 15 for every Education Authority to make arrangements for independent (also free and non-compulsory) mediation. Thirdly, there are alternative dispute resolution procedures available under section 16 – these apply in cases where the ASNTS does not have jurisdiction, i.e. where a child does not require a CSP.<sup>512</sup>

Another aspect of the 2004 Act which is worth noting is that its provisions are entirely parent-oriented. The parents have rights and responsibilities over the child, yet the child does not appear to have rights and responsibilities (despite being able to instruct a solicitor at age 12). This is a potentially significant access to justice issue in the provisions which could be incompatible with ECHR rights.<sup>513</sup> It is inconsistent with the idea that young disabled people should have their say in their own futures (see above).

### ***Resources and education***

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<sup>511</sup> [2006] CSOH 201.

<sup>512</sup> See the Additional Support for Learning (Dispute Resolution) (Scotland) Regulations 2005.

<sup>513</sup> I am grateful to Sir Crispin Agnew of Lochnaw for making this point during a Legal Services Agency seminar on Education Law, September 2007.

Something which has the potential to limit all social and economic rights is the question of public resources and this is, of course, no different in relation to education. Time and again, educational institutions and the authorities responsible for them are constrained in their decisions by budgetary considerations. As was considered above, the ECHR right to education is a weak one and this is no doubt in part due to the fundamental policy consideration that there is no point in construing a right which might be claimed against the state if it cannot practicably or economically be delivered. There is, however, high domestic authority to suggest that rights to education have the capacity to override economic considerations. In the English case of *R v East Sussex County Council ex parte T*,<sup>514</sup> the issue of local authority resources was considered in relation to the question of what was the proper forum of education for a disabled child. This case concerned a girl with chronic fatigue syndrome whose home tuition was being cut by the local education authority from five to three hours per week due to budgetary constraints. The House of Lords held that the statute did not suggest that resource considerations were relevant to the question of what was 'suitable education'. Browne-Wilkinson, LJ thought it was significant that the parallel parental duty to ensure their child received a suitable education 'cannot vary according to the resources of the parent'.

In *VK v Norfolk County Council and the Special Educational Needs and Disability Tribunal*,<sup>515</sup> the question arose as to whether or not the resources available to a local education authority could be taken into account in determining whether it had a material and substantial reason for its treatment of a disabled pupil. In terms of

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<sup>514</sup> [1998] ELR 251; [1998] AC 714.

justification for less favourable treatment, Stanley Burnton, J made it clear that a local education authority could not simply point to a lack of available resources within its visiting teacher scheme in order to justify its treatment of the disabled pupil.

### ***Indirect discrimination in education and exclusion from sport***

Chapter 3 identified three types of disability discrimination challenges arising in the context of sport. The second type concerns eligibility criteria which has a disparate impact on disabled people and can be regarded as a form of indirect discrimination (in which the relevant discriminatory practice is on the face of it ‘neutral’, yet it adversely affecting disabled people more than non-disabled people). A body of case law has developed in the USA in relation to this type of challenge. Although the situation in Scotland is somewhat different, there are examples of possible indirect discrimination happening in practice.

In the USA this type of challenge has often arisen in relation to what is known as the ‘age nineteen rule’, in which school athletes above a certain age are blocked from participating in sports and athletic programmes with children who are younger than them (supposedly in the interests of competitive fairness). The debate concerns whether the age nineteen rule should apply to a student whose disability has caused her to remain in high school beyond the age of eighteen, or whether applying the rule constitutes unlawful discrimination on the grounds of disability.<sup>516</sup> In the case of

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<sup>515</sup> [2004] EWHC 2921 (Admin).

<sup>516</sup> Frederickson, B A (2003) ‘The Age Nineteen Rule and Students with Disabilities: Discrimination Against Disabled Students with Athletic Ability’ 25 Thomas Jefferson Law Review 635, p.636. See

*Pottgen v Missouri State High School Activities Association*,<sup>517</sup> for example, a boy had repeated two years of school before his disability was identified. This meant that he turned nineteen before the deadline set for playing in the senior school year. In this case it was held that the age limit was an essential eligibility requirement, because it reduced the competitive advantage for teams using older athletes; protected younger athletes from harm; and discouraged students from delaying their education.<sup>518</sup>

The USA has had to tackle the issue of learning disabilities and exclusion largely because of the framework of sports institutions at school and college level, which includes highly-competitive leagues and generous scholarships.<sup>519</sup> There is a different framework of sports governance in Scotland, yet it is still possible for indirect discrimination issues to arise. One way this might happen is in the context of the future provision of Scottish sports schools and the proposals to create ‘sports academies’.<sup>520</sup> The general tenor of the current discussion about these proposals very much emphasises the role of elite mainstream sport, and there is little or no mention of disability sport, elite or otherwise.<sup>521</sup> At present, Scotland has only one such elite

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also Wolohan, J T (1997) ‘Are Age Restrictions a Necessary Requirement for Participation in Interscholastic Athletic Programs?’ 66 University of Missouri Kansas City Law Review 345.

<sup>517</sup> 40 F.3d 926 (8<sup>th</sup> Circuit 1994).

<sup>518</sup> See discussion in Frederickson, B A (2003) ‘The Age Nineteen Rule and Students with Disabilities...’ p.642.

<sup>519</sup> See Chapter 1.

<sup>520</sup> See ‘Experts Want Specialist Academies to Foster Talented Youngsters’ Scotland on Sunday, 19 August 2007. This article discusses the background to proposals for creating six new sports academies in Scotland. See also Coalter, F and Radtke, S (2007) ‘Sports Schools: An International Review: Report to the Scottish Institute of Sport Foundation’ Stirling: Department of Sports Studies.

<sup>521</sup> See ‘Academic Genius: How Sports Academies can Change Scottish Sport Forever’ the Scottish Institute of Sport Foundation ezine *In the Winning Zone* (Edition 12, December 2007), available at [www.inthewinningzone.com](http://www.inthewinningzone.com).

sports-orientated school, Glasgow School of Sport.<sup>522</sup> This school has never knowingly had a pupil who it has considered to be disabled.<sup>523</sup> It is revealing that the application form for the school makes no reference to prospective disabled pupils.<sup>524</sup> Under the heading 'Selection Procedure', there is a requirement that all applicants, having previously competed in sport, must match at least two of certain criteria (distances or times for five athletics disciplines). No allowance is made on the form for a different scale of distances or times for disabled applicants.<sup>525</sup> Just as there is a presumption that students are non-disabled in the age criteria in the USA, here there is a presumption that students are non-disabled in the selection criteria. In both cases, the practice is potentially indirectly discriminatory (though it has been justified in cases such as *Pottgen*, above). Hence, the aim of integration and social inclusion of disabled students in mainstream sports education can be seen to struggle against institutional, indirectly discriminatory practices.

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<sup>522</sup> Glasgow School of Sport, Bellahouston Academy, 30 Gower Terrace, Glasgow, G41 5QF. Telephone 0141 582 0034. Fax 0141 582 0032.

<sup>523</sup> This was confirmed in private correspondence between the author and the Director of the School. Note that the Director stated that the School would be open to applications from disabled pupils.

<sup>524</sup> Glasgow School of Sport Application for Admission (available from the above address).

<sup>525</sup> A disabled student with elite performance might be turned down on such facially neutral criteria.

## *Chapter 6: A Safe Environment – rights, planning and health and safety*

### ***Introduction***

The subject of this chapter is how planning and health and safety considerations interact with disability rights law.<sup>526</sup> The chapter first considers physical access for disabled people to the sporting environment and how this is served by disability rights law, in particular discrimination law. It goes on to consider how these rights relate to health and safety considerations and explores the idea of the disabled athlete as a ‘threat’.<sup>527</sup>

### **Access for Disabled People**

This part of the chapter considers access for disabled people to the sporting environment, within the context of the Disability Discrimination Act 1995 (DDA) and the analogous legislation in other jurisdictions.

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<sup>526</sup> Of course, there are other aspects of the law which affect the sporting environment: notably, the law of nuisance as used to control, for example, noisy crowds or potentially dangerous projectiles such as golf balls (see the early case *Castle v St Augustine’s Links Limited and Chapman* (1922) 38 TLR 615; and for the Scottish interpretation of nuisance *Kennedy v Glenbelle Limited* (1996) SC 95); and also environmental law (see, for example, the English case *R v Watford Borough Council, ex parte Incorporated West Hertfordshire Golf Club* [1990] 1 EGLR 263 concerning public access for environmental or public reasons). These give rise to issues of application to the general population, however, whereas this discussion focuses on problems specifically experienced by disabled people.

<sup>527</sup> There are also a number of areas of private law which impact on the participation of disabled people in sports and the safety and planning aspects of the physical environment – for example, personal injury liability and insurance law. There is insufficient space to consider these here, however, and the focus will remain on the public law aspects of the sporting environment.

### *The Fundamental Problem*

The fundamental problem is that in general terms the manmade world has not been designed for disabled people, yet whenever attempts are made to correct this it seems nobody can agree on how or even whether, this can be changed. Inevitably, arguments rapidly well up about resources, cost-effectiveness and the correct ratio of ‘disability-friendly’ physical features to ‘disability-indifferent’ features.

The barriers to access and participation created by the physical environment are numerous. Analysis of issues in accessible housing demonstrates the variety of aspects of adaptive design which need to be considered.<sup>528</sup> These include features which improve access for those with impaired mobility, such as widened doorways. There are, however, a multitude of other possible physical adaptations which could improve access to participation in sport for disabled people, ranging from clear and accessible signage to seating arrangements (see below).<sup>529</sup>

There are a number of reasons why disabled people find it difficult to access sport. Some of the fullest empirical research into these reasons in the UK has been undertaken by Sport England and The English Federation of Disability Sport

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<sup>528</sup> A recent summary of barriers in the design and construction of housing is provided in the context of the USA’s Fair Housing Act by Schwemm, R G (2006) ‘Barriers to Accessible Housing: Enforcement Issues in “Design and Construction” Cases Under the Fair Housing Act’ 40 University of Richmond Law Review 735. (Access issues in housing are arguably better developed than issues for sports buildings, but provide a reasonable analogy.)

<sup>529</sup> See, for example, the design of the Stade de France which incorporates a features such as a system of ‘vomitories’ to ensure safe and easy crowd flow (see for example [http://www.sportsvenue-technology.com/projects/stade\\_de\\_france/](http://www.sportsvenue-technology.com/projects/stade_de_france/)).

(EFDS).<sup>530</sup> Of those in a sample of young people asked what prevented them from doing more sport or exercise over the last 12 months, 37% cited the unsuitability of local sports facilities.<sup>531</sup> In a separate survey, the EFDS found that, out of a cross-section of disabled children surveyed in Leicester, 42% considered that access and equipment and 27.5% identified 'environment' as barriers to participation in sport.<sup>532</sup> This demonstrates that facilities, access and equipment and the sports environment all substantially contribute to exclude disabled people from access to sport. Clearly, if access is to be improved, physical barriers must be corrected as well as other discriminatory practices.<sup>533</sup>

### ***Physical barriers to participation as a spectator***

Some of the trickiest aspects of the access problem arise when disabled people wish to attend in person as spectators at sports events, rather than play sport themselves, although of course there is considerable overlap between these two activities both in terms of what it means for disabled people to 'participate' in sport and in terms of how the legal provisions function. In the USA, the question of how best to go about providing wheelchair-friendly seats at sports arenas and stadiums has foxed

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<sup>530</sup> Reports by Sport England (2000-2001) *Adults with a Disability and Sport National Survey*; and *Young People with a Disability and Sport*, Sport England.

<sup>531</sup> *Young People with a Disability and Sport*, p.41.

<sup>532</sup> The English Federation of Disability Sport (2002) *Young People's Experiences of Accessing Sport/Leisure Opportunities in Leicester* (available at [www.efds.net/index.php?incpage=content/research/research.php](http://www.efds.net/index.php?incpage=content/research/research.php).)

<sup>533</sup> Burgdorf Junior, Robert (1991) 'Equal Members of the Community' 64 *Temple Law Review* 551 discusses the importance of correcting architectural barriers as well as discriminatory practices.



developers, campaigners and lawyers alike.<sup>534</sup> In *Paralyzed Veterans of America v DC Arena, L P*, the Court of Appeals for the Washington DC Circuit attempted to clarify the standards for the construction of seating for disabled people, under the ADA Accessibility Guidelines (ADAAG).<sup>535</sup> The ADAAG were introduced in order to effect the requirement in Title III of the ADA that new facilities must be designed to be “readily accessible to and usable by individuals with disabilities”.<sup>536</sup> The approach that the ADAAG appear to take is nominally straightforward in that it consists of a quota system for a certain number of disabled access seats in proportion to the total number of seats.<sup>537</sup>

A factual point arising in this case which may not be immediately obvious is this. It is all well and good providing disabled access seating, but that is only of real benefit where the disabled spectator is in fact able to see whatever sporting action is taking place – there need to be adequate ‘sightlines’ from the seats, but these can be blocked by people standing up to cheer. Indeed, this point was anticipated by the ADAAG, which determined at section 4.33.3 that “[disabled access seating] shall be provided so as to provide people with physical disabilities a choice of... lines of sight comparable to those for members of the general public”. Generalising this principle, it becomes clear that absolute care must therefore be taken to ensure that accommodations built for disabled people into the physical environment have the intended result, which must surely be to allow participation on an equal, or at least close to equal, basis. The

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<sup>534</sup> See the general discussion in Conrad, M A (1998) ‘Wheeling Through Rough Terrain – The Legal Roadblocks of Disabled Access in Sports Arenas’ 8 *Marquette Sports Law Journal* 263.

<sup>535</sup> 28 CFR Pt. 36, App. A (1996).

<sup>536</sup> Section 12183(a) (1), ADA.

<sup>537</sup> Section 4.1.3(19), ADAAG, for example, requires arenas seating more than 500 people to have six disabled access seats plus one for every hundred total seats in excess of the first five hundred.

central goal of Title III of the ADA is, after all, to ensure that disabled people have access to "...the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation".<sup>538</sup>

More recently, the question of what exactly constitutes participation on an equal basis has been considered in a series of further 'sightlines' cases, this time about wheelchair access in the new type of 'stadium-style' cinemas<sup>539</sup> which have been introduced in the USA in recent years.<sup>540</sup> In *Oregon Paralyzed Veterans of America v Regal Cinemas Inc.*,<sup>541</sup> the question was whether wheelchair seating located in the front, flat portion of a cinema satisfied the requirements of section 4.33.3, ADAAG (above). The potential barrier for the disabled cinema-goer in this case was not of course spectators standing up to cheer, but it was the sharp viewing angles created by the location of the seats. The Ninth Circuit Court of Appeals held that viewing angles must be taken into account when assessing the comparability of sightlines.<sup>542</sup> The Court also held that it was possible to objectively evaluate and compare the amenity and comfort of the viewing angles and sightlines available for wheelchair users, based

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<sup>538</sup> 42 USC, section 12182(a) (2000).

<sup>539</sup> The idea behind the design of stadium-style cinemas is that they more closely resemble sports stadiums or arenas than do traditional cinemas by providing stepped seating on a steeper incline, thus improving sightlines to the screen. The problem then is that people using wheelchairs are obliged to sit only at the very front of the seating, where there are no steep steps.

<sup>540</sup> See further analysis of these cases in Watts, J D (2004) 'Let's All Go To The Movies, And Put an End to Disability Discrimination: *Oregon Paralyzed Veterans of America v Regal Cinemas, Inc.* Requires Comparable Viewing Angles for Wheelchair Seating' 34 Golden Gate University Law Review 1.

<sup>541</sup> 339 F.3d 1126 (9<sup>th</sup> Cir. 2003).

<sup>542</sup> For comparison, see the earlier case *Lara v Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1998 WL 1048497; 207 F.3d 783 (5<sup>th</sup> Cir. 2000), in which the Fifth Circuit Court of Appeals held that lines of sight did *not* encompass viewing angles, but merely required sightlines to be unobstructed.

on relevant engineering guidelines.<sup>543</sup> Since these guidelines designated the viewing angles in question as ‘uncomfortable’, the Court found that it was inconceivable that objectively uncomfortable seating met the requirements of the DDA to provide “...full and equal enjoyment...” for disabled people.<sup>544</sup>

Interestingly, in the *DC Arena* case it was deemed insufficient to provide a composite approach of making accommodations in both the physical environment *and* the social environment. The Defendants had suggested implementing ‘no-sell’ and ‘no-stand’ policies, the idea being that either the seats in front of the disabled access seats would be kept empty or the people in the seats would be given notice that they were not permitted to stand. According to the Court, however, this solution was an “operational” rather than a “design” solution which meant that it violated the ADA requirement that it is the design and construction that must provide the access.<sup>545</sup> Whilst it may seem churlish to criticise this relatively decisive and positive interpretation of the ADA, it does suggest that the Court was somewhat ignoring the teachings of the social model that a disability is caused by a complex mixture of environmental and social factors. In other words, to avoid discriminating against disabled spectators the right type of seat has surely got to be matched up with the right type of policy or ‘house rules’, such as requiring other spectators to treat disabled people respectfully and not blocking their view by standing up unnecessarily.

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<sup>543</sup> The Society of Motion Picture and Television Engineers: Engineering Guidelines: Design of Effective Cine Theaters (1994).

<sup>544</sup> *Regal Cinemas*, paragraph 1131.

<sup>545</sup> See Conrad (at note 5), p.274.

The ADA's accessibility requirements for new builds are strong. The only available defence to a failure to design in terms of accessibility is where meeting this requirement is "structurally impracticable" in "...those rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility features".<sup>546</sup> These are unlikely ever to apply to new stadiums.

It is also interesting to compare the approach in the *DC Arena* case with a similar English case, *Baggley v Kingston-upon-Hull Council*.<sup>547</sup> In *Baggley*, the issue was also to do with the sightlines available – this time from the position to the rear of a concert hall with which the Claimant had been provided (due to separate health and safety concerns). Although originally the District Judge had found that there had been unlawful discrimination in the hall's failure to provide a viewing platform, on appeal it was held that the DDA would not require adjustments to be made in these particular circumstances. The *DC Arena* case differed from *Baggley* in that it involved prospective, group litigation, rather than individual, retrospective litigation, but the principle question in each case was the same – should the venue be expected to improve the sightlines for the disabled spectator? Compared to the ADA requirements *Baggley* demonstrates the relative ease with which a service provider may be able to comply with the section 21(2) duties in the DDA to help disable people overcome physical features since these features have to make it "...impossible or unreasonably difficult for disabled persons to make use of such a service..." before they require to be altered. In practice, this appears to be a much harder test to satisfy when it comes to physical barriers to participation.

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<sup>546</sup> Section 12183(a) (1), ADA.

<sup>547</sup> (2002) CC Claim No. KH101929 (unreported), discussed in McColgan, A (2005) *Discrimination Law: Text, Cases and Materials* Oxford: Hart Publishing, p.603.

