
**WRITTEN REPRESENTATIONS BY AFRIFORUM ON THE DRAFT AMENDMENT
BILL TO SPORT AND RECREATION SOUTH AFRICA**

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INTRODUCTION

1. The Department of Sport and Recreation invited interested parties to make written representations on the draft Amendment Bill to Sport and Recreation South Africa (“SRSA”).
2. AfriForum is a registered non-profit company with a membership of over 230 000 individuals.
3. This written submission is made pursuant to the objectives of AfriForum, which include but are not limited to the following:
 - 3.1. The expansion and preservation of civil, minority, human and constitutional rights
 - 3.2. The safeguarding of good governance and governmental transparency
 - 3.3. The establishing of self-reliant and self-respecting communities
 - 3.4. The attainment of settlements in furtherance of peaceful coexistence and tolerance between communities
 - 3.5. The establishing and nurturing of mutual recognition and respect.
4. This submission will primarily focus on the following aspects:
 - 4.1. The constitutional validity of the proposed Amendment Bill;
 - 4.2. Whether, from an international law perspective, the proposed amendments would be permissible; and

- 4.3. The potential conflict between the proposed Amendment and the rules, regulations and/or by-laws relating to participation in sport on international level.

BACKGROUND

5. The legal questions have the following factual backdrop against which they have to be considered:

The influences of social institutions on the development of sport

6. According to the authors of *Sport and the Law in South Africa* (Issue 9)¹ a number of social institutions have had an influence on the practice and development of sport. Some of these social institutions and practices include the family, religion, economic and politics. The authors echo the view that² the political system, as an institution, probably has had and still has the greatest influence on the development of sport. This, they contend, is so because of its power to ultimately regulate people's lives, to establish a particular social order and to establish prescriptions in accordance with which human activities occur in a community, society or country.

¹ Chapter 1, p. 1 – 3.

² See par. 2.4 of Chapter 1.

7. Consequently, it is proposed by the authors that from the earliest times political institutions have played a significant role in the development of sport.³ Therefore, even chariot races in the Roman Empire, jousting in the Middle Ages and the Olympic Games in ancient Greece are classic examples of emperors, kings and other political leaders using sport to establish and promote their power. This trend it likely to persist in the future.

8. There are also examples of sport events being used – or (arguably) abused – in modern times for political purposes. Examples of this include the 1936 Olympic Games in Berlin; the Olympic Games in Moscow being boycotted by countries such as the USA as a result of the actions of the Soviet Government, and the Games in Munich which were disrupted because of political activities of anti-Semitic terrorists.

9. In South Africa too, politics have played a decisive role in respect of the isolation of certain sports from about 1960 to 1991.⁴ There is a strong argument that changing values also have an influence on sport. Therefore, sport cannot be separated from a society's values and norms and the influence they have on institutions, whether they be political, religious or the family. The counterpoint is that the values embodied in the Constitution of

³ Rice 1998 at 13 et seq.

⁴ Healey 1999 at 30 – 31.

South Africa must in turn have an influence in respect of the approach to sport in South Africa and the regulation of sport by the state.

10. Within the South African context, the relationship between fundamental rights and sports is not a new issue. During the apartheid era the sport boycott of South Africa is contended by some to have played a crucial role in forcing South Africa to open up its society and to end global isolation. South Africa was excluded from the 1964 Summer Olympics, and a number of other sport governing bodies expelled or suspended membership of South African affiliates.
11. This boycott in some cases, so it is contended, helped change official state policies. The South African Table Tennis Board (SATTB), a body founded in opposition to the (white) South African Table Tennis Union, was substituted for the latter by the International Table Tennis Federation. While the SATTB team was allowed to participate in the World Championships held in Stockholm in 1957, team members were immediately refused passports by the then government.
12. The issue of the international sport boycott also played a central role as part of the international Anti-apartheid Movement. A paper prepared for the United Nations Unit on apartheid in 1971 by Mary Corrigan under the title “International Boycott of Apartheid Sport” analysed the impact of apartheid on mixed sport and the international campaign against apartheid in sport. That report concludes with the following:

The Anti-Apartheid Movement has always urged that the outside world should boycott all apartheid sport. All links with racist bodies should be abolished until sport inside South Africa is conducted on the basis of merit alone and not of colour. This may not be possible until white domination itself is ended in South Africa. Until there is a non-racial society which will permit open sport, we may have to exclude South Africa from all international competitions. For it is wrong to support racialism in any form. And Apartheid is not a game.