So, why are the issues these cases raise important to the participation of disabled people in sport? Firstly, these sorts of issues exemplify classic examples of disability discrimination – they concern a barrier (or barriers) which substantially limit the disabled individual’s ability to enjoy an aspect of life, and to participate in the broad sense; yet this remains a barrier which may not be immediately obvious. Secondly, the prospect of creating a ‘wheelchair’ ghetto in this kind of scenario is a real and valid worry.<sup>548</sup> If the adjustments made to the physical environment only serve to segregate and bring unwanted attention to disabled participants, they quickly become counterproductive situations. Such scenarios suggest uncomfortable parallels with the classic Rosa Parks-style segregation<sup>549</sup> which ignited the civil rights movement in the USA, and consequently the wider world. Whereas Rosa Parks was discriminated against as a result of unfair barriers arising in the social environment (namely racist rules of segregation) which were all too easily overlooked, or at least tolerated; disabled participants in sport, whether spectators at a stadium or players in a match, are also discriminated against as a result of unfair barriers arising in the physical environment, which are perhaps equally easily overlooked or tolerated.<sup>550</sup>

In a 1998 English report by the Football Task Force,<sup>551</sup> it was suggested that FA Premier League clubs and Football League clubs should instruct architects to

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<sup>548</sup> See ‘Let’s All Go To The Movies’, p.22.

<sup>549</sup> In a famous incident in 1955, Rosa Parks, who was a black woman in Montgomery, Alabama, USA, refused to give up her seat on a crowded bus to a white woman. In this era, blacks and whites had segregated seating on public transport and this incident drew attention to this unfair discriminatory practice, ultimately resulting in the end of this policy and many other areas of racial discrimination.

<sup>550</sup> They can be discriminated against as a result of social barriers too (see Chapter 2).

<sup>551</sup> Report of The Football Taskforce (1998) *Improving Facilities for Disabled Supporters* (Submitted to the Minister for Sport 1998).

incorporate full wheelchair access to all social and retail facilities when commissioning plans for a new stand or ground; and review access to existing social and retail facilities and carry out corrective work where necessary. It was further suggested that The Football Trust should make it a condition of grant-aid that major new developments incorporate wheelchair access to all social or leisure facilities.

### ***The wheelchair – a deceptive symbol***

The prevalence and visibility of mobility impairments throughout the population as a whole, and the near inevitability that all of us will experience this form of disability at some point in our lives, no doubt helps to create society's illusion that 'disability' is synonymous with 'wheelchair'.<sup>552</sup> This really is, however, an illusion. It is an illusion not only because the development of the social model of disability has taught us of the relevance to the concept of disability of environmental and social factors – factors other than impairments and 'corrective' technology – and not only because we are forced by common medical, political and statutory usage to grapple with a wide and unwieldy definition of disability which encompasses a vast array of impairments. It is

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<sup>552</sup> Of course, this illusion has multiple sources – other sources than those mentioned above include the historical origins of the twentieth century disability civil rights movement in the aftermath of the two World Wars (and in the US in particular the Vietnam War), giving rise to organisations such as Paralyzed Veterans of America (discussed in the context of caselaw, below) the connotations of which possibly cemented in the public consciousness the image in popular culture of the wheelchair-bound Vietnam veteran (witness, for example, the enduring popularity of the character Lieutenant Dan in the Hollywood film 'Forrest Gump' (1994), see 'Gary Sinise, A Trouper for the Troops', Washington Post, May 28 2006). These sources also include, more theoretically, the idea that the technological developments characteristic of our post-industrialised society allow people to operate technological environmental controls, such as wheelchairs, in order to live both independently of and integrated in society is explored in Finkelstein, V (1980) *Attitudes and Disabled People*, New York: World Rehabilitation Fund.

an illusion because, in order to fully take account of disability when assessing the physical environment, it is essential to be able to see far beyond the ubiquitous ‘disabled’ sign which depicts a wheelchair in the abstract. It is this deceptive symbol of disability, however, which is perhaps most associated with the concept of disabled access in the manmade physical environment, which includes sports arenas, stadiums, pitches, centres, clubhouses and so on.

In 2005, the Scottish Executive (now Scottish Government) undertook an investigation into access to public services in Scotland using British Sign Language (BSL).<sup>553</sup> This research found significant barriers for deaf people in accessing services – mostly barriers which have little to do with wheelchair access. For example, glass windows in serving areas were particularly difficult to negotiate.<sup>554</sup>

### **Health and Safety Protections**

One of the major defences against disability discrimination claims is a justification on grounds of health and safety. The relationships between the law which determines the physical environment, the law which protects individuals within that environment, and disability discrimination law can be examined in the context of sport.

The DDA includes as one of its main ‘justification’ defences that the service provider holds a reasonable opinion that his or her (potentially discriminatory) treatment of the

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<sup>553</sup> Scottish Executive Social Research (2005) *Investigation of Access to Public Services in Scotland Using British Sign Language* Edinburgh: Scottish Executive (available at [www.scotland.gov.uk/socialresearch](http://www.scotland.gov.uk/socialresearch)).

<sup>554</sup> *Ibid.*, paragraph 4.8.

disabled person is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person).<sup>555</sup> In *Rose v Bouchet*,<sup>556</sup> a Scottish case concerning a visually impaired man who was refused the let of a flat which was up five steps with no handrail, a health and safety defence was used to successfully repel the pursuer's claim of discrimination under Part 2 of the DDA.<sup>557</sup> The Principal Sheriff Court held that the defence requires a subjective rather than an objective standard, in that the defender only needed to show that he had *reasonably* reached the conclusion, on the facts then known to him, that the scenario in question was unsafe for the pursuer. Sheriff Nicholson held that:

*...the defender's discriminatory treatment of the pursuer would be justified if, in the defender's opinion, the treatment was necessary in order not to endanger the pursuer's safety. So far as that part of the test is concerned, there can be little doubt in my view that it is subjective, in the sense that what is in issue is the opinion of the person carrying out the discriminatory act.*<sup>558</sup>

It is, therefore, unnecessary to determine *objectively* whether a disabled person would be endangered, or would endanger other people, when participating in sport. All that is required is that the person providing the sports services in question reasonably believes this to be the case.

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<sup>555</sup> Section 20(4) (a), DDA.

<sup>556</sup> [1999] IRLR 463.

<sup>557</sup> The Part 2 equivalent of the Part 3 health and safety defence is contained in section 24, DDA.

<sup>558</sup> Sheriff Nicholson, paragraph 32.



A comparable defence exists in the ADA.<sup>559</sup> An obvious difference, however, is that unlike the DDA the ADA does not provide an explicit defence where participation would endanger the health and safety of the participant themselves.<sup>560</sup> It has been left to the Supreme Court to clarify that the defence extends to a direct threat to self.<sup>561</sup> A second difference is that the ADA utilises an objective test, which is based on the decision in *School Board of Nassau City v Arline*,<sup>562</sup> in which the Supreme Court reconciled competing interests in prohibiting discrimination and preventing the spread of disease which posed a ‘significant risk’. Otherwise, the ADA defence works in a way that is sufficient for the comparison below. Weaker, however, is Australia’s Disability Discrimination Act 1992. There is no specific health and safety defence in this statute – instead courts have had to make do with the artificial construct of finding an appropriate hypothetical comparator who would pose the same risks as the disabled person, in determining whether discrimination is lawful.<sup>563</sup>

### ***The officious referee and the ‘free for all’***

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<sup>559</sup> 28 CFR. s.36.208 provides a defence where allowing participation would create “a direct threat to the health or safety of others”.

<sup>560</sup> *Ibid.*

<sup>561</sup> In *Chevron USA Inc v Echazabal* 536 US 73 (2002) it was held that regulations permitting a refusal to hire an individual on the grounds of a disability which meant that doing the job would endanger his own health were within the scope of the ADA. (See further discussion below.)

<sup>562</sup> 480 US 273, 287.

<sup>563</sup> In *Purvis v New South Wales (Department of Education & Training)* (2003) 202 ALR 133, discussed further below, the hypothetical comparator in the case of a disabled child who was excluded from education as a result of the risks caused by his ‘violent’ behaviour was found to be a child who displayed the same behaviour but was not disabled, thus justifying the exclusion on the grounds of safety.

It is extremely difficult to decide how strong the health and safety defence should be made in the context of sport (and indeed in any disability discrimination context). The three different legislative approaches, briefly described above, each have their own disadvantages. The problem with the approach of the DDA, as illustrated by *Rose*, is that it may weight the balance too far in favour of the provider of sports facilities or services. Making the defence subjective, albeit according to the standard of *reasonableness*, risks allowing to surface all the drawbacks of the medical (or ‘individual’) model of disability. The focus is then on the perceived limitations imposed by the individual’s impairment, rather than on an objective examination, along the lines of the social model, of what are the real risks arising from the physical environment.

Favouring an objective test, as in the ADA, however, raises its own set of disadvantages. In *Knapp v Northwestern University*,<sup>564</sup> the university refused to let Knapp play basketball based on a medical opinion that he should be ineligible on grounds of his increased risk of cardiac death.<sup>565</sup> At trial, the five medical experts disagreed on the acceptability of this risk,<sup>566</sup> which immediately raises the evidential conundrum – who should arbitrate when such disagreements arise? The general disadvantage of this approach is therefore that it is often extremely hard to objectively determine the risks posed by the physical environment, either to the disabled sports participant, or to others. This exposes the courts to a heavy procedural burden.

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<sup>564</sup> 101 F.3d 473 (7<sup>th</sup> Cir. 1996).

<sup>565</sup> Although this case was brought under the Rehabilitation Act 1973, the same objective approach to the health and safety defence is found in the ADA, which in many respects reproduces the earlier Act.

<sup>566</sup> *Ibid.* at 484.

If the health and safety defence is left too weak or is only indirectly present, as it is in the Disability Discrimination Act 1992, the disadvantage is that, as in *Purvis v New South Wales (Department of Education & Training)*,<sup>567</sup> courts will be left to decide on their own account that for policy reasons it must be possible to exclude disabled people where their participation seems clearly to endanger themselves or others. They may then be inclined to ‘work backwards’ by finding a mechanism to achieve that policy outcome.<sup>568</sup> This has led Australian commentators, frustrated at the lack of certainty in the relationship between discrimination and health and safety law, to call for greater prescription and specificity of a health and safety defence.<sup>569</sup>

Dipping for a moment into the somewhat richer stream of case law in the employment field to compare how the health and safety defence has been used in that context,<sup>570</sup> in 2002, the former Disability Rights Commission conducted a review of UK case law on the use of health and safety requirements as a false excuse for not employing sick or disabled persons.<sup>571</sup> This review strongly suggested that the effect of the DDA is

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<sup>567</sup> See above.

<sup>568</sup> See discussion of this interpretation of the approach of the court in Campbell, J (2005) ‘Using Anti-Discrimination Law as a Tool of Exclusion: A Critical Analysis of the *Disability Discrimination Act* 1992 and *Purvis v NSW*’ 5 *Macquarie Law Journal* 201, p.218.

<sup>569</sup> See, for example, Rattigan, K (2004) ‘*Purvis v New South Wales (Department of Education & Training: A Case for Amending the Disability Discrimination Act 1992 (CTH))*’ 28 *Melbourne University Law Review* 532, p.560.

<sup>570</sup> This comparison has limitations because the employment case law is not directly applicable to education and goods, facilities and services because the justification defence in non-employment related discrimination is dealt with differently – section 5, DDA, specifies that the employer can show less favourable treatment to be justified if there is a reason which is “both material to the circumstances of the particular case and substantial” – i.e. there is not a specific reference to health and safety.

<sup>571</sup> Disability Rights Commission (2002) *Review of UK Case Law on the Use of Health and Safety Requirements as a False Excuse for not Employing Sick or Disabled Persons* (available at <http://www.hse.gov.uk/research/rrhtm/rr167.htm>).

dampened by the ease with which the health and safety defence can be utilised by employers; and it reported expert suggestions both “that health and safety operates as a subtext behind many disability discrimination cases and that there is a tension between health and safety protectionism and non-discrimination, whether this arises as an explicit issue or not”.<sup>572</sup> In particular, the Court of Appeal’s test in *Jones v Post Office*<sup>573</sup> was highlighted as having important implications for cases in which health and safety concerns are pleaded as a justification for not employing a disabled person. The test developed in *Jones* entails that the court must consider whether the employer’s decision not to hire is within a range of responses open to a reasonable employer. This is a relatively easy test for the employers to satisfy,<sup>574</sup> taking into account the wide range of risks, from relatively minor and remote risks to serious and major ones, upon which they might decide to base their decisions. This leaves open the possibility that stereotyped views about disabled people, excessively cautious risk assessments and decisions which are simply wrong may all act as lawful barriers, so long as they do not result in decisions which fall outside the range of responses open to a reasonable employer.<sup>575</sup> Although *Jones* is not directly applicable outside the field of employment,<sup>576</sup> it has been referred to as being of assistance in the judgment

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<sup>572</sup> *Ibid.* p.6, reporting that these views had been expressed by a senior practitioner, Nicola Dandridge, then Head of Equality at Thompsons Solicitors (one of the UK’s leading firms representing claimants) and Director of the DDA Representation and Project and Nick O’Brien, then Director of Legal Services at the Disability Rights Commission. (It is helpful to be aware of the views of those in a position to judge the issues arising in the (large majority of) disability discrimination cases which settle before tribunal.)

<sup>573</sup> [2001] ICR 805 (CA); [2001] IRLR 384.

<sup>574</sup> See also *Heinz Co. Limited v Kendrick* [2000] ICR 419 (EAT), which had already established a relatively low threshold for the justification defence generally, in employment disability discrimination cases.

<sup>575</sup> Disability Rights Commission (2002) *Review of UK Case Law...*, p.1.

<sup>576</sup> See above.

of the Part 3 sports participation case of *White*.<sup>577</sup> In relation to participation in sport then, the position is no different. Health and safety concerns are almost raised as standard in both education and facilities and services cases, acting to block disabled participants from taking part both with non-disabled people and with other disabled people.<sup>578</sup>

There is, however, a proviso in favour of disabled people. Health and safety concerns are quite clearly at the root of many reasonable adjustments<sup>579</sup> (or ‘accommodations’ in the language of the ADA – see Chapter 3) which the law requires for disabled sports participants, so it is in the interests of disabled people not to completely surrender these concerns. The correct balance in the law must be struck between allowing it to act like an unwanted, officious referee who steps in to decide whenever there is the merest hint of an unsafe outcome; and permitting a ‘free for all’, leaving disabled people to fight it out over what they can and cannot do, be it with employers, educators or service providers.

One possible way of achieving this balance might be to reevaluate the standard of risk as it has evolved within the context of health and safety law. Whether the health and safety defence is specified in the legislation or not, and whichever of the mechanisms is chosen, the brief comparative examination above suggests that courts have a tendency to allow paternalistic protectionism to override the disabled person’s

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<sup>577</sup> Ashton, J at paragraph 23. See citation and discussion of this case in Chapter 4.

<sup>578</sup> See, for example, the discussion of the *Parent A* case in Chapter 5 and *White* in Chapter 4.

<sup>579</sup> For example, in *Roads v Central Trains Limited* [2004] EWCA Civ 1541 the adjustments at issue were considered to be reasonable as a result of the only available route for Mr Roads to reach the station platform being negotiable only with excessive difficulty and risk in his wheelchair.

autonomous choice and this arguably conflicts with the purpose of disability discrimination law.<sup>580</sup>

If we are to find a new standard of acceptable risk, it is worth considering the concept of ‘reasonable practicability’ which has its basis in the common law, in cases such as *Edwards v National Coal Board*.<sup>581</sup> Here, Asquith LJ defined ‘reasonably practicable’ as a computation in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed on the other – if the risk is insignificant in relation to the sacrifice, then there is a defence for the employer.<sup>582</sup> This test could be evolved to take account of the disability discrimination created by the DDA.<sup>583</sup> Following *Edwards*, the two questions to ask in utilising this concept in the context of Part 3 of the DDA, for example, would then become: (1) what measures are necessary and sufficient to prevent any breach of section 20(4) (a); and (2) are these measures reasonably practicable?<sup>584</sup> This approach would also be compatible with the concept of ‘autonomy’ which acknowledges that risks may carry benefits and that disabled individuals should be permitted to assume known risks, allowing them to participate in society (which would include participation in sport).<sup>585</sup>

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<sup>580</sup> This observation is adapted in general terms from Davies, J and Davies, W (2000) ‘Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State’ 29 *Industrial Law Journal* 4.

<sup>581</sup> [1949] 1 All ER 743; followed by *R v HTM Ltd* [2007] 2 All ER 665.

<sup>582</sup> *Ibid.* Paragraph 747 E-F.

<sup>583</sup> Davies, J and Davies, W (2000) ‘Reconciling Risk...’ p. 365.

<sup>584</sup> Section 20(4) (a) states that (a provider of services can be justified in treating the disabled person less favourably) if “in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person)”.

The right of the individual to be free from a paternalistic state and to make autonomous choices about risk is reflected in the court's interpretation of section 504 of the Rehabilitation Act 1973<sup>586</sup> in the sports participation case of *Poole v Plainfield Board of Education*.<sup>587</sup> The court interpreted the purpose of section 504 as being "...to permit handicapped individuals to live life as fully as they are able, without paternalistic authority deciding that certain activities are too risky for them".<sup>588</sup> This is no doubt the sort of thought that communities of disabled people are aiming at politically, with the slogan 'nothing about us, without us'.<sup>589</sup>

As has been seen in Chapter 4, if the real normative and political purpose behind disability discrimination law is to do with the concept of social inclusion, a cornerstone of this purpose must be autonomous, individual choice, which is manifested through the inclusion of disabled people in decision-making. Instead, the health and safety defence in current disability discrimination law seems to broadly follow two of the most negative aspects of the medical model: paternalism and the disenfranchisement of disabled people in assessing their own needs (and the needs of others in relation to them). Perhaps one reason why the law is yet to alight on a good assessment of risk is down to entrenched misperceptions of the needs and requirements of disabled people. What does the law reveal about such misperceptions?

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<sup>585</sup> Davies, J and Davies, W (2000) 'Reconciling Risk...' p. 365.

<sup>586</sup> On which Title III, ADA is based.

<sup>587</sup> 490 F. Supp. 948 (D.N.J. 1980). This case concerned whether a high school wrestler with only one kidney was 'otherwise qualified' to participate.

<sup>588</sup> *Ibid.*, pp. 953-954. This interpretation is highlighted in 'An Ethical and Legal Dilemma', p.383.

<sup>589</sup> See Chapter 4 and also Inclusion Scotland (2007) *Manifesto for Inclusion – Policy into Practice* (available at [www.inclusionScotland.org/manifesto/index.asp](http://www.inclusionScotland.org/manifesto/index.asp)).

### *The disabled athlete as a physical ‘threat’*

As was seen above, adapting the physical environment for disabled sportsmen and women is not a simple story of making adjustments to allow wheelchair access; likewise, health and safety for disabled participants does not begin and end with keeping a wheelchair from dangerously straying into another lane on the running track, though of course wheelchairs do provide their own particular set of safety issues.<sup>590</sup> The idea of the disabled person as a physical ‘threat’ to others has been developed in sociological theories and it also has some evidential basis in cases where disabled individuals have attempted to participate in sports. These theories and cases act to cast light on how the law chooses to include or exclude disabled people from participating in sport, in particular through the relationship between disability discrimination and health and safety law.

On 3 December 2007, the Indian cricketer Muttiah Muralitharan bowled out England’s Paul Collingwood to become the world’s leading wicket-taker in Test cricket.<sup>591</sup> Apart from this spectacular and unique sporting achievement, Muralitharan is notable because he is an elite athlete with particularly unusual physical characteristics in his arm. He is both ‘double-jointed’ in his wrist, and he was born

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<sup>590</sup> The health and safety aspects of using a wheelchair were considered in *Lawrence and Others v Cambridge County Council, Monkfield Park Primary School and Anderson (Headmistress)* [2005] EWHC 3189 (QB).

<sup>591</sup> Collingwood was Muralitharan’s 709<sup>th</sup> Test cricket ‘victim’. Muralitharan is recognised as one of the finest bowlers of his generation. He imparts an exceptional amount of spin on the cricket ball when it is bowled at the wicket, making it particularly difficult for the batsmen to hit the ball.



with a permanently bent arm.<sup>592</sup> In seeking to account for Muralitharan's exceptional ability, the cricket analyst Simon Hughes opined that he "...is what I would call a freakish genius..."<sup>593</sup> The former India spin bowler Bishan Bedi said that the International Cricket Council, in relaxing its rules on bowlers keeping straight arms and as a consequence accommodating Muralitharan, had "created a monster" by legitimising his playing style.<sup>594</sup> Thus, instead of simply celebrating his sporting success, commentators report on Muralitharan's physical difference as making him a 'freak' and a 'monster' that somehow threatens and endangers sport.<sup>595</sup> It is this stigmatizing focus on physical differences and how these impact on social 'acceptance' which is the focus of Goffman's analysis.<sup>596</sup> More recently, Wendell<sup>597</sup> has characterised this threat in terms of 'the myth of control', in which the widespread belief that the body can be controlled results in a fear of abnormality and a rejection of people with physical disabilities.

### ***The hidden threat – HIV/AIDS***

The inherently physical nature of sport means that it is an area of public life in which even otherwise unnoticed physical differences, such as Muralitharan's, are subject to

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<sup>592</sup> It is not clear whether or not the characteristics of Muralitharan's arm would constitute a disability for the purposes of the DDA or other discrimination legislation. The point, however, is to do with the perception of abnormal physical difference which has obvious parallels with disability.

<sup>593</sup> Reported on the BBC Sport Website, 3 December 2007 (available at [www.bbc.co.uk/sport](http://www.bbc.co.uk/sport)).

<sup>594</sup> *Ibid.*

<sup>595</sup> See also the case of Oscar Pistorius, discussed in Chapter 4. Pistorius' prosthetic limb is seen as a physical threat both to himself and the runners in other lanes.

<sup>596</sup> Goffman, E G (1963; 1990) *Stigma: Notes on the Management of Spoiled Identity* London: Penguin Books Ltd, p.19. (See Chapter 2.)

<sup>597</sup> Wendell, S (1996) *The Rejected Body: Feminist Philosophical Reflections on Disability* London: Routledge – see in particular Chapter 2.

especially close public scrutiny. The physical impairments of disabled people, which are a subset of physical differences, are also subject to scrutiny, at least when they are noticeable. Muralitharan's physical difference, however slight, is noticeable even to the casual observer. Another, equally high-profile example of an athlete with a physical difference trying to participate in sport is the case of the American professional basketball player Ervin 'Magic' Johnson who contracted HIV.<sup>598</sup> HIV is a near-perfect example of unnoticed physical differences which can occur in sport at all levels and yet which amounts to profound physical disability.<sup>599</sup>

In *Bragdon v Abbot*,<sup>600</sup> the courts considered the issue of whether the plaintiff's asymptomatic HIV would have put her dentist at risk of infection during treatment in his office. It was held by the US Supreme Court that the existence of a significant health risk from the treatment or accommodation of the disabled person must be determined from the standpoint of the person refusing treatment or accommodation. The risk assessment, however, must be based on medical or other objective evidence, and not simply on that person's good-faith belief that a significant risk exists. This affirms the objective test for the health and safety defence in the ADA. It is reasonable to suppose that this principle would also be applicable in the context of

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<sup>598</sup> Magic Johnson was, by any standards, a basketball superstar who played for the Los Angeles Lakers, winning both the National Basketball Association (NBA) Most Valuable Player award at the 1992 NBA All-Star Game and a gold medal in the Olympics that same year.

<sup>599</sup> At least during the phase of HIV which is 'asymptomatic' – the person infected with the virus does not at this stage exhibit any symptoms that are easily distinguishable by the ordinary person from, for example, those of flu. For a concise summary of HIV/AIDS and further analysis of its impact on sports management and law, see Wolohan, J T (1997) 'An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes' 7 *Marquette Sports Law Journal* 373. See also Mitten, M J (1993) 'Aids and Athletics' 3 *Seton Hall Journal of Sport Law* 5; and Hums, M A (1991) 'AIDS and Sports Participants: Legal and Ethical Considerations for School Sports Programs' 1 *Journal of Legal Aspects of Sport* 22.

<sup>600</sup> 912 F. Supp. 581 (1995); 524 US 624 (1998).

sport, and that a service provider refusing to let a disabled person participate, or to make suitable accommodations, citing a ‘direct threat’, would be judged against this objective standard.

Wolohan identifies a series of questions to ask in assessing the legal position in respect of HIV-infected athletes wishing to take part in competitive sport, which follow this objective theme: do athletes with HIV pose a direct threat to the health and safety of other athletes while competing in athletic events; should any athlete infected with HIV compete in competitive athletics; are there any reasonable accommodations that can be made to eliminate the risk of transmission to non-infected athletes?<sup>601</sup> These would be equally applicable to sport in Scotland.

The cause of people with HIV/AIDS in Scottish sport has been significantly advanced in recent years by the incorporation by the Disability Discrimination Act 2005 of HIV/AIDS as one of the grounds for unlawful disability discrimination.<sup>602</sup> Consequently, the issues discussed in these cases from the USA now have far greater relevance to this jurisdiction. In August 2006, the UK Government produced a discussion paper entitled *Tackling AIDS Through Sport*.<sup>603</sup> This paper addresses a number of the issues, such as stigma and social inclusion (which are addressed elsewhere in this thesis). Like the Lisbon Treaty, the policy aims are focussed on

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<sup>601</sup> Wolohan, J T (1997) ‘An Ethical and Legal Dilemma...’ pp.394-396.

<sup>602</sup> Section 18, Disability Discrimination Act 2005 amends Schedule 1 of the DDA (which supplements the definition of ‘disability’ in section 1 of that Act) to include HIV infection, also providing that “[i]n this Schedule “HIV infection” means infection by a virus capable of causing the Acquired Immune Deficiency Syndrome [AIDS]”. Note also that this section also adds to the definition of disability in the DDA, cancer of certain types and multiple sclerosis.

<sup>603</sup> Department for Culture Media and Sport and Department for International Development (August 2006) *Tackling AIDS Through Sport* London: HMSO.

children and young people. It is perhaps too early to predict whether the recommendations in this paper will have any impact on participation, but what is clear is that disabilities such as HIV/AIDS infections are not going to disappear from sport and they will continue to pose tricky legal questions.

### ***The violent threat***

In the Australian case *Purvis*, a disabled child, Daniel, who had suffered severe brain injury as a child, was excluded from his local high school on grounds that his violent behaviour threatened the health and safety of the staff and students. A complaint was made on behalf of Daniel to the Human Rights and Equal Opportunities Commission (HREOC), alleging that his exclusion amounted to direct discrimination under the Disability Discrimination Act 1992. The complaint was initially upheld by the Inquiry Commissioner who reasoned that Daniel's disability and the behaviour in question were so closely connected that they should be treated as the same thing. According to section 5, Disability Discrimination Act 1992, in the test for direct discrimination the comparator is the person in the same or not materially different circumstances, without the disability. The Commissioner combined these two premises, one factual the other legal, to conclude that the correct comparator in this case was a student without the disability who had not behaved like Daniel. Because this comparator existed in the form of other students who had not been excluded, it was easy to see that Daniel had been treated unfavourably and had been discriminated against.

The New South Wales Department of Education and Training appealed this decision to the Federal Court, where the appeal was upheld on the grounds that the

Commissioner's first, factual premise was incorrect and that he had consequently chosen the wrong comparator. The Federal Court held that the correct comparator would be someone who behaved as Daniel had, but who was not disabled. On further appeal, the High Court upheld the Federal Court's findings, affirming the view that the correct comparator should be this hypothetical one.

This vain search for an appropriate comparator reveals the difficulty the courts have in deciding how to treat children with a disability which plays a part in behaviour threatening health and safety. Just as an athlete with HIV like Magic Johnson, or a cricketer with a deformity like Muralitharan, is perceived as a potential threat and a danger to sport; a disabled child like Daniel creates a defensive, hard-line response. With all of these people, the instinctive reaction of the public and the courts alike (and, sadly, other sportsmen and women) seems to be to try to find ways to exclude, rather than include, them. Jacob Campbell sums this up: "In Daniel's case disability was reduced to individual, pathological behaviour and that behaviour was, in turn, reduced to violence and threat".<sup>604</sup>

### *The threat to self*

Last, but not least, risk of harm to self is very often cited as a reason to exclude disabled athletes.<sup>605</sup> A person who has serious heart problems, of which they may at first be unaware, is one example – as in the case of *Knapp*, above. In characterising

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<sup>604</sup> Campbell, J (2005) 'Using Anti-Discrimination Law as a Tool of Exclusion: A Critical Analysis of the *Disability Discrimination Act 1992* and *Purvis v NSW*' 5 *Macquarie Law Journal* 201, p.215.

<sup>605</sup> See the general discussion in Mitten, M J (1998) 'Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics' 8 *Marquette Sports Law Journal* 189.

the disabled athlete as a socially-constructed 'threat', it is of course important not to lose sight of the possibility that he or she poses a genuinely high medical risk by participating in sport. In such cases paternalism may be called for and discriminatory treatment justified. Jones has argued that athletes can easily lose sight of their limitations (sometimes even regarding themselves as 'invincible') and particular care needs to be taken that they are fully aware of, and understand, the medical implications, should they choose to continue to play a particular sport.<sup>606</sup>

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<sup>606</sup> Jones, C J (1992) 'College Athletes: Illness or Injury and the Decision to Return to Play' 40 Buffalo Law Review 114, p. 201.

## *Conclusion*

This thesis has examined the nature of the rights of disabled people to participate in sport. As part of this examination, it has been possible to determine the potential emergence of a specific right to sport; the existence of a composite group of rights, which taken together may equate to such a right; and the utility of antidiscrimination rights, mainly as contained in disability discrimination legislation. In terms of a legal framework, the nature and strength of these rights depends in part on whether the focus is on international public law, which may contain an embryonic right to sport; a national constitutional or bill of rights model, which contains a composite group of rights; or a model of domestic legislation, which focuses on antidiscrimination rights.

The general failure of sports superpowers such as the USA to sign up to international provisions brings into sharp relief the potential lack of utility in positing rights in international public law. The increasingly international focus of sport nevertheless means that it can no longer be seen as a purely domestic issue and attentions may increasingly need to turn towards provisions such as Article 30.5 of the new UN Convention on the Rights of Persons with Disabilities, which applies to sport for disabled people. In a world where the Governor of the USA's richest state, which is not party to the Convention, acts as ambassador to the 2007 Beijing Special Olympics,<sup>607</sup> held in a country which is simultaneously a sports superpower and notorious for its human rights record, the need to comprehend disability rights to sport has arguably never been greater.

Within instruments such as the Canadian Charter of Rights and Freedoms and the new Treaty of Lisbon, as well as the ECHR, the constitutional focus becomes more apparent, reflecting the merits of a more holistic approach to rights. There is some evidence that a right for disabled people to participate in sport may be gleaned from other rights, such as those protecting the ‘integrity’ of the individual, or the right to education. The gain in strength of the mechanisms for enforcing these sorts of rights (over rights in international public law) may be in approximately inverse proportion to the decrease in the specificity of the rights protected.

Within the USA and the UK domestic models (as well as in Australia), a relatively powerful set of disability rights are specified by antidiscrimination legislation, and these are complemented by statutes which provide a further group of rights, such as education statutes. Once again, although these sorts of rights are more directly enforceable than the disability rights contained in constitutional or public international law, they are yet further removed from a ‘direct’ right to sport, and can only hope to achieve increased (and better quality) participation for disabled people ‘indirectly’, via general concepts such as equality or social inclusion.

Disability rights are an invention which has still to develop beyond the inherent struggle between the quality of the right protected and the quality of the remedy provided. The first conclusion is, therefore, that in order to truly identify and deliver rights to participate in sport for disabled people, it may be necessary to significantly strengthen the relationship between international law, constitutional law and state

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<sup>607</sup> Arnold Schwarzenegger, who is Governor of California, acted as ambassador to the Special Olympics 2007.



decision-making at the level of domestic law, in order to attain both greater specificity *and* better enforcement.

Within the context of sport for disabled people, the thesis has examined concepts contained in the law, such as ‘social inclusion’, and its application to the integration/segregation debate in sports education; the redistributive ideals of ‘equality’; models of disability and their application to definitions of disability contained in discrimination legislation; the rules of sport and their relation to the law; and the potential creation of ‘new’ rights such as a right to sport. All of these have been shown to cause significant problems of interpretation for the judiciary in Scotland and further afield. The fact that courts struggle with, or even shy away from, these concepts is not a reason in itself to think that the law cannot legitimately deal with them. What this thesis has tried to demonstrate, however, is that this area of the law is perhaps especially hard to separate from a *purposive* interpretation of the law, in which judges must attempt to discover the underlying aim of the legislation, rather than *formalist* interpretations in which the text alone is taken to constitute the law. The second fundamental conclusion then is that the law which has been examined in this thesis operates at the very boundaries of what has traditionally been taken to be the role of the courts.

This second conclusion can be illustrated by revisiting questions arising in key cases that have been considered. For example, does the purpose of disability discrimination legislation extend to overriding the rules of mainstream sports, so as to allow for individual enhancements or accommodations for disabled sportspersons, as in *Martin*? Does a child with behavioural difficulties which are inextricably linked to his

disability, like the boy in the *Parent A v East Ayrshire Council* case, retain a right to be integrated in mainstream sports, or must he play sport separately from the other children? How much of a ‘threat’ must the disabled athlete constitute before he is legitimately excluded from participating in sport and, as was the issue in *Knapp*, who should make that decision? Should a disabled athlete continue to receive more favourable treatment when it means they potentially end up performing *with a distinct advantage over* non-disabled athletes (as in the case of Oscar Pistorius)? All of these are ultimately questions of social policy and perhaps society should attempt to find clearer answers to them, and the legislature should create clearer law, before courts are asked to undertake the challenging task of deciding them.

Further to these two main conclusions, this study also concludes that the context of sport demonstrates that disability discrimination law, and in particular its ‘adjustments’ (or ‘accommodations’) requirements, may be closer in character to the main canon of discrimination law than is often assumed. It also raises questions about the adequacy of the current law to cater for the requirements of disabled athletes (and disabled people more widely), who are ‘super-enabled’ by way of technological enhancements. (Implicit in the law is the assumption that disabled people are ‘less able’.)

Lastly, in terms of the underlying aims of the law, it is concluded that, in relation to sport (as opposed to areas such as employment) the concept of ‘social inclusion’ may better fit the law, rather than the concept of ‘equality’; and in relation to definitions, the ‘social’ model of disability should not entirely supersede the ‘medical model’ in the context of sport.

### *The way forward*

There may be a fundamental tension between the concept of disability discrimination and many of the features of sport that have been taken for granted by society up to now. It is likely that disabled people will increasingly continue to enter sport at all levels, both recreational and competitive, including elite sport. Technological innovations will increasingly help to allow disabled people to participate in sport and the time may come when sports regulators have to make many further allowances for those who have a good claim to use enhancements as legitimate, reasonable adjustments to their chosen sport.

Some of the issues arising from this examination of discrimination law will have to be addressed further, and this will probably require the involvement of the courts. In particular, the extent of what amount to reasonable adjustments, and how far favourable treatment can be taken, will ensure that this debate continues. Rights drawn from discrimination law will also have to be more enforceable if real change is to be achieved. The proposals for new domestic equalities legislation should aim to strengthen, rather than weaken, the disability equality duties, which should help increase sports provision at public authority level.

Although this thesis has not managed to confidently identify a human right to participate in sport for disabled people, the UN Convention on the Rights of Persons with Disabilities comes somewhere close to achieving this in Article 30.5 and the UK Government should be urged to ratify, without reservation, this important treaty. This, and the increasing recognition of sport in European law and policy, via concepts such

as 'personal integrity', could play an important role in implementing change and assisting organisations such as NGOs to facilitate better access for disabled people to participate in sport.

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*Appendix*

# **Single Equity Scheme Promoting equality of opportunity in sport**

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# Chair's foreword

Equity is not necessarily about treating people equally, but is concerned more with fairness, justice and inclusion. It's about taking action to ensure that all individuals are respected, have equality of opportunity, and have their rights protected. Sports equity is about making sure that everyone has an equal chance to take part in sport if they choose to do so, and that no one is discriminated against for reasons such as gender or gender reassignment, disability, race, religion or belief, sexual orientation, age, marital or civil partnership status, pregnancy or maternity, or social background.

We'd all like to believe that sport is open to everyone, but this is not always the case, as the results of research repeatedly show. For some – for example, people with a disability, black and minority ethnic (BME) people, and women and girls – there are a range of barriers which can hinder their opportunities to take part in sport, whether as a participant, official, volunteer, coach or club member. These barriers are unacceptable and as Scotland's national agency for sport, we're committed to taking action as an organisation and with our partners to help remove them.

Everyone has a unique range of skills and knowledge that they bring to sport. Recognising this and the value that different cultures, backgrounds, abilities and lifestyles contribute to developing sport and achieving organisational objectives is a clear sign of a healthy and inclusive organisation committed to diversity and continuous improvement. If we embrace diversity and strive to achieve equity within **sportscotland** and in Scottish sport, we will not only reap real benefits for our organisation and staff, but we will also make a positive and tangible impact on both increased sports participation and improved sporting performance – the two key aims of our Corporate Plan and the national strategy for sport.

This Single Equity Scheme (the 'Scheme') for 2006-2009 sets out how we will embed equity into our functions, and how we'll comply with our statutory Disability, Gender and Race Equality Duties, promoting equality between disabled people and other people, men and women, and people from different racial groups.