13. The United Nations proceeded to adopt the International Convention against Apartheid in Sports (40/64). The following definition of the “Olympic Principle” was given in the Convention:

(c) The expression "Olympic principle" shall mean the principle that no discrimination be allowed on the grounds of race, religion or political affiliation;

Sport, public policy and the role of the state

14. Contrary to popular belief, when the National Party came to power on the apartheid ticket in 1948, sport in South Africa was already segregated.⁵ Building on the Blacks (Urban Areas) Acts of 1923 and 1930,⁶ the Nationalist government promulgated a string of laws which impacted directly on sport.

⁵ See the discussion in *Sport and the Law in South Africa* (Service issue 9) Chapter 2.

⁶ These two Acts were consolidated in 1945.

15. The Group Areas Act of 1950 and the Reservation of Separate Amenities Act of 1953 were the primary pieces of legislation invoked by the government to effectively outlaw mixed sport in the country.⁷
16. The unbanning of political organisations in 1990 and the movement of the country towards a full democracy enabled South Africa to take part, for the first time in many years, in the Olympic Games (in Barcelona, Spain, in 1992).

The role of parliament in defining government policy and legislation

17. Parliament, mainly through the Minister and the Portfolio Committee on Sport and Recreation, is principally responsible for defining government policy, legislation (which may be enabling or disabling) and budget allocations.
18. There is no direct reference to sport in the Constitution of the Republic of South Africa save for the reference in Schedule 5, Part A, which provides that provincial sport falls within the exclusive functional area of the provinces.⁸ There are, however, a number of other rights which may indirectly impact upon sport and the rights of citizens. Those rights will be dealt with under a separate rubric below.
19. The functions and priorities set for itself by the Department of Sport derives its authority from the National Sport and Recreation Act, Act 110 of 1998 (“the

⁷ There were also other laws such as the Native Laws Amendment Act of 1957 and the pass laws which restricted the free movements of Blacks.

⁸ The relevance of this will be dealt with in more detail below.

Act”). It is to this Act that the Amendment Bill relates. The Act makes provision for, *inter alia*, the promotion and development of sport and recreation and the co-ordination of the relationships between Sport and Recreation South Africa and the Sports Confederation (SASCOC), national federations and other agencies and provides for measures aimed at correcting imbalances in sport and recreation. To this end, the Act enjoins the Minister to issue guidelines or policies to promote “equity, representivity and redress in sport and recreation” (section 13A).

20. To promote equity in sport and recreation, Sport and Recreation South Africa must organise programmes aimed at mobilising the nation to play (section 9). Allied to these imperatives, Sport and Recreation South Africa is required, in accordance with its funding policy, to provide physical facilities for sport and recreation nationally, depending on the availability of funds (section 8; see also section 10 regarding funding generally).
21. The Sports Confederation, as the macro body responsible for the promotion and development of high performance sport, is empowered to develop guidelines (section 2(2)) and is enjoined to co-ordinate all activities relating to high performance sport, including team preparations, and it must, accordingly, consult with the relevant sport bodies in this regard. This means that sport bodies are not exempted from the responsibility of the development of high performance in the various sport activities they individually administer.