We are required to publish this Scheme by law but, regardless of our legal requirements, we are committed to promoting equity because we passionately believe that sport should be open to and enjoyed by all. We always welcome feedback on our approach to equity, and we look forward to continuing to work with our partners in sport to ensure that everyone has a sporting chance.

**Julia Bracewell OBE**  
**Chair**

# Executive summary

Equity is about fairness. Our vision for equity in Scottish sport is to ensure that discrimination in sport is tackled, barriers are broken down, current inequalities in participation, coaching and leadership are addressed, and that Scottish residents have equal opportunities to participate in sport at all levels. This must be regardless of factors such as their gender or gender reassignment, disability, race, religion or belief, sexual orientation, age, marital or civil partnership status, pregnancy or maternity or social background.

Our vision is supported by a number of key pieces of legislation, set to reshape the landscape of equity across the UK, and within sport. The three main pieces of legislation relevant to this vision, and to which this Scheme responds, are listed below:

- The Race Relations (Amendment) Act 2000 (RRAA 2000) which places on us a general duty to consider the need to eliminate unlawful racial discrimination, promote equality of opportunity and promote good relations between people of different racial groups. And as outlined under the Race Relations Act 1976 (Statutory Duties) (Scotland) Order 2002 (as amended in 2006), we have a specific duty to publish a Race Equality Scheme.
  - Under the Disability Discrimination Act 2005 (DDA 2005), we have a general duty to promote equality of opportunity between people with a disability and other people. This Act also requires us to publish a Disability Equality Scheme.
  - Under the Equality Act 2006, we have a general duty to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women. And, like the legislation for disability and race, we must publish a Gender Equality Scheme.
- This Single Equity Scheme (the 'Scheme') covers how we meet the general and specific duties outlined in each piece of legislation. A general duty is best described as the outcomes an organisation needs to achieve. A specific duty involves the steps an organisation must take to achieve the general duty, and thus reach equity, such as publishing an equity scheme or conducting an equal pay review.

The overall aim of these duties is to address the inequalities faced by some groups of Scottish society – including women, people with a disability, and black and minority ethnic (BME) people.

We are required to publish a Disability Equality Scheme by 4 December 2006, a Gender Equality

Scheme by 29 June 2007, and a Race Equality Scheme by 30 November 2007.

We have decided to combine the three schemes into one. We strongly believe that issues such as gender, disability and race should not be viewed as separate elements. The life and experiences of an individual will be affected by a variety of these factors, and some people are affected by multiple discrimination. The whole field of equity is moving towards an integrated approach, as demonstrated by the UK Government's decision to replace the three commissions for race, gender and disability with the Commission for Equality and Human Rights (CEHR). On a practical level, the duties outlined in each piece of legislation have many common elements, and the steps we'll take to tackle them will be similar, so it makes sense to take a combined approach and publish the three Schemes for disability, gender and race within one Single Equity Scheme.

In order to meet our public sector duties, and help to fulfil our vision for equitable sport, we have identified five goals for equity which all the key agencies involved in developing and delivering Scottish sport should strive to achieve. These goals provide a framework for the detail of our Scheme, and are as follows:

- a network of informed, well trained people working and volunteering in sport to deliver and promote opportunities for all;
- quality, accessible facilities in place that provide and promote opportunities for Scottish people to participate in sport;
- strong and equitable organisations supporting and promoting equality of opportunity for all in sport and in the workplace;
- the development of sporting pathways that promote opportunities for everyone to take part in sport at all levels to the best of their ability; and



- strong awareness of current equity issues, and promotion of the importance of embedding equity and ensuring equality of opportunities for all.

We have outlined a number of specific objectives that we will aim to meet in order to contribute to each of these goals for equity in Scottish sport. It is vital to realise that we can only be expected to contribute to the five goals. Their achievement will require contributions from all of the key partners working to develop and deliver sport in Scotland. The detail of how we will work to achieve our agreed outcomes is set out in our Generic Equity Action Plan, Disability Equity Action Plan, Gender Equity Action Plan and Race Equity Action Plan, which are included in this document as Appendices E to H.

As well as committing to our general duties, we have a number of specific duties to fulfil. One of these is publishing this Scheme. The others are as follows:

### **Involving and consulting stakeholders in the development of the Single Equity Scheme**

We are required to involve disabled people and consult with male and female stakeholders and people from different racial groups to shape the way we carry out our functions; develop our Equity Scheme; decide on equity goals; and carry out assessments to ascertain the equity impact of our policies, programmes and services. The specific requirements vary between each of the three public sector duties, as set out in more detail in the Scheme.

We've already made considerable inroads into this requirement, including research to find out the barriers that prevent participation, and setting up a number of advisory and consultation groups to help us develop this Scheme. We will continue to involve and consult with a range of stakeholders, as appropriate, as we develop and implement the Scheme and action plans.

### **Monitoring sportscotland's workforce**

All three of the public sector duties for race, gender and disability equality require us to undertake some form of equity monitoring of our staff. Again, the specific requirements differ between the three duties, but in essence, we need to look at the recruitment, retention, training, development and promotion of our staff by gender, disability and racial group, and publish the results of this monitoring each year.

In December 2006, we carried out an equity profile survey on all staff. We will repeat the exercise annually, and report the results to our Board for consideration as part of the ongoing development and implementation of the Scheme.

### **Equity impact assessment**

All three of the public sector duties require us to undertake some degree of Equity Impact Assessment of our policies, practices, services and functions. This means we'll look at how the work we do impacts on key excluded populations such as BME individuals, women and disabled people.

Plans are already in place to look at the areas outlined above, including ownership, training, consultation and publishing of the results.

### **Monitoring the impact of sportscotland's policies on the promotion of equality of opportunities**

All three of the public sector duties on race, gender and disability equality require us to set out in our Scheme how we will monitor the impact of our policies on disabled people, women and men, and BME people. By following the steps set out to conduct Equity Impact Assessments on our policies, programmes and services, we will be engaging with people from all three of these groups, which will allow the impact of the policies to be monitored. We will also monitor the impact through a variety of other means, including investment agreements, ongoing partnership working and formal reporting, as set out in the Scheme.

### **Procurement**

Each year, we form a number of contracts with external organisations to commission work on our behalf. When an external consultant undertakes work or provides services on our behalf, the obligation to comply with the public sector duties remains with us. However, this means

that we will need to build relevant equity considerations into the procurement process, to ensure that we meet the public sector equality duties in relation to this function. The Scheme and attached action plans address how we will meet these duties.

#### **Monitoring, reporting and review**

**sportscotland's** Equity Project Group, chaired by the Senior Management Team Equity Champion, will be responsible for overseeing delivery of, reporting on and reviewing the Scheme. It will meet regularly during the period of the Scheme. Progress on delivery will be reported on a regular basis to the Senior Management Team and the Board. Any issues regarding non-delivery or other significant problems will be escalated to the Senior Management Team as soon as possible.

We are required by law to publish annual reports on our Disability, Gender and Race Equality Schemes. An integrated report on the entire Scheme will be published by 4 December 2007, and then once every year after that. The three public sector duties require us to revise our Gender, Race and Disability Schemes within three years of their initial publication dates. Therefore, the entire Scheme will be reviewed and revised by 4 December 2009, and every three years thereafter. Towards the end of 2008, the Equity Project Group will develop a plan for the review and revision of the Scheme. Disabled people, women and men, BME people and key stakeholders representing the other key equity strands will be involved in this process as appropriate.

For more information on the Scheme, talk to our Ethics Manager on **0131 317 7200**, or visit **[www.sportscotland.org.uk/ethics](http://www.sportscotland.org.uk/ethics)**.

# 01

## Introduction and background to the Single Equity Scheme

### About sportscotland

**sportscotland** is the national agency for sport in Scotland. We are a non-departmental public body. Working with our core partners, our key responsibility is to facilitate the development of sport and physical recreation in Scotland.

Our goal is to get more people participating more often in sport in Scotland. Everything we do is part of the drive to achieve the dual challenges of increasing participation and improving performance.

**sportscotland** has a key role in supporting local authorities and Scottish Governing Bodies of sport (SGBs) to develop and implement their planning and delivery frameworks. We advise the Scottish Executive on sports policies and issues; invest Exchequer and Lottery funding primarily through local authorities and SGBs; and support partners in developing their contribution towards Scotland's national strategy for sport. We also identify and disseminate good practice and develop technical, policy and financial support. In all that we do, we strive to add value to the work of our partners.

Based in Edinburgh, we employ approximately 260 staff. The organisation is run by a Board of Directors, and is headed up at executive level by the Chief Executive Officer, who is supported strategically by the Senior Management Team. Further details of **sportscotland's** structure, teams and Board members can be found at [www.sportscotland.org.uk](http://www.sportscotland.org.uk), as can our Corporate Plan<sup>608</sup>.

**sportscotland** is also the parent company of the Scottish Institute of Sport, and the three National Centres of Glenmore Lodge, Cumbrae and Inverclyde.

The public functions of the Scottish Institute of Sport and the three National Centres are or will be subject to the general race, disability and gender equality duties. However, unlike **sportscotland** itself and an extensive list of listed public authorities in the UK, these organisations are not subject to the additional specific duties, such as the duties to publish a Race, Disability or Gender Equality Scheme. During the period of this first Scheme, we'll work with the Scottish Institute of Sport and the three National Centres to advise and support them as they comply with their general duties.

### Our Single Equity Scheme

Equity is about fairness. In sport, it's about making sure that people living in Scotland, regardless of factors such as gender or gender reassignment, disability, race, religion or belief, sexual orientation, age, marital or civil partnership status, pregnancy or maternity, or social background are able to participate and enjoy the benefits an active life has to offer.

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<sup>608</sup> Our Corporate Plan is currently under review. The new Corporate Plan for 2007-2011 will be available from spring 2007.

As the national body for sport in Scotland, there are a number of statutory public duties we need to consider in order to promote equity. Some of these are general duties, some of these are specific.

A general duty is best described as the outcomes an organisation should achieve, such as promoting equality of opportunity. A specific duty involves the steps an organisation must take to fulfil its general duties and reach equity, such as publishing an equity scheme or conducting an equal pay review. The overall aim of these duties is to address the inequalities faced by some groups of Scottish society – including women, people with a disability and black and minority ethnic (BME) people – and to promote equality of opportunity for people in these groups.

We have produced this Scheme as part of our statutory duty to promote equality, but also because we passionately believe that sport should be open and accessible to all.

### **Accountability and leadership**

Ultimately, our Chief Executive, Chair and Board have accountability for the delivery of this Scheme and thus for ensuring that we meet our public sector race, gender and disability duties. Our Senior Management Team has nominated one of its members to be the **sportscotland** Equity Champion, and to lead the Equity Project Group. The Equity Champion will ensure that a key reporting and communication link exists between the Equity Project Group and our Senior Managers and Chief Executive.

However, every member of staff in the organisation has a responsibility to ensure that **sportscotland** complies with its public sector equality duties, and to help deliver the actions within this Scheme. All staff will be made aware of these responsibilities through briefings and training, as discussed in more detail later in the Scheme.

## **Public Sector Equality Duties and our Single Equity Scheme**

### **Race Equality Duty**

Under the Race Relations (Amendment) Act 2000 (RRAA 2000) we have a general duty to consider the need to eliminate unlawful racial discrimination; promote equality of opportunity; and promote good relations between people of different racial groups.

As a result of the Race Relations Act 1976 (Statutory Duties) (Scotland) Order 2002 (as amended in 2006), we are also subject to a number of specific race equality duties. For example, we are required to monitor the profile of our staff by racial group ('the employment duty'), to carry out assessments on the impact of our policies on race equality, and to publish a Race Equality Scheme by 30 November 2007.

Details of our general and specific race equality duties are set out in Appendix C.

### **Disability Equality Duty**

Under the Disability Discrimination Act 2005 (DDA 2005), we have a general duty to promote equality of opportunity between people with a disability and other people. The detailed requirements of this duty are set out in Appendix A.

As part of this Act, we are also subject to a set of specific duties, one of which is to produce a Disability Equality Scheme, including an action plan. The Disability Equality Scheme is intended to help us meet our general duty more effectively. The details of all our specific duties under the DDA 2005 are also set out in Appendix A.

### **Gender Equality Duty**

Under the Equality Act 2006, we have a duty to eliminate discrimination that is unlawful under the Sex Discrimination Act 1975 or the Equal Pay Act 1970, to eliminate harassment on the grounds of sex (including gender reassignment, or pregnancy and maternity) and to promote equality of opportunity between men and women.

This duty came into force on 6 April 2007.

By 29 June 2007, we'll also be subject to a number of additional specific duties under this Act, as set out in more detail in Appendix B. One of these is to publish a Gender Equality Scheme, helping us to meet our general duty more effectively.

### **Other anti-discrimination and equalities legislation**

At the time of publication, public authorities do not have a duty to promote equality in relation to any of the other major equity strands (age, sexual orientation and religion or belief). However, our commitment to equity and diversity goes beyond simply complying with legislation; we are committed to promoting equality of opportunities as far as possible for all people in Scottish society.

In light of this commitment, we'll give due regard to promoting equity for all, regardless of age, sexual orientation and religion or belief when developing policies and carrying out our functions.

This includes:

- considering age, sexual orientation and religion or belief when monitoring the equity profile of our staff;
- considering the impact of these factors, as appropriate, when carrying out Equity Impact Assessments on our policies, programmes and services; and
- including actions in our Equity Action Plan (for example, the delivery of staff equity training) that relate to these three equity strands as well as to disability, gender and race equality.

In addition to fulfilling our race, disability and gender equality duties, we will continue to comply with the following additional legislation:

- the Equal Pay Act 1970;
- the Sex Discrimination Act 1975 (as amended in 1986 and 1999);
- the Race Relations Act 1976 (as amended in 2000);
- the Disability Discrimination Act 1995 (as amended in 2005);
- the Human Rights Act 1998;
- the Scotland Act 1998;
- the Employment Equality (Religion or Belief) Regulations 2003;
- the Employment Equality (Sexual Orientation) Regulations 2003;
- the Gender Recognition Act 2004;
- the Civil Partnership Act 2004; and
- the Employment Equality (Age) Regulations 2006.

We will also comply with any future anti-discrimination or equalities legislation that comes into force during the period of this Scheme. This includes those elements of the Equality Act 2006 which will make it unlawful for an organisation involved in providing goods, facilities or services to discriminate on grounds of religion or belief or sexual orientation<sup>609</sup>.

### **Why a Single Equity Scheme?**

Our decision to publish one Scheme, rather than three separate Disability, Gender and Race Equality Schemes was influenced by a number of factors.

We strongly believe that it's vital not to view issues such as gender, disability, race, age, sexual orientation and religion or belief as wholly separate elements. The life and experiences of any single individual in Scotland will be affected by a variety of these factors, and some individuals are affected by multiple discrimination. This view is commonly backed up by research and the views of contributing partners, and is clearly a strong factor in the UK Government's decision to replace the three Commissions for race, gender and disability equality with the Commission for Equality and Human Rights (CEHR). Therefore, it is important not to separate out the actions to tackle inequalities and discrimination into three

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<sup>609</sup> The relevant elements of the Equality Act 2006 are due to come into effect by April 2007.

separate strategies, especially when many actions will help us to meet our three public sector duties simultaneously.

The Race, Disability and Gender Equality Duties have many common elements. All three duties require us to have 'due regard' to the need to eliminate discrimination and to promote equality. There are also many similarities in the specific requirements under each of these equality duties, for example, shared duties to assess and consult on the impact of proposed policies, monitor existing policies, and monitor our staff equity profile.

The current context of evolving anti-discrimination and equalities legislation means it's important that we look to the future. The approach we develop now must be one that can easily be adapted at a future date to encompass any additional public sector duties to promote equality in relation to religion or belief, sexual orientation and age. We believe the rationale behind this approach is strengthened by the ongoing Discrimination Law Review and the potential for a single Equality Bill by 2009, as well as the decision to replace the three Commissions for race, gender and disability equality with the CEHR.

In order to genuinely mainstream equity into the functions of **sportscotland**, it is important that our 10 staff and partners are able to understand the context and implications of the whole equity agenda. Having three separate schemes for race, gender and disability equality would simply reinforce the misconception that each area of action is separate, unrelated, and additional to our core work. In order to change the culture within sport, it will be vital to demonstrate that equity is integral to the existing work of organisations, not a burdensome 'add-on'. Having this Scheme will also significantly reduce duplication.

The requirement to publish the three Schemes has been placed on us at largely the same time.

Therefore, the processes to develop the three Schemes would have to run almost simultaneously, so it's more effective to combine the development processes.

## Why equity and not equality?

We've chosen to publish a Single Equity – rather than Equality – Scheme as this is the terminology that **sportscotland** and Scottish sport already uses. Equity is about the promotion of equality of opportunities and fair – rather than necessarily equal – treatment, which is in essence what the three equality duties focus upon. Equity recognises that everyone is different, and that sometimes people need to be treated differently – and on occasion more favourably – in order for barriers, inequalities and discrimination to be overcome. However, in this Scheme, the terms equity and equality have both been used interchangeably, in order to reflect the requirements of the three public sector equality duties.

In 2005 we published an Equity Strategy (which has now been superceded by this Scheme)<sup>610</sup>, and are currently engaged in the implementation and roll out of the *Equity Standard: A Framework for Sport* ('the Standard').

## How sportscotland will comply with the Race, Disability and Gender Equality duties

Although we recognise the benefits of producing a Scheme, we are fully aware of the need to ensure that the specific requirements of each duty are addressed in an explicit and discernible way.

There are a number of requirements specific to each duty. For example: the Race Equality Duty requires promotion of good race relations; the Disability Equality Duty requires the involvement of disabled people in developing the Disability Equality Scheme and the promotion of positive attitudes towards disabled people; and the Gender Equality Duty requires us to publish an Equal

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<sup>610</sup> Working Towards Diversity and Inclusion in Sport: sportscotland's Equity Strategy (**sportscotland**, 2005).

Pay statement by 28 September 2007.

When developing our Scheme, we've taken full account of all the specific requirements, and these have been addressed in the Scheme. To date, we've taken steps to ensure that we meet the specific Disability, Gender and Race duties, listed below.

- Including distinct sections on meeting the various elements of the Disability, Gender and Race Equality Duties throughout the Scheme.
- Including disability, gender and race specific objectives in the Scheme.
- Identifying within the Generic Equity Action Plan those actions that will help to promote equality of opportunities between disabled people and other people, men and women, and people from different racial groups.
- Including separate disability, gender and race action plans which set out the additional actions that are specific to the promotion of equity between disabled people and other people, women and men, and people from different racial groups respectively.
- Ensuring that our arrangements to carry out Equity Impact Assessments on our policies and functions specifically consider the impact on disability, gender and race equity (as well as on the other major equity strands).
- Including actions to fulfil our duties in relation to the equal pay elements of the Gender Equality Duty.
- Involving disabled people in the development of the disability equity elements of the Scheme by organising disability focus groups, attending external disability working groups, and inviting disabled people and their representatives to provide feedback on an earlier version of the Scheme.
- Involving BME people and their representatives in the development of the race equity elements of the Scheme, through the establishment of a race equity consultative group in 2006.
- Involving women and men in the development of the gender equity elements of the Scheme, through holding a gender consultation event, and inviting written feedback on the gender equity elements of the Scheme.
- Involving a wide range of staff, both male and female, in the development of all aspects of the Scheme, notably through the Equity Project Group.
- Ensuring that our employment monitoring arrangements enable data to be disaggregated in order to produce specific reports on disability, gender and racial group (as well as age, sexual orientation and religion or belief).
- Identifying which of our functions are relevant to each of the three duties, and setting this out in the Scheme.

# 02

## Achieving the visions for Scottish sport and equity

### A vision for Scottish sport

The vision for Scottish sport is for Scotland to be:

- a country where sport is more widely available to all;
- a country where sporting talent is recognised and nurtured; and
- a country achieving and sustaining world-class performance in sport.

At the core of this vision is the principle of sport for all. That means that all Scottish residents, regardless of gender or gender reassignment, disability, race, religion or belief, sexual orientation, age, marital or civil partnership status, pregnancy or maternity, or social background should have equal opportunities not only to participate in sport recreationally, but also to develop talent and to achieve excellence.

Underpinning the vision to transform Scotland into a truly sporting nation, as set out in the national strategy for sport, are the dual challenges of increasing participation and improving performance. Rising to meet these challenges will be critical to the successful achievement of the vision for Scottish sport.

The building blocks – the components that will help overcome the challenges and turn the vision into reality – are four separate but interdependent national policy objectives. Achieving these objectives must be the aim of everyone involved in the planning, development and delivery of sport in Scotland.

Together, these organisations must deliver:

- well-trained people;
- strong organisations;
- quality, accessible facilities; and
- improved pathways for all.

The challenges and building blocks of the national strategy for sport set the context for everything

that **sportscotland** does. Therefore, every action that we carry out to tackle discrimination, promote equality of opportunity and promote good relations as part of this Scheme will also be contributing directly to the achievement of the vision for Scottish sport.

### A vision for equity in Scottish sport

Our vision for equity in Scottish sport is to ensure that discrimination in sport is tackled, barriers are broken down, current inequalities in participation and leadership are addressed, and that Scottish residents have equal opportunities to participate in sport at all levels, regardless of factors such as their gender or gender reassignment, disability, race, religion or belief, sexual orientation, age, marital or civil partnership status, pregnancy or maternity, or social background.

Success would be demonstrated by an increase in participation and improved performance in Scottish sport by people from groups that are currently under-represented. This would directly contribute to meeting the dual challenges set for Scottish sport of increasing participation and improving performance.

To help achieve the overall visions for equity and for Scottish sport as a whole, organisations involved in the planning, development and delivery of sport must work towards the achievement of the following five goals:

#### **1. Informed, well trained people**

A network of informed, well trained people working and volunteering in sport to deliver and promote opportunities for all.



## **2. Quality, accessible facilities**

Quality, accessible facilities in place that provide and promote opportunities for Scottish people to participate in sport.

## **3. Strong and equitable organisations**

Strong and equitable organisations supporting and promoting equality of opportunity in sport and in the workplace for all.

## **4. Development of sporting pathways**

The development of sporting pathways that promote opportunities for all to take part in sport at all levels to the best of their ability.

## **5. Awareness and promotion of equity**

Strong awareness of current equity issues, and promotion of the importance of embedding equity and ensuring equality of opportunities for all.

# **Current inequalities in Scottish sport**

## **Inequalities in participation**

Increasing participation is critical to the achievement of the vision for Scottish sport. More people in Scotland taking up sport, and an increased frequency of participation by those who already do, will help to build a healthier, more active nation and will also help to improve Scotland's sporting performance.

Yet despite the benefits of sport, research shows that 50% of people in Scotland still do not take part in any form of sport or physical recreation in its broadest definition<sup>611</sup>. Furthermore, research also shows that people from particular groups of society – notably older people, women and girls, disabled people, BME people and people from more deprived social backgrounds – participate significantly less frequently than the average population.

In Scotland as a whole, 63% of adults and 96% of children aged 8-15 take part in sport and physical recreation (excluding PE classes) at least once a month. All of the figures below are also based on participation frequency of at least once a month.

### **• Female participation in sport is considerably less frequent than male participation**

59% of women take part in sport compared with 68% of men, and 94% of girls take part in sport compared with 98% of boys. This shows that, as a whole, female participation in sport is considerably less frequent than male participation.

### **• People with a disability are much less likely to take part in sport**

Research shows that people with a disability, who represent 23% of the adult Scottish population, are also much less likely to participate in sport. Just 39% of adults who regard themselves as having a long-term illness, health problem or disability that limits their daily activity (Census 2001 definition) take part in sport and physical recreation, compared with 69% of those who do not have a disability.

### **• Participation of people with a disability decreases with age**

Both lower participation and a higher incidence of disability are strongly related to increasing age, so it is more accurate to compare the participation of disabled people and non-disabled people according to different age groups.

The data shows that, for the youngest adults (16-24), there is actually little difference in participation for those with a disability (78%) and those without a disability (80%). However, the effects of disability on participation are much greater for older age groups: for those aged 35-54, 46% of those with a disability participate compared with 69% without a disability; and for those aged 55 and over, 30% of those with a disability participate compared with 58% of those without a disability.

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<sup>611</sup> Scottish Opinion Survey: rolling average 2003-2005 figures.

**• Fewer people from black and ethnic minority populations take part in sport, compared to white adults in the same age range**

The most recent national participation figures indicate that 68% of the adult minority ethnic population take part in sport compared with 63% of the adult white population (using the standard 2001 Census definitions).

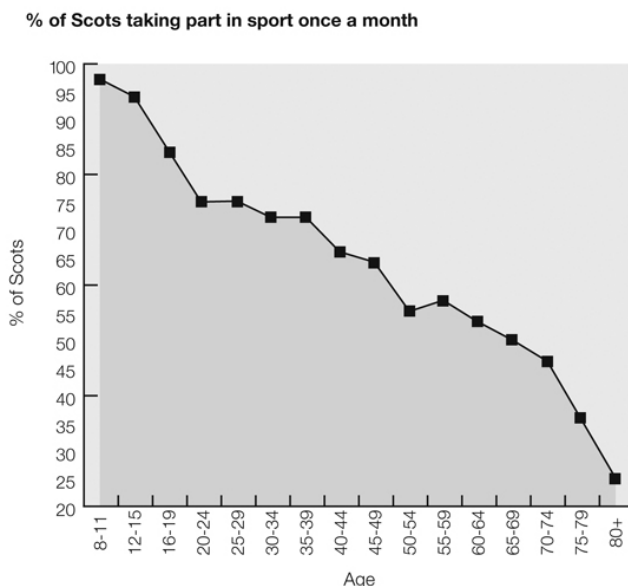
However, this difference is accounted for by the different age profiles: 75% of minority ethnic adults are aged 16-44, compared to 50% of white adults. Therefore, these figures are not comparable.

Taking into account this and other factors, the relevant comparisons for adults are that 60% of those from ethnic minorities aged 25-34 participate compared with 74% of those from the white population in this age group; 51% of ethnic minorities participate compared with 69% of the white population in the 35-44 age group; and 33% of ethnic minorities participate compared with 63% of the white population in the 45-54 age group.

**• Participation declines from 97% of 8-11 year olds to 29% of those aged 80 plus**

Age is the single most important factor in whether people are likely to take part in sport. Even with the broadest definition, participation declines from virtually all (97%) of 8-11 year-olds to 29% of those aged 80 or more.

Participation therefore declines significantly with age, but there are some key transitional points in life where participation tends to drop off, including primary to secondary school and secondary school into further education or work. A graph illustrating the rate of participation decline according to age is shown below.



**• The lower socio-economic groups have the lowest participation rates in sport**

Participation is also influenced by social background, with lower participation rates amongst the lowest socio-economic groups. Based on the Scottish Index of Multiple Deprivation 2004, 51% of those who live in Scotland's 15 most deprived areas take part in sport compared with 66% of those who live in other areas.

### **Inequalities in coaching and sports leadership**

In 2004, **sportscotland** conducted research into women in sports leadership in Scotland and the UK, which exposed some considerable inequalities in leadership positions, as the examples listed show.

- Across the UK, only one in four coaches was female.
- The proportion of female coaches decreases as the level of coaching increases. At Olympic level, only 8% of coaches were female.
- In Scotland, most female coaches are found at introductory and club level: of 20 clubs that have a national coach, only one club had a female national coach.
- The study found that women were also under-represented in other areas of sports leadership in Scotland. For example, only 18% of clubs had a female chair, 18% of clubs had a female head coach and 10% of clubs had a female team manager.

Similarly, the report of the Coaching Task Force (2002)<sup>612</sup> concluded that women, disabled people and individuals from minority ethnic backgrounds are under-represented in coaching, particularly at performance and elite levels.

Information from the survey of coaches undertaken for the *Coaching Scotland Research Report*

(**sportscotland**, 2006) concluded that, of the 137 paid coaches, 76% were male and 24% female.

Only 12% of the full-time paid coaches were female.

Further evidence of the under-representation of women at the elite end of the coaching spectrum was provided by the recent audit of Scottish Gymnastics<sup>613</sup>. The audit showed that the sport of gymnastics attracts a high percentage of females into coaching positions (93% of coaches gaining Foundation coaching awards were female), but that the gender balance switches to 61% male and 39% female when looking at high performance and international performance coaches. Work to identify the coaching profile within other sports is planned.

### **Additional research**

There has been little additional quantitative research into the involvement in sport of disabled people, BME people, older people, people with different religious backgrounds or beliefs, and lesbian, gay, bisexual and transgender people, although the boosted sample used in our participation survey does allow data on some of these groups to be captured.

The main reasons for the lack of additional quantitative research are related to difficulties in identifying and targeting sample groups for research, and in identifying sample groups of sufficient size to allow statistical analysis to occur.

We have identified this area as a gap, and during the period of the Scheme will work with our partners, particularly other sports councils in the UK, the Scottish Executive and major equity organisations in the UK, to identify possible arrangements for common working in this area. In terms of qualitative research, we have conducted several pieces of research in recent years into the barriers facing particular groups of Scottish society, and potential solutions to address these barriers, as set out in Appendix D.

These research findings, along with the information gathered from consulting with disabled people and their representatives, women and girls, and BME people during the development of the Scheme, have identified a range of barriers to sports participation by disadvantaged groups in Scottish society. This has, in turn, helped us shape this Scheme.

### **sportscotland's contribution to the vision for equity in Scottish sport**

Our contribution towards the vision and goals for equity in Scottish sport will be to firstly ensure that equity is mainstreamed into the relevant aspects of our work from the outset. This

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<sup>612</sup> DCMS, The Coaching Task Force – Final Report. London: DCMS Sport and Recreation Division, 2002.

<sup>613</sup> Coaching Audit and Workforce Development Plan, Stirling: John Lyle Consulting for Scottish Gymnastics, 2006.

includes policy development, programme delivery, employment and recruitment, and investment in partner organisations, sports development and facilities.

When delivering our functions, we will have to give due regard to equity: that is, consider the principles of proportionality and relevance when considering whether equity relates to each function. We will need to pay greatest attention to mainstreaming equity into those functions which are most relevant to one or more of the public sector duties. Clearly, some of our functions will be more relevant to the duties than others. We have set out which of our policies and functions are most relevant to the three duties in Appendix I of the Scheme.

Secondly, we will also take a role in influencing and encouraging our key partners – to varying degrees – to promote equity throughout their functions. Our degree of influence and support will depend on factors such as the amount of investment we make in an organisation.

We cannot achieve this vision of equity for sport on our own. It will take a contribution from everyone, notably our key partners in Scottish sport – local authorities, SGBs, sports clubs, the Institute Network and the Scottish Executive – if the vision for equity in Scottish sport is to be achieved.

It is also important to consider that many of our key partners – notably the local authorities – are also subject to the public sector duties to promote disability, gender and race equality. This means that these organisations are themselves responsible for ensuring they tackle discrimination and harassment, promote equality of opportunities and promote good relations between different groups in all aspects of their work to develop and deliver Scottish sport.

We will therefore not be responsible for these organisations meeting their duties in relation to the development or delivery of sport at the local level. Instead, this Scheme sets out how we, **sportscotland**, will contribute to the achievement of the vision for equity in Scottish sport. Our commitment to contributing to the vision of equity is also to be set out in our Corporate Plan for 2007-2011, which can be downloaded from our website [www.sportscotland.org.uk](http://www.sportscotland.org.uk) or obtained from a member of our communications team.

## **sportscotland's existing work to promote equality of opportunities**

Taking action to promote equity is not a new concept for **sportscotland**: we already undertake a great deal of work across the organisation with the aim of promoting and achieving equity, which will directly impact on the achievement of the vision and goals for equity in Scottish sport.

### **Work to promote opportunities for disabled people**

#### **• Delivery teams and staff**

We work in close partnership with Scottish Disability Sport (SDS), the Scottish Governing Body for disability sport, ensuring the development of partnerships which provide sporting opportunities and provision for disabled people. Our delivery teams work together to provide an integrated and inclusive approach to investment. Disability sport is part of a number of staff roles at **sportscotland**. These staff work with a range of sports to support provision of opportunities for disabled people.

#### **• Disability Inclusion training courses**

In partnership with SDS and the Youth Sport Trust, we've developed a Disability Inclusion training course. Initially, the course will be aimed at the Active Schools Network. All local authorities must ensure that every Active Schools Coordinator at primary and secondary level is given the opportunity to attend the course by March 2008. The training is aimed at raising disability awareness, and should help to ensure that children with disabilities within mainstream schools are given improved opportunities to participate in sport.

#### **• Active Schools**

'Children and young people with a disability' is one of five key groups targeted for inclusion by the Active Schools programme. In order to assist the Active Schools Network of staff to achieve this target, an Active Schools Inclusion Networking group was established. One coordinator attends the group from each local authority, and is the lead contact for disability inclusion for that authority. The networking day serves as an opportunity for information sharing and the promotion of best practice within inclusion.

At the time of publication, there are seventeen people employed in the Additional Support Needs (ASN) sector: three full time Active Schools Coordinators (ASC) (ASN), twelve part time ASC ASN posts and two full time ASC (Inclusion) posts.

#### • **Facilities Development**

Through published technical guidance and advice available from our project managers, applicants and building professionals are able to design and specify buildings which minimise the physical barriers that may prevent use by some of the most vulnerable and disadvantaged groups in the community.

Our Facilities Development team seeks to ensure that the facilities in which we invest are accessible to all members of the community. From the first point of contact with the applicant, we provide assistance on build and specification required, and management of the facility and programme development, ensuring that all sections of the community have access to the new facility and its services. Through the assessment process, we take steps to ensure that the design, specification, operation and programming of the facility is accessible and inclusive. Project monitoring is then carried out to ensure that the applicant does carry forward the practices and principles detailed throughout the application process.

#### • **Performance sport**

sportscotland has increased investment into SDS in recent years, with a focus on performance development staff. Appointments made so far a Performance Development Officer for SDS to work across six identified 'strand one' sports and a Disability Swimming Development Officer within Scottish Swimming. Further investment means a Disability Athletics Development Officer post in partnership with Scottish Athletics is planned.

Investment into performance sport is made directly to each SGB and then to athletes identified by each SGB through its selection policy. We're committed to reviewing all SGB selection policies on an annual basis as part of this Scheme.

#### • **Provision of support to disabled people**

We have taken care to ascertain the support needs of disabled people when holding events and meetings. For example, we provided BSL interpreters and hearing loops during our disability focus groups held in summer 2006, and again provided BSL interpreters at the UK Equity Standard seminar in December 2006. One of the actions in this Scheme is to ascertain particular support needs of disabled people before planning events in future, and responding to these needs as appropriate. We are also committed to providing our corporate publications in alternative formats on request as appropriate and reasonable.

#### **Work to promote opportunities for BME people**

##### • **Participation data**

Our annual participation survey has been boosted to include a sample of at least 650 minority ethnic adults (aged 16+). This allows for a top line comparison of sports participation based on census categories of white versus black and minority ethnic populations in Scotland.

##### • **Partnerships**

We've developed relationships with various organisations with a remit for race equality. These organisations include the Council for Ethnic Minority Voluntary Organisations in Scotland, Black and Ethnic Minorities Infrastructure in Scotland, Sporting Equals and the Glasgow Anti Racist

Alliance. Representatives of these organisations, plus others with a remit for race equality are now participating in **sportscotland's** Race Equity Consultative Group.

- **Positive representation**

We are committed to promoting BME sport through our marketing and communications functions.

With this in mind, we try to ensure that we feature individuals from a range of racial groups taking part in sport in our publications. We are also committed to making our corporate publications available in alternative languages on request.

- **Employment**

We continue to undertake minority ethnic employment monitoring in line with our duties under the Race Relations Amendment Act 2000. In December 2005 and January 2007 we undertook equity profiling exercise involving our staff and Board members which included questions on both racial group and religion or belief.

- **Equity Strategy and Equity Standard**

We published our Equity Strategy: *Working Towards Diversity and Inclusion in Sport* in 2005. This strategy is based on the implementation of the *Equity Standard*, the aim of which is to embed equity in all the practices and services of sports organisation. To achieve the Standard, organisations must be able to demonstrate their commitment to promoting opportunities for BME people, as well as women and girls, disabled people and other groups under-represented in Scottish sport. In 2006, we achieved Foundation level of the Equity Standard. We are now working towards the Preliminary level of the Standard, which requires us to have an Equity Action Plan including appropriate actions related to increasing equity between racial groups (as well as actions related to increasing equity for disabled people, and between women and men).

### **Work to Promote Opportunities for Women and Girls**

- **Staff**

In 2005, **sportscotland** employed a Women, Girls and Sport Officer, with a remit for overseeing the development and coordination of work within our organisation to promote women and girls' sport.

As well as providing advice and guidance on women and girls' sport as part of the development of

our work, the Women, Girls and Sport Officer works closely with key partners – notably the Active

Schools Network – to deliver training. In addition, the Officer works closely with the Women's Sport Foundation to develop guidance, conduct research and share good practice.

- **Research**

In 2004, we conducted research into women in sports leadership in Scotland and the UK. The findings of this research are discussed more in Section 2, 'Current inequalities in sport'. A significant amount of work went into conducting research into the barriers to sports participation for women and girls. The findings of this research are published in the report *Increasing Demand for Sport and Physical Activity for Adolescent Girls in Scotland* (2006) This is supplemented by *Increasing Demand for Sport and Physical Activity for Adolescent Girls in Scotland: Exploring Ideas, Suggesting Solutions* which contains recommendations on how to involve adolescent girls in sport and physical activity, aimed at practitioners involved in delivering sport.

- **Guidance**

In 2005, we published the guidance document *Making Women and Girls More Active: A Good Practice Guide*. This document presents recommendations for overcoming the major barriers to

women and girls' participation in sport, and showcases good practice examples of existing work

taking place within Active Schools, sports clubs, and in other parts of the community.