22. In terms of the Act, the Minister is authorised, after consultation with or after consideration of proposals submitted by the Sports Confederation, to determine a general policy to be pursued with regard to sport and recreation (section 4) and that policy may relate to, among others, identifying latent talent, helping in cementing the sports unification process and instituting necessary affirmative action controls so as to ensure that national teams “*reflect all parties involved in the process*”. The Amendment Bill proposes to exclude the obligation of the Minister to consult with the Sports Confederation.
23. In terms of the current Act, the Minister has no power to interfere in matters relating to the selection of teams. See in this regard section 13(5)(b)(ii), which reads as follows:

“(b) The Minister may **not** --

- (i) *intervene if the dispute or mismanagement in question has been referred to the Sports Confederation for resolution, unless the Sports Confederation fails to resolve such dispute within a reasonable time; and*
- (ii) ***interfere in matters relating to the selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport or recreation body.***
- (c) *If a national federation fails to adhere to a decision of the mediator or directive issued by the Minister as referred to paragraph (a), the Minister may-*
 - (i) *direct Sport and Recreation South Africa to refrain from funding such federation;*

- (ii) *notify the national federation in writing that it will not be recognised by Sport and Recreation South Africa; and*
- (ii) *publish his or her decision as contemplated in subparagraphs (i) and (ii) in the Gazette.” (Own emphasis)*

The Amendment Bill intends to dramatically amend section 13 of the Act.

24. The Act also makes provision for dispute resolution in sport. This is an innovation in South African sport and each national sporting body is now obliged, it would seem, to include in its constitution a procedure in terms of which disputes are to be resolved. The constitution is also to provide remedies for such disputes. The practicality of providing remedies in a constitution as required is doubted. A constitution may, of course, incorporate by reference procedures and remedies that may be contained in another document. The Amendment Bill apparently seeks to extend these functions and powers by way of the creation of a special purpose tribunal.
25. The Act also provides for commissions to conduct investigations following allegations of malpractice or corruption in sporting bodies. It appears that the Amendment Bill intends to extend the powers of such commissions whilst taking the right to initiate such investigations from the hands of the Sports Confederation and placing that right in the hands of the Minister.
26. Examples of such past investigations include the Eckard Commission of Inquiry into irregularities in the National Soccer Body and the Browde Commission of Inquiry which was tasked with investigating certain financial

and administrative aspects of the South African Rugby Football Union. The appointment of the latter by the President of the Republic was successfully challenged in court⁹ on the grounds, mainly, that the President had merely rubberstamped the decision of the Minister to set up a commission without himself properly applying his mind to and considering the matter himself.

27. Currently, section 13(4) of the Act authorises the Sports Confederation to cause, of its own accord, an investigation to be undertaken to ascertain the “truth” within a “sport or recreation body” where allegations of malpractice of any kind, including corruption, in administration have been made. The proposed amendment of section 13(4) of the Act in the Amendment Act seeks to divest the right to institute an investigation from the Sports Confederation by vesting that right directly in the Minister. The Minister in turn is empowered, in terms of the proposed Amendment Bill, to take the necessary steps to institute the inquiry, and the Ministerial Committee of Inquiry shall have certain extensive rights in conducting the investigation.

See: *The Amendment Bill specifically in respect of the proposed sections 13(9) to (16). The Amendment Bill goes as far as to provide for a criminal sanction in respect of any person who wilfully interrupts the proceedings of the Ministerial Committee of Inquiry or wilfully hinders or obstructs the*

⁹ *SARFU and Others v President of the RSA and others* 1998 (10) BCLR 1256 (T) which was later overruled by the Constitutional Court in *President of the Republic of SA and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

Ministerial Committee of Inquiry in the performance of its functions.

SPORT AND PUBLIC POLICY

28. The state's major role in sport is to regulate and facilitate sporting activities,¹⁰ and it is supposed to do so as the protector and custodian of the country's social values. But for the Amendment Bill, sporting organisations, as mainly voluntary associations, are, in principle, independent of state intervention. The state may, on grounds of public policy, prohibit certain activities which are viewed by some as a type of sport, such as dog fighting and so-called blood sports.¹¹

How to define public policy within the context of sport

29. The question then arises: what is public policy? The difficulty of determining public policy was described as follows in **SASFIN (Pty) Ltd v Beukes 1989 (1) SA 1 (A)** by Smalberger JA, who said the following:

“Public policy is an expression of “vague import”.... and what the requirements of public policy are must needs often be a difficult and contentious matter.”