- **Strategy**

In 2006, **sportscotland** developed a five year women, girls and sport strategy. A range of organisations and partners – including the Scottish Executive and the Women's Sport Foundation – were consulted and encouraged to provide feedback during the production of the document. Many of the actions within the strategy have been incorporated into the generic and gender specific action plans within the Scheme in order to help fulfil our Gender Equality Duties.

# 03

## Fulfilling the general duties

### The objectives of sportscotland's Single Equity Scheme

We aim to achieve a number of objectives in relation to each of the five goals for equity in Scottish sport. The objectives we've set for ourselves have been influenced by a number of factors:

- the findings of our research into barriers to participation by disabled people, women and girls, and BME people;
- the outputs of engagement with disabled people, BME people, and women and men, as set out in more detail in the section on involving stakeholders in the development of the Scheme. We have tried to develop the key objectives to reflect some of the main concerns of the representatives of these groups;
- the development of the Scottish Executive's new national strategy for sport in Scotland; and
- the development of our new Corporate Plan 2007-2011.

These key objectives reflect both the priorities for action identified through research as well as our

own priorities for action and as such are closely aligned with the vision for Scottish sport as set out in the Scottish Executive's new national strategy for sport.

By the end of the period which is covered by this Scheme (up to 31 December 2009), sportscotland will aim to achieve the following objectives. Unless an earlier date is specified in relation to each outcome, the date for achievement will be 31 December 2009.

#### Goal: informed, well trained people

##### Objectives

- All our staff will be aware of their responsibilities under the disability, gender and race equality duties, and will be aware of the impact of these duties on their work by autumn 2007, following appropriate briefings and/or training.
- By summer 2007, key staff involved in the development and delivery of our policies and functions will have been trained to carry out assessments to determine the impact of our policies on women and men, disabled people and other people, and people from different racial groups (plus the impact on age, sexual orientation and religion and belief where appropriate).
- By the end of 2007, we will understand the equity training needs of our staff and a training plan will be in place to take account of these needs. By December 2009 we will have repeated the training needs analysis at least once.
- The Active Schools staff network will be trained in Disability Inclusion by March 2008, and a plan for future roll out to other partners will be developed by the end of 2008.
- By December 2009, the Active Schools Network staff and other key partners will have a good understanding of the issues facing girls and women and how they, by taking a targeted approach to provision, can help to overcome these issues.
- By December 2009, the Active Schools Network staff and other key partners will have a good understanding of the issues facing people from BME groups and how they can help to overcome these issues by taking a targeted approach to provision.
- An initial network of trained Equity Standard advisers and sports equity trainers will be in place by the end of 2007 to support our partners as they take steps to mainstream equity throughout their functions through achieving the Equity Standard. The network will continue to expand until December 2009, and will include experts in disability, gender and race equity wherever possible.
- By December 2009, key staff and volunteers in the Scottish Governing Bodies of sport (SGBs) involved in the implementation of the Equity Standard will have undergone at least introductory sports equity training.



### **Goal: quality, accessible facilities**

#### **Objectives**

- Throughout the period of the Scheme, **sportscotland** guidance on the planning, design, management and programming of sports facilities will continue to promote equality of opportunity for disabled people, women and girls, BME people and other under-represented or disadvantaged groups by providing practical advice and good practice examples.
- Throughout the period of the Scheme, guidance on the development, design, management and programming of sports facilities will increasingly reflect the needs of people from disadvantaged or under-represented groups, as a result of greater involvement by people from these groups in the development of the guidance.
- By the end of 2007, criteria for making investment in sports facilities will include criteria on provision for disabled people, women and girls and/or BME groups.

### **Goal: strong, equitable organisations**

#### **Objectives**

- We will continue to be an equitable employer which tackles discrimination and promotes equality of opportunity and fair treatment for all staff and potential employees.
- We will monitor and report annually on how many recorded instances of discrimination and harassment in the previous year were related to gender, race, disability, gender reassignment, pregnancy or maternity, age, marital or civil partnership status, sexual orientation or religion or belief, and we will have effectively tackled any discrimination or harassment of our staff that occurs on these grounds.
- By December 2009, following continuing review of our HR policies/procedures and the adoption of positive action initiatives if required, our workforce will be more diverse and representative of the Scottish population, compared to the staff profile obtained in December 2006.
- By December 2009, we will have successfully reduced any pay gap between women and men that is identified in our equal pay review undertaken in 2007-2008.
- By the end of the period of the Scheme, our policies and functions will help to promote opportunities for disabled people, women and girls, and BME people wherever appropriate and possible, as a result of Equity Impact Assessments being carried out and changes being made as necessary.
- From spring 2007 onwards, any new policies and functions will pay due regard to the implications for disabled people, women and girls, and BME people, as a result of Equity Impact Assessments having been built into the development process.
- Through the development of an equity monitoring framework, we will better understand the extent to which our investment in partner organisations and facilities promotes equality of opportunities for disabled people, women and girls, and BME people by December 2009.
- By the end of our next Corporate Plan period, governing bodies in receipt of **sportscotland** investment will have achieved at least Foundation level of the Equity Standard: A Framework for Sport<sup>614</sup>. (Note: this objective is still being considered by the **sportscotland** Board – a decision will be made by the end of April 2007).
- By the end of 2008, at least 20 Scottish Governing Bodies of sport will have received support and guidance to assist them towards achieving the Equity Standard.
- Throughout the period of the Scheme – and beyond – our Partnership Managers will add value to the work of our partners by promoting equality of opportunity and good relations between women and men, disabled people and other people, and people from different racial groups.

### **Goal: sporting pathways that promote equality of opportunities for all**

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<sup>614</sup> The level of requirement will depend on factors including the capacity of the organisation and the level of **sportscotland** investment in that organisation.

## **Objectives**

- Scottish Disability Sport strand one sports will have in place performance plans which include a focus on pathways for disabled people by summer 2007.
- Targeted programmes for women and girls – supported by **sportscotland** – will be in place, with the aim of increasing and sustaining participation among women and girls in sport and physical activity.
- A network will be in place to support the further development of female athletes and coaches by the end of the period covered by the Scheme.
- By the end of 2007, at least twelve sports will have coaching workforce development plans in place that identify gaps in the coaching workforce in terms of gender, disability and racial group.
- By the end of 2009 and thereafter, the strategic/development plans of our key partners – including local authorities, the national centres, Scottish Governing Bodies, and the Institute Network – will include specific and measurable actions to provide increased and targeted opportunities for disabled people, women and girls, and BME people.
- Local authority Active Schools implementation plans, 2008-2011, will give due regard to provision of opportunities for disabled children, girls and BME children by December 2007.
- By the end of 2007, we will have identified a number of minimum criteria encompassing equity to be recommended as good practice in the criteria of local authority and Scottish Governing Body club accreditation schemes.
- Up to 100 new or upskilled existing female coaches, and up to 30 new female coach mentors, will be in place by December 2009 as a result of our Women into Coaching programme.

## **Goal: awareness and promotion of equity issues**

### **Objectives**

- By the end of the period of the Scheme, our communications functions will increasingly promote equality of opportunity by including the participation and successes of disabled people, women and girls, and BME people.
- We will be able to demonstrate a measurable increase in the quantity and quality of marketing and publicity of women and girls' sport through our communications functions.
- We will have developed targeted resources, guidance and programmes that will assist our partners to develop more gender sensitive services and programmes.
- Throughout the period of the Scheme, where appropriate and reasonable, our published and electronic materials will be made available in alternative and accessible formats.
- By the end of 2008, we will have published resources which identify and share good practice in relation to the provision of sporting opportunities for disabled people, and people from different racial groups, and partners will continue to have access to the materials we have published on engaging women and girls in sport.
- By summer 2008, one or more mechanisms to allow our partners to share information and good practice in relation to the provision of opportunities for disabled people, women and girls, and BME people will be in place.
- By summer 2008, Scottish Governing Bodies will have a greater awareness of the equalities and anti-discrimination legislation that affects them (in relation to the six equity strands, including gender, race and disability equity).
- From summer 2007, our research reports and/or policy implication analyses of research reports will include an analysis of the potential equity issues wherever appropriate, including potential impacts of the findings on women and girls, disabled people, and people from different racial groups.
- During the period of the Scheme and thereafter, our policy development process will take into account relevant evidence, information and issues relating to gender, disability and race equity.
- During the period of the Scheme and thereafter, we will ensure that relevant equity issues – including information on gender, disability and race equity – are integrated into the content and programmes of relevant sporting conferences and seminars.

- Our website will be more accessible to people with visual impairments. It will meet the minimum requirements of level A and level AA of the eGIF W3C Web Accessibility Initiative by March 2007 and March 2009 respectively.

## Achieving the objectives

We've set out how we intend to achieve these objectives in our Equity Action Plans (Appendices E, F, G and H).

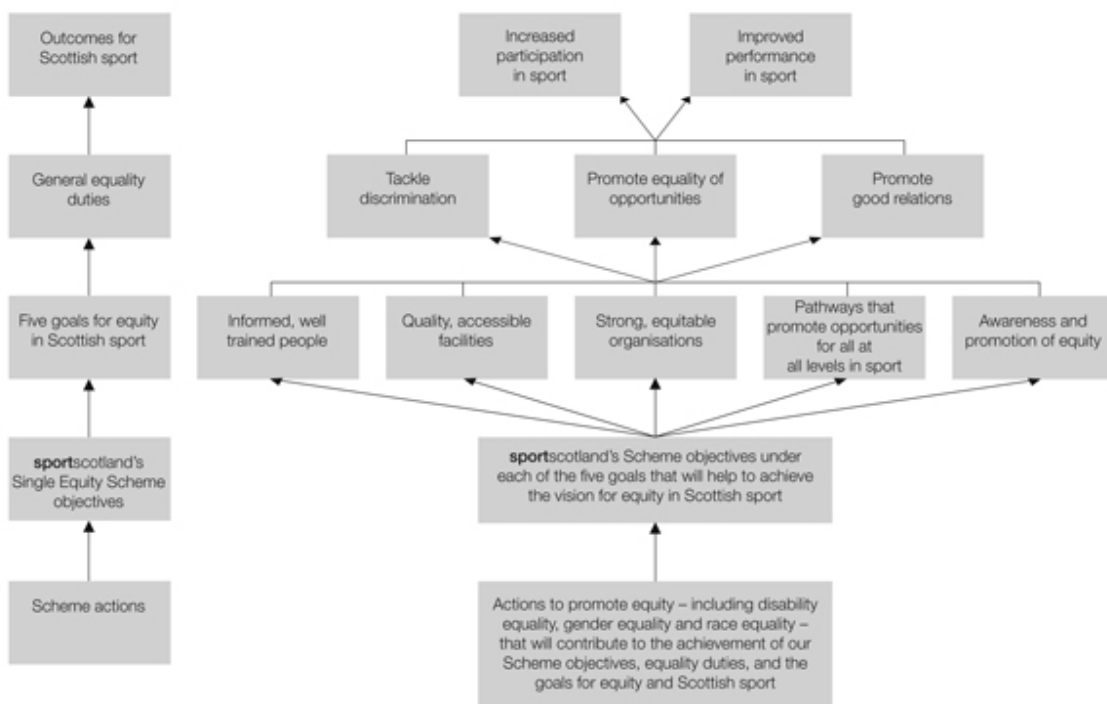
The Generic Equity Action Plan (Appendix E) details all of the actions intended to tackle discrimination and harassment, and/or promote equality of opportunity or good relations in relation to gender, disability, race, and indeed other equity strands where appropriate. It sets out who at **sportscotland** will be responsible for leading on the delivery of each action, a timescale for action and, where appropriate, identifies resources required.

In order to meet the requirements of the three duties, we've identified within the Generic Equity Action Plan whether each action relates to disability, gender or race equality, or if it relates to one of the other three major equity strands.

We've also developed separate action plans for disability, gender and race equity which identify additional actions that will specifically impact on the promotion of opportunities for disabled people (Appendix F), women and men (Appendix G) and BME people (Appendix H).

Our Equity Project Group will be responsible for overseeing progress and reporting on the delivery of the actions, as discussed in more detail in the section on 'monitoring, reporting and review'.

The following diagram shows how the actions we've identified in our equity plans will help to achieve our Scheme objectives and our general equality duties. It also shows how these actions will contribute to the five equity goals and overall challenges for Scottish sport.



# 04

## Fulfilling the specific duties

### Involving and consulting stakeholders in the development of the Single Equity Scheme

The requirements to involve and consult with stakeholders vary between the three public sector duties:

- The Disability Equality Duty requires that we involve disabled people 'who appear to the authority to have an interest in the way it carries out its functions' in the development of its Disability Equality Scheme.
- The Gender Equality Duty requires that we consult with male and female stakeholders and employees in order to ensure that our gender equality goals are chosen with the support of those most likely to be affected by them.
- The Disability, Gender and Race Equality Duties require us to involve disabled people, and to consult women and men and people from different racial groups respectively when developing our arrangements for carrying out Equity Impact Assessment on our policies and services.

The actions we took to meet these duties are set out below.

#### Identifying barriers

We were in a relatively strong position when developing our Scheme, as we'd already gathered evidence about the key barriers to sports participation facing disabled people, women and girls, BME people and older people that could be used to help shape the priority objectives and actions in the Scheme. See Appendix D for more details of this research.

#### Involving disabled people

We've taken a number of steps to involve disabled people in developing our Scheme, as follows:

- We conducted research on the barriers to participation facing disabled people in 2001. A range of disabled people were involved in this research, through a variety of methods including workshop days and in-depth interviews. People with a range of disabilities – including physical disabilities, learning disabilities, and sensory (visual and hearing disabilities) were involved in the research. Therefore, the barriers identified in the research are representative of a range of disabilities.
- During 2006, we organised and held meetings with two different disability Advisory Groups. The first group was made up of athletes and people working in disability sport, the second of service users. This approach was chosen in order to hear the experiences of people currently involved in sport as well as those who found themselves excluded from sport in some way. The first Advisory Group was established with the support of SDS, and the service users' group with the support of the Scottish Disability Equality Forum. Both groups included people with physical disabilities, including wheelchair users, and people with a variety of sensory impairments (visual and hearing). A representative of people with learning disabilities also participated in the first Advisory Group, as did officers from SDS. A representative of the Scottish Disability Equality Forum participated in the service users' group. We provided support for the disabled people in both groups. For example, we provided and paid for BSL interpreters to attend the service users' Advisory Group, as some of the participants had hearing impairments. A hearing loop was also provided for the use of hearing impaired participants in this group. We also paid for all expenses incurred by the participants of the groups.
- We provided support for the disabled people in both groups. For example, we provided two BSL interpreters to attend the service users' Advisory Group, as some of the participants had hearing impairments. A hearing loop was also provided for the use of hearing impaired

participants in this group. We also paid for all expenses incurred by the participants of the groups.

- In addition to organising our own Advisory Groups, we also attended and delivered a presentation on the proposed objectives of our Scheme to the Scottish Executive's Same As You Implementation Group, which included a number of people with learning disabilities, as well as some representative organisations.

The approach taken with all three groups was similar. We first of all summarised our work and explained the provisions of the Disability Equality Duty. We then presented a summary of the barriers identified during earlier research, and invited discussion on these. Following identification of the major barriers to participation in sport, we then invited the groups to discuss and advise on the priority areas for action in terms of our Disability Equality Scheme. We also invited the groups to discuss and recommend some actions for us to take in order to tackle the main barriers to participation.

In addition to holding meetings of the Advisory Groups, we also prepared written material on our role, the requirements of the Disability Equality Duty, a summary of barriers to participation identified in earlier research and a summary of our work to date to develop disability equality. This material, plus particular questions for consideration, was circulated to the members of the Advisory Groups in advance of the meetings, in large print format. This provided an alternative mechanism to enable disabled people and their representatives to participate in the development of the Scheme.

- We invited feedback from all those previously involved in the initial work summarised above on the initial draft of our Single Equity Scheme, published in December 2004. This version focused strongly on meeting our disability equality duties. The feedback received was considered during the redevelopment of the Scheme.

### **Major findings of the information gathering, consultation and involvement exercises 28 involving disabled people**

Through a combination of the research undertaken, and the involvement of disabled people and their representatives, we were able to identify a number of key issues to focus on as part of this Scheme. The major issues identified as barriers to disabled people taking part in sport and employment were: inequitable recruitment practices; a lack of appropriate disability inclusion training for people working and volunteering in sport; poor access to sports facilities; lack of provision of opportunities in relation to school sport, club sport and coaching; a lack of suitable role models in sport; and a lack of accessible published materials.

The outputs and key findings from all of this work were collated and presented to both the Equity Project Group and the Senior Management Team for discussion and consideration, and were used by the Equity Project Group members to inform their discussions on action planning with their teams.

The information obtained through the research, Advisory Groups and written feedback on the first version of the Scheme were therefore all fundamental to the selection of our objectives and actions for this Scheme.

### **Continued involvement of disabled people**

We are committed to continuing to involve disabled people in the delivery of this Scheme, notably during the Equity Impact Assessment process, during monitoring, and during review of the Scheme, and we will report on future involvement of disabled people in our annual reports on the Scheme.

### **Involving BME people**

We have involved BME people in the development of our Scheme in the following ways:

- In 2001, we carried out research into the barriers facing BME people in terms of sports participation. The research showed that there were relatively few circumstances where the

needs of BME people differ from those of the majority of the population, and that where there are differences, these generally relate to the delivery of the activity. For instance, this may include the appropriateness of the sporting facilities. However, by far the largest barrier identified was an experience or fear of racial discrimination. This does not just refer physical or verbal abuse, but also includes institutional racism.

- To further explore the issues identified through research, **sportscotland** developed relationships with various equity partners whose remit is race equity. As part of this work, in summer 2006, we established a Race Equity Consultative Group which comprised a range of BME people and representatives of race equity organisations. This group advised us on the identification of key issues that impact on sports participation by BME people; on the priority areas for action and Scheme objectives; and on recommended actions for us to take forward as part of the Scheme.
- The Race Equity Consultative Group has met three times to date and, following the first two meetings of the group, we began to shape our draft race equity objectives and actions for inclusion in the Scheme. These were influenced both by the research we had previously carried out and the contributions of the group at the first two meetings. The actions were then discussed with the group at its third meeting, and amended to take on board additional comments made.
- **sportscotland** has also visited organisations in Scotland that offer sporting opportunities to BME communities to further explore the issues involved and to learn from examples of good practice.
- In addition to this work throughout Scotland, we have engaged separately with Sporting Equals to identify ways of joint working in the future, and to take advice on our future approach to the development of race equity in Scottish sport.

### **Major findings of the information gathering and consultation exercises involving BME people**

- The barriers to participation in sport by BME people identified through the consultation work were largely consistent with previous research. The Consultative Group identified the major issues as being related to four areas: culture, perception, experiences and racism.
- More specific key issues identified through discussion with group members and with other representative organisations included: staff being unaware of race issues; lack of strategic direction to investment; lack of suitable facilities; lack of engagement with BME people; lack of monitoring of BME participation and performance; insufficient linkages between organisations; and poor signposting to examples of good practice.
- Consultation also suggested that the issues could effectively be addressed through the five key equity goals identified within the Scheme. For instance, a lack of suitable facilities was highlighted throughout the consultation process. This issue will be addressed through the equity goal of a quality, accessible facilities in place that provide and promote opportunities for Scottish people to participate in sport.
- And in the same way, issues relating to sporting organisations, such as organisations often not working effectively together to address the needs of BME people, will be addressed through the goal of strong and equitable organisations supporting and promoting equality of opportunity for all in sport and in the workplace.
- The findings of all the work set out above were collated and presented to the Equity Project Group at its meetings in January, February and March 2007. Group members discussed these proposals with their teams and Directors. The outputs of these discussions helped to shape the revised draft objectives for the Scheme and the generic and race specific Equity Action Plans.

### **Future consultation with BME people**

We are committed to continuing to consult BME people where appropriate in the delivery of this

Scheme, notably during the equity impact assessment process, during monitoring, and during review of the Scheme. We intend to keep engaging with the BME consultative group to do this, and will revise or expand the membership of the group as appropriate. We will report on future involvement of BME people in our annual reports on the Scheme.

### **Involving women and men**

As part of the process of developing the gender duty sections of the single equity scheme we have been consulting internally and externally. We initially consulted widely when we developed

**sportscotland's Women, Girls and Sport Strategy 2005-2010** in 2005. The initial consultation in

preparation for the strategy was mainly done online and through partners. The issues raised in this consultation were incorporated in the strategy.

This strategy has now become part of the Single Equity Scheme and the actions have been incorporated into the Scheme's gender action plan. While developing the Scheme, we wished to consult more widely and involve both women and men in the development of the Scheme. We have done so in the following ways:

- The Equity Project Group, which is responsible for the overall development of the Scheme, is made up of both women and men, and so the perspectives of both sexes have been taken into account. Similarly, a range of women and men across **sportscotland**, including the Senior Management Team, have been directly involved in the development of the Scheme from the outset.
- We have involved women and women's groups, as well as the Women's Sport Foundation, in 30 our recent work to identify the barriers to women and girls in terms of sports participation, and in identifying potential solutions to these barriers. Specific projects are discussed in more detail in the earlier section on our existing work to promote equity.
- We work closely on an ongoing basis with the Women's Sport Foundation in our work to develop women and girls' participation in sport, and have collaborated with them on specific projects, such as the development of the good practice guide on making women and girls more active, published in 2005.
- We attended a number of events on the gender equality duties and the gender equality scheme, in order to obtain advice from the Equal Opportunities Commission and other participants about the development of our Scheme.
- As part of the development of this version of the Scheme, we held a gender consultation event, to which we invited a range of our partners from governing bodies of sport, the Scottish Institute of Sport, local authorities, the university sector, gender equity organisations such as Engender, the Scottish Executive, and the Women's Sports Foundation. We also invited a number of athletes and gender experts/academics. The invitee list included both men and women.

The purpose of this event was to consult our partners and stakeholders on the draft goals, objectives and actions within the Scheme, and to seek comments on our proposed arrangements to meet our specific gender equality duties.

We also invited written comments on the draft Scheme from the whole list of consultees and their colleagues.

### **Major findings of the information gathering and consultation exercises involving women and men**

- The outputs from this consultation process were summarised in a paper which was discussed by the Equity Project Group and with colleagues more widely. As a result, a number of changes were made to the draft objectives to make them more outcome focused, to clarify roles and to reflect certain specific points raised during the consultation. For example, it was noted during the consultation that in some cases the draft objectives focused on the Active Schools programme when the objective would also be relevant to our work with our other partners. As a result, we added objectives that focused more on supporting our partners to integrate equity generally – and gender equity specifically – into their strategic plans through the work of our Partnership Managers.

We also added a new objective about integrating information on equity (and gender equity) issues

into conferences and seminars, to reflect feedback about the importance of information and good practice sharing.

- The consultees reacted positively to the goals and objectives of the Scheme and generally agreed that the arrangements for meeting the specific duties (eg, impact assessment) laid out



the Scheme would be appropriate. There was a suggestion that a specialised impact assessment tool for facilities may be required, as the questions involved in impact assessing facilities may differ from those in an impact assessment of policy or other forms of service delivery.

- Participants in the consultation also stressed the value of the support that **sportscotland** provides to its partners in the process of implementing equity and the need to continue that support.

### **Future consultation with women and men**

We are committed to continuing to consult women and men and key gender equity partners where appropriate in the delivery of this Scheme, notably during the equity impact assessment process, during monitoring, and during review of the Scheme. We intend to keep engaging with those consultees who attended our gender consultation event to do this, and will revise or expand those involved as appropriate. We will also continue to work closely with the Women's Sport Foundation and gender equality colleagues in the Scottish Executive, local authorities, Institute Network, and Scottish Governing Bodies of sport as we deliver the actions set out in our Scheme.

In conjunction with this process, one of our specific objectives is to establish and develop a network to support the further development of female athletes and coaches. This network will be used as a network for communication, support for coaches and athletes as well as for further training and development, but we will also consult with the women in this network on relevant issues relating to the delivery of our Scheme and our specific gender equality duties.

We will continue to consult with male and female staff during the delivery of the Scheme. The Equity Project Group will continue to be the key mechanism to facilitate this consultation. We will continue to consult and update the Senior Management Team on the delivery of the Scheme. We will also ensure our staff are briefed on the Scheme and are given the opportunity to feed into future development and delivery through this process.

We will report on future involvement of women and men in our annual reports on the Scheme.

### **Involving LGBT people and their representatives**

**sportscotland** has developed relationships with a number of organisations involved in the promotion of rights and equity for lesbian, gay, bisexual and transgender (LGBT) people, including Stonewall Scotland, the Equality Network, and LGBT Youth.

We met with representatives from all three organisations during the development of the Scheme, in order to ascertain their views on the key issues that we should be considering and addressing in terms of promoting equality for LGBT people, and we have incorporated their comments as appropriate.

Many of the actions in the generic action plan are relevant to the sexual orientation equity strand (for example, we include questions on both sexual orientation and transgender status in our staff equity monitoring survey), or seek to ensure that LGBT people are not harassed or discriminated against (for example, we will ensure that LGBT issues are considered in staff equity training, and our equity policy explicitly covers discrimination and harassment on the grounds of sexual orientation). In 2006, we amended the wording of the question on gender in the staff monitoring survey on the advice of our LGBT equity partners.

We will continue to develop our relationships with our LGBT equity partners, and will seek to involve these partners where appropriate in the ongoing delivery and future development of the Scheme. We will also seek to engage these partners in the development of specific work to promote equality for LGBT people as appropriate.

## **Meeting the equality duties in employment**

To meet the equality duties in our employment functions, we must ensure that we have due regard to the need to eliminate unlawful discrimination and harassment in our employment practice, and to actively promote gender, disability and race equality within our workforce.

We are strongly committed to the fair treatment of all our employees, and to preventing unlawful

discrimination and harassment. We already take steps to meet the equality duties by:

- ensuring our recruitment processes are fair;
- monitoring the equity profile of job applicants and staff in post;
- promoting and managing flexible working arrangements, including arrangements to support those with caring responsibilities (both male and female);
- having clear anti-bullying and anti-harassment, equity and equal opportunities policies in place;
- having robust grievance and disciplinary procedures in place;
- offering a wide range of work-based training opportunities to our staff, regardless of gender, disability, race or other equity-related factors; and
- reviewing our HR policies on an ongoing basis, and taking steps to make any changes required as a result of new anti-discrimination and equalities legislation.

Further details of how we are currently meeting the equality duties in employment, or how we plan to do this in future, are set out on the following pages.

### **Transsexual employees and potential transsexual employees**

We are fully aware of our legal duty to prevent discrimination of transsexual people on the grounds of their gender reassignment in employment and vocational training, and this duty covers those who have undergone gender reassignment as well as those who intend to undergo gender reassignment, or who are currently undergoing it. We are also aware that, by the end of 2007, it will be unlawful to discriminate against transsexual people on the grounds of their gender reassignment in relation to access to and the supply of goods and services.

We are fully committed to the protection of any transsexual member of staff or job applicant, and the rights of transsexual people are protected through our equity, equal opportunities, bullying and harassment, and grievance and disciplinary policies and procedures. We will also continue to ensure that the impact of our policies and functions on transsexual people is considered through the work of our HR policy review group, and through the Equity Impact Assessment process.

### **Preventing discrimination on the grounds of pregnancy and maternity**

We are fully aware that we have a legal duty to protect the rights of female staff who become pregnant and who take maternity leave. This includes protecting their rights before, during and after their period of maternity leave. We have a range of policies in place already – including our equal opportunities and equity policies, our maternity policy and our policies on flexible working and parental leave – which seek to ensure that these rights are protected.

However, we will continue to ensure that the impact of our policies and functions on pregnant women and women who are on maternity leave or returning from a period of maternity leave is considered through the work of our HR policy review group, and through the Equity Impact Assessment process.

We will also collect data on the number of women returning to work after a period of maternity leave, and will consider the impact of part time working and caring responsibilities through our staff equity monitoring surveys and our equal pay review.

### **Arrangements to ensure equal pay**

As a result of the gender equality duty, we will have a specific duty to publish an equal pay statement by 28 September 2007. This statement will require us to set out our policy and arrangements to ensure equal pay. We will ensure that this statement is published by this date.

We will also conduct an equal pay review by the end of 2007, in order to ascertain any discrepancies in terms of pay between men and women doing comparable work. We also plan to extend this review to ensure that any pay discrepancies between disabled people and other people, and between people from different racial groups are identified. Should any discrepancies be identified during this review, we will agree steps to address them. Any steps agreed upon will then form part of a later version of the Single Equity Scheme action plan(s).

## **Monitoring the equity profile of our staff**

All three of the public sector duties require us to undertake some form of equity monitoring of our staff. The detailed requirements are as follows.

### **Race Equality Duty**

Under the RRAA 2000, we have a duty to monitor, by reference to the racial groups to which they

belong, the numbers of:

- staff in post;
- applicants for employment, training and promotion, and;
- staff from each such group who:
  - receive training;
  - benefit or suffer detriment as a result of our company's performance assessment procedures;
  - are involved in grievance procedures;
  - are the subject of disciplinary procedures; or
  - cease employment with that person or other body.

We are also required to publish the results of this monitoring every year.

### **Disability Equality Duty**

The specific duties require authorities like us to have information gathering systems established in relation to recruitment, development and retention of disabled employees. The Code of Practice for the Disability Equality Duty makes it clear that these systems should enable data to be collected and reported on at least the same categories that apply to the Race Equality Duty.

### **Gender Equality Duty**

Under the Equality Act 2006, the specific duties of the Gender Equality Duty require us to gather information on the profile of our staff, including data on recruitment, promotion, the distribution of women and men in the workforce by seniority and by types of work, harassment, training opportunities, grievance and disciplinary procedures, and redundancy. We are also required to analyse this data for part-time staff, and those with caring responsibilities, because women are 34 disproportionately represented in these groups.

### **Existing arrangements to monitor the equity profile of staff**

We already collect equal opportunities information about job applicants. An equal opportunities form is issued to all applicants, which includes questions about gender, disability, race, age, sexual orientation and religion or belief. In addition, in December 2005, we conducted a staff equity profile survey. All staff were asked to complete the survey, which asked questions about gender, disability, race, age, sexual orientation and religion or belief. 65% of the workforce responded to the survey.

The survey was completed anonymously, and all findings presented only in the aggregated format. We based the questions on those asked in the 2001 Census, and sought advice from SDS on the wording of the question on disability. The results of the survey were made available in their disaggregated format to all staff via the intranet.

## **Results of the sportscotland Equity Profile Survey: Staff**

91% of respondents completed the questionnaire, whilst 9% chose not to complete the questionnaire. In relation to all responses, bands A-C generally represent administrative and support functions, whilst bands D-H generally represent officer, lead officer, Partnership Manager, adviser and management functions.

### **Gender**

45% of respondents were female, 44% male and 11% chose not to answer this question. This represents an almost equal split of male and female staff across the organisation. However, in paybands A-C, 34% of responses are male and 66% female. There are comparatively more females in less senior positions. In pay bands D-H, 58% of respondents were male, and 42% were female. There are comparatively fewer females in more senior positions.

### **Disability**

86% of respondents answered no; 3% yes and 11% chose not to answer this question. Very few staff in the organisation regard themselves as having a disability. In terms of disability, there is little variation in terms of banding.

### **Ethnic origin**

70% of all staff selected white Scottish; 13% chose white other British; 11% chose not to answer this question; 1% selected white Irish and 5% selected any other white background.

### **Sexual orientation**

83% of staff chose heterosexual; 14% chose not to answer this question; 1% selected bisexual and 2% other. 99% of respondents from pay bands D – H reported a heterosexual orientation (the other 1% did not answer the question), indicating slightly less diversity in terms of sexual orientation in more senior positions.

### **Religion or belief**

48% selected Protestant; 5% Roman Catholic; 4% Other Christian; 19% Other. Buddhist, Jewish and Muslim were each selected by 1% of respondents. 21% chose not to answer. This indicates that there is some diversity in the workforce in terms of religion or belief.

### **Age**

The age split is almost identical between bands A-C and D-H. 64% of the A-C band and 63% of the D-H band are aged under 40. **sportscotland** is therefore a relatively young organisation.

### **Conclusions: Staff**

The workforce is relatively diverse in terms of age and religion or belief. However, it is much less diverse in terms of ethnic origin and disability. This is true across the whole workforce, and when the profile in terms of bands A-C and D-H are viewed. There is a greater proportion of men at senior level than women. The proportion of female staff declines as positions become more senior.

### **Results of the Equity Profile Survey: Board members**

The form was also issued to all **sportscotland** Board Members. From the responses, the following was ascertained:

- 71% of Board members were male;
- 86% of Board members did not consider themselves to have a disability. The other 14% reported that they have a visual impairment;
- 86% of the Board was white Scottish;
- 86% of the Board reported that they were heterosexual, with 14% choosing not to answer the question;
- 57% of Board members reported that they were Protestant in their beliefs, 14% were 'other Christian' and the remaining 29% reported that they were Aethiest;
- 14% of Board members were aged 31-40; 29% were aged 41-50; whilst 43% were aged 51-60; and 14% of respondents chose not to answer this question.

### **Conclusions: Board Members**

The results of the equity audit show that in December 2005, there was a greater proportion of men than women on the **sportscotland** Board, and that the vast majority of Board members were white Scottish, heterosexual, Christian, and did not have a disability. But the **sportscotland** Board has changed quite considerably in its composition since this survey was undertaken. The equity profile of the new Board will be ascertained following a new survey in 2007.

#### **Future arrangements to monitor the equity profile of staff and Board members**

The staff equity profile exercise was re-run in January 2007. The survey questions on race and religion or belief again matched the Census questions. The question on gender was revised to take account of advice from our LGBT equity partners. The question on disability was revised to take account of guidance recommended by the Disability Rights Commission. A new question on caring responsibilities was added, in light of our new gender equality duty. The reports generated from this exercise will be published on the **sportscotland** website and staff intranet by the end of 2007, in line with our equality duties.

By mid 2007, we'll have an upgraded Human Resources system in place, which will enable staff equity monitoring to take place electronically in future. Staff will be asked to complete their own profile details electronically and review these details annually. The system will enable the staff equity profiling data to be cross-referenced with information on recruitment, training, grievances, disciplinary action, performance appraisal, promotions, patterns of working, and termination of employment.

Reports on each of these areas, showing the equity profile, will be published every year from December 2007, in line with our equality duties.

The results of the profiling exercise undertaken in January 2007, and the subsequent reports produced from the new HR system, will be reported to the Senior Management Team annually. Any actions that need to be taken as a result of the findings of these reports will be integrated into the Scheme action plan.

#### **Staff training on the equality duties**

Under the RRAA 2000, we have a legal duty to set out in our Scheme our proposed arrangements for training our staff in connection with the general duty to promote race equality, and any specific duties.

We are committed to doing this, and to also training our staff in connection with our duties to promote gender and disability equality.

During the development of the Scheme, staff have received various briefings and information on the duties and on the Scheme itself. As well as receiving information at team meetings, all staff can access relevant briefings notes on a dedicated equity section of the staff intranet.

In spring 2007, we will hold equity awareness briefings for all our staff. These briefings will explain the public sector equality duties, and will make staff aware of their responsibilities under these duties.

Further briefings or training on particular elements of the duties, and on the Single Equity Scheme, will follow as required. For example, staff involved in carrying out Equity Impact Assessments on our policies and functions are currently receiving training on what this will involve.

During 2007, we will also scope out the requirements for further equity training for staff, and will ensure that all staff receive equity training during the period of the Scheme. The need for ongoing equity training will again be ascertained before the end of the Scheme, following training needs analysis and/or internal staff engagement surveys. All new staff will also receive a briefing on our

equity work, including the equality duties, as part of their induction.

### **Monitoring the impact of internal policies**

We are committed to keeping our internal policies under review on an ongoing basis. Part of this function will help us to ensure that our existing or future staff are not being discriminated against or harassed, and that our policies help to promote gender, race and disability equality in line with our public sector duties.

In practice, we will continue to ensure that the impact of our internal policies and functions on all equity strands is considered through the work of our HR policy review group, and through the Equity Impact Assessment process.

## **Equity Impact Assessments**

All three of the public sector duties require us to undertake some degree of Equity Impact Assessment of our policies and functions.

### **Race Equality Duty**

Under the specific duties of the Race Relations Act 1976 (Statutory Duties) (Scotland) Order 2002 (as amended in 2006), we are required to:

- identify the relevance of our policies and functions to race equality, and;
- assess the likely impact of proposed policies on race equality and good relations.

### **Disability Equality Duty**

• Under the DDA 2005, our Disability Equality Scheme must include a statement of our intended methods for assessing the impact of our policies and practices, or the likely impact of our proposed policies and practices, on equality for disabled persons. These methods must then be carried out during the period of the Scheme.

### **Gender Equality Duty**

Under the Equality Act 2006, we have a duty to ensure that our Scheme sets out the actions we have taken or intend to take to assess the impact of our policies and practices, or their likely impact on gender equality. The term 'policies and practices' is intended to cover all our proposed and current activities. This duty requires the assessment of our existing policies and practices as well as ones which are developed subsequently.

Therefore, the disability and gender equality duties require us to look retrospectively at the equity impact of our policies and functions, as well as considering the possible impact of future policies and functions.

A list of policies and functions identified as relevant to our race, disability and gender equality duties is included as Appendix I.

### **sportscotland's arrangements for Equity Impact Assessment**

For the purposes of this Scheme and the impact assessment process, we will refer to 'policies and functions'. This should be taken to cover all the Equity Impact Assessment requirements of the three public sector duties.