30. Wessels¹² states that:

¹⁰ “Sport and the Law” Chapter 2, par. 5.

¹¹ The Animals Protection Act, Act 71 of 1962, which makes animal fights by design a criminal offence.

¹² The Law of Contract in South Africa Second Ad. Vol 1 in par. 480.

“An Act which is contrary to the interest of the community is said to be an Act contrary to public policy.”

31. In ***Napier v Barkhuizen***¹³ Cameron JA (as he was then) stated that “*public policy now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-rationalism and non-sexism.*”
32. In ***Barkhuizen v Napier*** the Constitutional Court endorsed the statement in ***Loriman Productions Incorporated v Sterling Clothing Manufacturers (Pty) Ltd*** 1981 (3) SA 1129 (T) at par. 1152 that public policy “*is the general sense of justice of the community, the bonis mores, manifested in public opinion.*”
33. There can be no doubt, owing to our peculiar history, that sport can be seen as an increasingly important part of cultural life that needs to be supported and cultivated by the state. It is indeed also on this basis that sport is intertwined with certain constitutionally entrenched rights which at first glance may have appeared unrelated.

SOUTH AFRICA AND THE RULE OF LAW

¹³ 2006 (4) SA 1 (SCA) at par. 7.

34. Central to the South African legal system is the concept of the rule of law.¹⁴

The implications of this concept can generally be stated as follows:

34.1. **First**, no man or woman is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land; and

34.2. **Second**, no man or woman is above the law, and every man and every woman is subject to the law of the land, irrespective of his or her status – and this extends also to the state.

35. A notable example of this was the appearance before the High Court of the late President Nelson Mandela in the dispute between the South African Rugby Football Union (SARFU) and the government arising from the appointment of a judicial Commission of Inquiry into the affairs of SARFU.¹⁵

36. The concept of the rule of law, implying the supremacy of the law and equality of each before the law, is now constitutionally enshrined. The South African Constitution¹⁶ provides that the Republic of South Africa is one sovereign

¹⁴ Maropeng Mpya* and Nomthandazo Ntlama: “The Evolution of the Constitutional Law Principle of the ‘Rule of Law’ in the South African Constitutional Court”; Martin Krygier: “What About the Rule of Law?”; *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

¹⁵ *SARFU and Others v President of the Republic of South Africa and Others* supra.

¹⁶ Constitution of the Republic of South Africa, 1996.

democratic state founded on a number of values, *inter alia*, supremacy of the Constitution and the rule of law.

37. The Bill of Rights has been described¹⁷ as the cornerstone of the South African democracy which in turn enshrines “*the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom*”.
38. The Constitution “*applies to all law*” and also “*binds a natural or juristic person*” (in other words operates horizontally), depending on the nature of the right involved and any duty imposed by that right.¹⁸
39. Although the Bill of Rights does not directly deal with the issue of sport, there are a number of rights which may indirectly impact upon the administration of and participation in sport. In this regard, as examples, see:
 - 39.1. Section 15(1) – “*Everyone has the right to freedom of conscience, religion, thought, belief and opinion*”.
 - 39.2. Section 16(1) – “*Everyone has the right to freedom of expression, which includes ... freedom to receive or impart information or ideas*”.
 - 39.3. Section 18 – “*Everyone has the right to freedom of association*”.

¹⁷ “Sport and the Law” Chapter 3-2.

¹⁸ See sections 8, 12 and 22 of the Constitution.

- 39.4. Section 22 (taking cognisance of the fact that professional sport plays an important role in society these days) – *“Every citizen has the right to choose their trade, occupation or profession freely”*, although the section contains a rider: *“(T)he practice of a trade, occupation or profession may be regulated by law.”*.
- 39.5. Section 30 – *“Everyone has the right to use the language and to participate in cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”* Note that sport very often also forms part of the culture of a community or group.
- 39.6. Section 31 – *“(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community* –
(a) to enjoy their culture, practice their religion and use their language;
and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

40. Sport is undeniably part of society and, as such, it is subject to the general laws of the country. South African law, be it statute law or the common law, touches every aspect of our lives, with sport being one of such aspects.
41. There is also a long history of legislation which dealt with playing a sport on a Sunday such as the Sunday Observance Ordinance (Cape)¹⁹ which forbade persons gathering “*for the purpose of playing at any game*” and similarly, the Sunday Law (Transvaal)²⁰ which forbade the playing of sport in a public place on a Sunday.

THE INTERNATIONAL APPROACH IN RESPECT OF POLITICAL INTERFERENCE OR DISCRIMINATION IN SPORT

42. In dealing with sport, especially on an international level, most of the international bodies provide for an approach in respect, *inter alia*, of:
- 42.1. **First**, racial discrimination;
- 42.2. **Second**, the regulation of political statements by athletes;²¹ and
- 42.3. **Third**, political interference in sport.

¹⁹ No. 1 of 1938

²⁰ No. 28 of 1896

²¹ The second aspect does not form the subject matter of this submission but a helpful article discussing this issue was prepared by Charles Morees (published 20 May 2016) under the title “*Politics and Sport: How FIFA, UEFA and the IOC regulate political statements by athletes.*”

43. It appears that there is a general tendency to avoid the rationalisation and politisation of sport.

The Olympic Charter and the Olympic Principle

44. The International Olympic Committee presents itself as the custodian of “*Olympiasm*”, promoting a peaceful society concerned with the preservation of human dignity and with the intention of being at service of the development of humankind and, importantly, ensuring that every individual must have the possibility of practising sport without discrimination and in a spirit of friendship, solidarity and fair play.

45. In 1962²² the then President of the IOC, Mr Avery Brundage, addressing the cancellation of the World Championships after political interference had resulted in the exclusion of certain teams at the World Championship event, stated that:

“The fundamental basis of the Olympic code is that no discrimination because of race, religion or political affiliation is permitted. Participants are welcome on their merits....”

and

“The International Olympic Committee stands unequivocally against the use of sport as a political instrument or weapon....”

²² See the reference in par. 29 of the letter directed to NOXA dated 23 January 2020.

46. Paragraph 4 of the Olympic Charter provides as follows:

“To prevent discrimination of any kind against a country, private person or groups of people on account of ethnic origin, gender, language, religion, politics or any other reason”.

47. Paragraph 5 of the Olympic Charter provides that a state may not interfere with Olympic organisations, which must perform their functions independently and without political interference.

48. There is a strong argument that the National Sport and Recreation Act even in its unamended form provides for the usurping of many functions which fall under the auspices of sport governing bodies.

The provisions of the International Association of Athletics Federations (“IAAF”) Constitution

49. Article 3 of the IAAF Constitution states, as parts of the objectives of the IAAF, that:

49.1. participation in athletics should be encouraged regardless of age, gender or race;

49.2. the IAAF, in taking a proactive stance combatting any form of discrimination or political influence, shall endeavour to ensure that no discrimination in athletics may exist, or even develop in any form, and

that all may participate in athletics regardless of gender, race, religious or political views or any other irrelevant factor;

- 49.3. compliance with the above-mentioned objectives is to be monitored and enforced; and
- 49.4. the authenticity and integrity of athletics should be safeguarded against corrupt conduct which might place the authenticity or integrity of athletics at risk.

World Rugby

50. Bye-law 3(f) of the World Rugby Bye-laws provides as follows:

“To prevent discrimination of any kind against a country, or against a private person or groups of people including on account of age, gender, marital status, maternity status, disability, race (including colour, nationality, ethnic or national origin), religion or belief, sex or sexual orientation or any other reason.”