The process that we will be required to follow to conduct Race, Disability and Gender Equity Impact Assessments will be broadly similar. Mindful of this, and of the potential requirement to consider the impact of policies and functions on age, sexual orientation and religion or belief in the coming years, we intend to carry out overarching Equity Impact Assessments on our policies and functions. This will enable one process and toolkit to be used, and will ensure that gender, disability and race equality all are considered simultaneously.

We intend to go beyond the requirements of the current duties by undertaking Equity Impact  
38

Assessments on both our future and existing policies and functions and by considering the  
impact

on gender, disability and race equity, as well as the impact on age, sexual orientation and  
religion or belief where possible and appropriate. These multi-strand assessments will also  
enable **sportscotland** to better identify the effects of multiple discrimination and multi-strand  
barriers.

Set out below are the steps we have taken to date – or propose to take in the coming months  
– to  
conduct Equity Impact Assessments on our policies and functions.

Actions undertaken so far include the following:

- The Equity Project Group, in consultation with all of **sportscotland**'s teams, has produced a first

draft of our existing and proposed policies and functions. When developing this list, group  
members were asked to identify whether each **sportscotland** policy/function should be  
regarded as being 'high' 'medium' or 'low' priority in terms of when it undergoes impact  
assessment. The group drafted some suggested criteria that staff used in order to undertake  
this prioritisation exercise.

These criteria are as follows:

- Is the policy/function a major one in terms of **sportscotland**'s work?
- Will the policy/function impact on a high number of people (for external policies)?
- Will the policy/function impact on a high number of staff (for internal policies)?
- Is the policy/function directly related to the investment of money in external partners?
- Is the policy/function currently being developed, or is it due to be developed this year (or is it an existing policy?)

- The Equity Project Group also identified which members of staff from each team will be responsible for carrying out Equity Impact Assessments on each of the policies and functions identified. This was based on identifying which staff would have a key role in the development or delivery of each of the policies and functions.

- These two actions culminated in the production of an Equity Impact Assessment **timetable for**

**action**. This sets which policies and functions will be screened in order to determine their  
relevance to and impact on each equity strand, the order in which they will be screened, who  
will be responsible for screening, and by which date. The timetable for action is available to all  
our staff on the staff intranet, and is also available on the Single Equity Scheme page of our  
website. The timetable for action will be regularly monitored and updated by the Equity  
Project Group. Any comments on the timetable for action are welcome, and should be  
directed to our Ethics Manager.

- In the early months of 2007, we commissioned the development of an Equity Impact  
Assessment toolkit and guidance manual that could be used by our staff when carrying out  
impact assessments on our policies and functions.

In parallel with the above actions, we are now also training staff on how to carry out Equity  
Impact

Assessments. This training is intended to cover the requirements of the three public sector  
duties,

explain the process that should be followed when carrying out impact assessments, and  
demonstrate the use of our Equity Impact Assessment toolkit on some of our policies and  
functions. Following the delivery of this training, Equity Impact Assessments on our policies  
and functions will be undertaken in line with our timetable for action.

We will seek to consult and involve key stakeholders – including disabled people, women and  
men and BME people, plus representatives of the three other major equity strands where  
appropriate and relevant – on the findings of the initial screenings. This will be done through a  
variety of consultation/ involvement mechanisms which might include inviting stakeholders  
from a range of equity groups to consultation events, and/or inviting written feedback on the

initial findings. The nature of the consultation and involvement will depend on the policy or function being impact assessed.

We will publish the results of all initial screenings on our website.

Following the initial screenings, we will be able to identify whether each policy or function needs to undergo a partial or full Equity Impact Assessment (either for its impact on all six equity strands, or for its impact on a particular strand e.g. disability equality). This will depend on whether the screening has shown that the policy/function has a high, medium or low (or unknown) impact on a particular equity strand or strands.

We will undertake partial or full Equity Impact Assessments on the appropriate policies and functions identified through the screening process. To do this, we will follow the recommended staged process as set out in our impact assessment toolkit, including involving and consulting with key stakeholders throughout the process as appropriate.

We will publish the results of all full Equity Impact Assessments on our website.

We will make any necessary changes to policies and functions that have been identified as a result of the Equity Impact Assessment, to address or avoid any adverse impact on a particular equity group, or to better promote equality of opportunity.

Actions and timescales for this process are set out in our Generic Equity Action Plan.

## **Monitoring the impact of sportscotland's policies on the promotion of equality of opportunities**

All three of the public sector duties on race, gender and disability equality require us to set out in our Scheme how we will monitor the impact of our policies on disabled people, women and men and BME people. By following the steps set out above to conduct Equity Impact Assessments on our policies, programmes and services, we will be engaging with people from all three of these groups, which will allow the impact of the policies to be monitored.

In terms of ongoing monitoring of our policies, programmes and services, the following arrangements will apply.

- Our investment in local authorities will be subject to monitoring – both formal and through the ongoing involvement of Partnership Managers – to ensure equality of opportunity for girls, disabled people and BME people. Progress reports to Partnership Managers, and data provided by local authorities will detail how closely targets have been met in line with agreed implementation plans, agreed targets, stated objectives and outcomes.
- We will monitor our investment into SGBs through:
  - setting investment conditions – including those which cover the SGB's requirements to give due regard to equality of opportunity for disabled people, women and men and BME people;
  - monitoring the fulfilment of these conditions on an ongoing basis through the provision of support via a network of SGB Partnership Managers; and
  - receiving and reviewing integrated investment reports from the SGBs twice a year.
- We will monitor our investment into the Institute Network by ensuring we have robust investment agreements in place, and through regular area managers meetings held quarterly with the Area Institutes of Sport, and Board meetings held monthly with the Scottish Institute of Sport.
- We will monitor our investment into sports facilities to ensure that they help to promote equality of opportunities for disabled people, women and men and BME people by ensuring, through a series of planned monitoring visits to each site, that the facility does carry forward the practices and principles as detailed throughout the application process.



- During the period of the Scheme, we will integrate equity criteria into the SGB Fit for Purpose audits.
- Particular criteria on the promotion of equality of opportunities for disabled people, women and girls and BME people will be developed as appropriate at this time.
- Our support for governing bodies implementing the Equity Standard will be monitored and evaluated through the Sports Council Equity Group's monitoring and evaluation framework.
  - The impact of Active Schools on disabled children, girls and BME children will be monitored as part of our ongoing arrangements to monitor and evaluate Active Schools.
  - The impact of our internal policies (for example, our car leasing scheme, our remote working policy and our IT policies) on the promotion of opportunities for our staff will be monitored and evaluated on an ongoing basis. Wherever possible, we will seek to gather and analyse information on these policies in terms of their impact on and differential take-up by women and men, and – if possible – their impact on and differential take-up by people from other equity groups.
  - A monitoring and evaluation framework to ascertain the impact of this Scheme will be developed in 2007, as set out in more detail below. Certain elements of the Scheme will also be monitored through our Corporate Plan and Business Plan monitoring arrangements.

## Procurement

Each year, we enter into a number of contracts with external organisations to commission work on our behalf. When an external consultant undertakes work or provides services on our behalf, the obligation to comply with the public sector duties remains with us. However, this means that we will need to build relevant equity considerations into the procurement process, to ensure that we meet the public sector equality duties in relation to this function.

The Statutory Codes of Practice for the Disability Equality Duty and the Gender Equality Duty set out a number of requirements that we must meet in relation to procurement. In order to comply with the duties, we need to:

- provide guidance and/or training for all staff involved in procurement work so that they fully understand the provisions of the three public sector equality duties, and the relevance of these to their area of work;
- review and, if required, revise our standard terms and conditions for contracting services to include information about the RRAA 2000, the DDA 2005 and the Equality Act 2006, ensuring that relevant Scottish Executive guidance on equality issues in procurement is considered;
- include a requirement in every tender brief and contract that the contractor must comply with the relevant anti-discrimination provisions of the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995 (as well as other anti discrimination legislation that relates to the other key equity strands);
- where relevant, specify what evidence the contractor may need to provide in order to demonstrate its compliance with the anti discrimination provisions of the applicable legislation;
- ensure that race, disability and gender equity are appropriately reflected, and given due weight in the criteria for the selection of tenderers and the award of the contract, and in contract conditions, in a way that is consistent with EC and UK procurement rules and which is proportionate and reasonable to the contract;
- ensure that contractors fully understand any race, disability or gender equity requirements of the tender brief or contract;
- monitor fulfilment of race, disability and/or gender equity requirements as set out in the contract; and
- seek legal advice if there is uncertainty as to how the duty might affect the design and process of a particular procurement.

Our Generic Equity Action Plan sets out how we will meet these duties. Actions will be developed to take account of guidance on equity in procurement produced by the

Commissions for race, gender and disability (and their successor body, the CEHR) where appropriate.

## **Monitoring, reporting and review**

### **Monitoring progress**

**sportscotland's** Equity Project Group, chaired by the Senior Management Team Equity Champion, will be responsible for overseeing delivery of, reporting on and reviewing the Scheme. It will meet regularly during the period of the Scheme. The Equity Project Group will work with monitoring staff in 2007 to discuss arrangements for monitoring progress towards delivery of the Scheme. This framework will consider how disabled people and other key stakeholders will be involved in the monitoring process, where appropriate.

### **Reporting on progress**

Progress on delivery will be reported on a regular basis to the Senior Management Team and the Board. Any issues regarding non-delivery or other significant problems will be escalated to the Senior Management Team as soon as possible.

We are required by law to publish annual reports on our Disability, Gender and Race Equality Schemes. An integrated annual report on the Scheme will be published by 4 December 2007, and then once every year after that.

### **Reviewing the Scheme**

The three public sector duties require us to revise our Gender, Race and Disability Schemes within three years of their initial publication dates. Therefore, the entire Scheme will be reviewed and revised by 4 December 2009, and every three years thereafter. Towards the end of 2008, the Equity Project Group will develop a plan for the review and revision of the Scheme. Disabled people, women and men, BME people and key stakeholders representing the other key equity strands will be involved in this process as appropriate.

## **Publication of the Single Equity Scheme**

- This version and subsequent versions of **sportscotland's** Scheme are available on our ethics website [www.sportscotland.org.uk/ethics](http://www.sportscotland.org.uk/ethics)
- The Scheme is available primarily in electronic format to allow for regular updating, as necessary.
- The Scheme can be made available in hard copy, alternative formats and languages on request.

If you would like to order a copy of the Scheme in an alternative format, please contact a member of **sportscotland's** communications team on 0131 317 7200.

# Appendix A

## The Disability Discrimination Act 2005: The Disability Equality Duty

1. The Disability Discrimination Act 1995 (DDA 1995) has been amended by the Disability Discrimination Act 2005 (DDA 2005) so that it now places a duty on all public authorities, when carrying out their functions, to have due regard to the need to:
  - 1.1 promote equality of opportunity between disabled people and other people;
  - 1.2 eliminate discrimination unlawful under the DDA 1995;
  - 1.3 eliminate harassment of disabled people;
  - 1.4 promote positive attitudes towards disabled people;
  - 1.5 encourage participation by disabled people in public life; and
  - 1.6 take steps to meet disabled people's needs – even if this means treating disabled people more favourably.
2. The totality of this duty, covering all elements, is referred to as the 'Disability Equality Duty', or 'the general duty'. The overarching goal of the general duty is to promote equality of opportunity, and the other elements of the duty both support this goal and require due regard in their own right.
3. Listed public bodies, including **sportscotland**, are subject to a further set of specific duties under the Act. Listed public authorities must:
  - 3.1 Publish a Disability Equality Scheme demonstrating how it intends to fulfil its general and specific duties, and which includes a statement of:
    - 3.1.1 the way in which disabled people have been involved in the development of the Scheme;
    - 3.1.2 the authority's methods for impact assessment;
    - 3.1.3 steps which the authority will take towards fulfilling its general duty (the 'action plan');
    - 3.1.4 the authority's arrangements for gathering information in relation to employment, and, where appropriate, its delivery of education and its functions; and
    - 3.1.5 the authority's arrangements for putting the information gathered to use, in particular in reviewing the effectiveness of its action plan and in preparing subsequent Disability Equality Schemes.
  - 3.2 Involve disabled people in the development of the Scheme.
  - 3.3 Within three years of the Scheme being published, take the steps set out in its action plan (unless it is unreasonable or impracticable for it to do so) and put into effect the arrangements for gathering and making use of information.
  - 3.4 Annually publish a report containing a summary of the steps taken under the action plan, the results of its information gathering and the use to which it has put the information.
  - 3.5 Review and re-publish the Disability Equality Scheme every three years.
4. The first Disability Equality Schemes must be published by 4 December 2006.
5. It is permissible to include the Disability Equality Scheme within another document (such as a business plan or a Single Equality Scheme) so long as the disability equality elements are clearly identifiable and it is clear how the authority shall meet both the general and the specific duties.

# Appendix B

## The Equality Act 2006:

### The Gender Equality Duty

1. The Equality Act 2006 amends the Sex Discrimination Act 1975 to place a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need:
  - 1.1 to eliminate discrimination that is unlawful under the Sex Discrimination Act 1975 or the Equal Pay Act 1970;
  - 1.2 to eliminate harassment on the grounds of gender; and
  - 1.3 to promote equality of opportunity between men and women.
2. This is known as 'the general duty' and this came into effect on 6 April 2007.
3. In addition to the general duty, listed public authorities – including **sportscotland** – will – by 29 June 2008<sup>615</sup> – be subject to a set of more detailed specific duties. The proposed duties require those authorities to:
  - 3.1 gather information on how their work affects women and men;
  - 3.2 consult employees, service users, trade unions and other stakeholders;
  - 3.3 assess the different impact of policies and practices on women and men and use this information to inform their work;
  - 3.4 identify priorities and set gender equality objectives;
  - 3.5 plan and take action to achieve gender equality objectives; and
  - 3.6 publish a gender equality scheme, report annually and review progress every three years.
4. Listed Scottish authorities will also have a duty to publish an equal pay statement by 28 September 2007, (if they have 150+ staff) and report on progress every three years.
5. It is permissible to include the Gender Equality Scheme within another document (such as a business plan or a Single Equality Scheme) so long as the gender equality elements are clearly identifiable and it is clear how the authority shall meet both the general and the specific duties.
6. In the Sex Discrimination Act 1975, unlawful discrimination is defined as:
  - 6.1 direct and indirect discrimination on the grounds of sex;
  - 6.2 discrimination on the grounds of pregnancy and maternity leave;
  - 6.3 discrimination on the grounds of gender reassignment;
  - 6.4 direct and indirect discrimination against married persons and civil partners;
  - 6.5 victimisation; and
  - 6.6 harassment and sexual harassment.

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<sup>615</sup> This date applies to listed Scottish public bodies only. Listed public bodies in other parts of the UK were required to comply with the specific duties in April 2007.

# Appendix C

## The Race Relations (Amendment) Act 2000: The Race Equality Duty

1. The Race Relations (Amendment) Act 2000 places a general duty on a wide range of listed public authorities to promote race equality. This duty means that authorities must have due regard to the need to:

- 1.1 eliminate unlawful racial discrimination;
- 1.2 promote equality of opportunity; and
- 1.3 promote good relations between people of different racial groups.

2. Listed public authorities are also subject to a number of specific duties.

### The Duty to Produce a Race Equality Scheme

3. The Race Relations Act 1976 (Statutory Duties) (Scotland) Order 2002 placed a duty on a number of listed Scottish public authorities to produce and publish a Race Equality Scheme. **sportscotland** was not one of these authorities.

4. However, the 2002 Order was amended in 2006, with the result that **sportscotland** must publish a Race Equality Scheme by 30 November 2007.

5. The Order states that a public authority's Race Equality Scheme shall set out:

5.1 those of its functions and policies, or proposed policies, which that body or person has

assessed as relevant to its performance of the duty imposed by section 71(1) of the Race

Relations Act (the general duty) and;

5.2 that body or person's arrangements for:

5.2.1 assessing and consulting on the likely impact of its proposed policies on the

promotion of race equality;

5.2.2 monitoring its policies for any adverse impact on the promotion of race equality;

5.2.3 publishing the results of such assessments and consultation, and of such monitoring;

5.2.4 ensuring public access to information and services which it provides; and

5.2.5 training staff in connection with the duties imposed by section 71(1) of the Race Relations Act (the general duty), and this Order.

6. The race equality scheme can be part of a more general equality strategy or improvement plan, as long as it can be easily identified as meeting all the statutory requirements for this type of scheme.

### The Employment Duty

7. In addition to the general duty, listed public authorities – including **sportscotland** – have a duty to monitor, by racial group, the number of staff in post and applicants for employment, training and promotion.

8. Listed public authorities that employ more than 150 full time staff are also required to monitor, by racial group, the members of staff who

8.1 receive training;

8.2 benefit or suffer detriment as a result of its performance assessment procedures;

8.3 are involved in grievance procedures;

8.4 are the subject of disciplinary procedures; and

8.5 cease employment with the organisation.

# Appendix D

## Existing Research into Equity in Sport

1. In 2001, **sportscotland** published the research report *Sport and Disabilities: Aiming at Social Inclusion*, which identified the key barriers facing disabled people in relation to sports participation.
2. In 2001, **sportscotland** published the research report *Sport and Ethnic Minorities: Aiming at Social Inclusion*, which identified the key barriers facing BME people in relation to sports participation.
3. In 2004, **sportscotland** published the research report *Women in Sports Leadership* which examined gender differences in the leadership structures within Scottish sport.
4. In 2005, **sportscotland** published *Older People, Sport and Physical Activity*, which provided an overview of the key issues in relation to sports and physical activity participation by older people to inform future policy and programmes.
5. In 2005, **sportscotland** and the Women's Sport Foundation published *Making Women and Girls More Active: A Good Practice Guide*. Drawing on research conducted with a range of organisations promoting women and girls' sport, this report identified a wide range of ways to practically tackle the key barriers to sports participation by women and girls.
6. In 2005, **sportscotland** developed its *Women, Girls and Sport Strategy*, which sets out the steps that it will take to promote the development of women and girls' sport over the coming five years.
7. In 2006, **sportscotland** published *Increasing Demand for Sport and Physical Activity for Adolescent Girls in Scotland*. This research report and accompanying good practice guide (*Exploring Issues, Suggesting Solutions*) identified the key barriers facing adolescent girls in terms of participation in sport and physical activity, and offered a range of solutions to these barriers.
8. All of these documents<sup>13</sup> are available on the **sportscotland** ethics website [www.sportscotland.org.uk/ethics](http://www.sportscotland.org.uk/ethics)
9. **sportscotland** monitors sports participation in Scotland. Data is collected throughout each year and published annually. Figures can be produced on participation by adults (16+), children (8-15), women, disabled people, white and BME people, people from a variety of age groups, and people from areas of social disadvantage (according to the Scottish Index of Multiple Deprivation) and urban/rural areas. It is possible to provide figures on participation by some individual sports in relation to some, but not all, of these groups.

For further information on **sportscotland**'s participation data, please contact a member of the Research and Evaluation Unit on 0131 317 7200.