51. The sanction provided for extends to a member country being expelled or suspended from membership of World Rugby, which may also impose such other punishment or penalty, including a fine, as it considers fit on a union or association for any infringement of the bye-laws or regulations or for any conduct which in the opinion of the council is prejudicial to the interest of World Rugby or of the game or which may bring World Rugby or the game or any persons, administrators or officials into disrepute (see bye-law 9.4(q) read with regulation 18).

International Netball Federation

52. The International Netball Federation's equality and diversity policy provides that:
- (i) Direct discrimination occurs when any person is treated less favourably than others; and
 - (ii) Indirect discrimination is when a provision or criterion is applied which on the face of it applies equally to all and is fair but can disadvantage individuals.
53. Paragraph 2 of the Articles of Association sets as its fundamental purposes to *“promote, improve and develop Netball globally, at all levels, in accordance with the ideals and objectives of the Olympic and Commonwealth movements, and without any discrimination on the grounds of race, gender, religion, creed, political beliefs, disability, marital status, sexual orientation or trade union activity”*.

International Cricket Council

54. In terms of paragraph 5C and D of the International Cricket Council's memorandum of association the ICC has as its purpose to uphold, respect and advance the unique culture, ethic and spirit of cricket and to protect the independence and autonomy of the ICC.

55. Paragraph 2.4A requires members to respect and further the objects of the ICC and paragraph 2.4D requires that domestic affairs be managed autonomously and to ensure that there is no government interference in its governance.
56. The ICC anti-racism Codes states: “*ICC and all of its members shall ensure that there is no discrimination in any form against any person because of race, colour, religion, national or ethnic origin.*”

FIFA

57. FIFA has adopted a very stringent approach in respect of political statements, extending even to the equipment used by players.
58. In terms of the International Football Association Board clarifying law “*the basic compulsory equipment must not have any political, religious or personal slogans, statements or images....the team of a player whose basic equipment is political, religious or personal slogans, statements or images will be sanctioned by the competition organiser or by FIFA*”. This even extends to the undergarments worn by the players and it is reasonably clear that a player wearing a political statement on his shirt or removing his shirt or other clothing item to reveal a statement underneath would face the risk of sanction.

THE TRANSFORMATION OF SOUTH AFRICAN SPORT

59. The concept of transformation of South African sport is not a new one. During the term of the then Minister of Sport and Recreation, Mr Ngconde Balfour, there was much talk of the need for a “*transformation charter*” to impose the world of government on recalcitrant sports federations in respect of transformation at all levels of their operations, ranging from the administrators to players and officials.²³
60. At that stage, there were even voices supporting the promulgation of a so-called “Sports Equity Act” or a “Black Economic Empowerment Act” in the sports context – that is legislation aimed at forcing those federations and individual functionaries in South African sport who are reluctant to embrace transformation to play a more active role in promoting the representation of all groups in sport.²⁴
61. The 1998 White Paper on sport and recreation contained a number of references to transformation, which included in Priority 6: *“Currently club, provincial and national teams do not reflect the racial demographics of South Africa. Clearly the concept of “Sport for all” is based on values of equity and access, which can only be realised through a concerted effort to develop previously disadvantaged sports people. South African sport will not be able*

²³ See the address by Minister Balfour on 10 February 2000 at the GCIS Media Briefing available online at www.pmg.org.za/briefings/000210sport.htm and the Minister’s media briefing of 22 September 2000 available online at www.pmg.org.za/briefings/briefings.php?id=141

²⁴ Louw: “Transforming South African Professional Sport: Some observations on recent developments”.

to realise its true potential, unless it reaches all its people. It is an imperative that will ensure ongoing and sustained success”.

62. During a briefing in respect of the White Paper on 19 October 2004 it was explained that because the White Paper was not binding on sports federations “*there should be a law to compel (federations) to do certain things*”. Even at that stage it was suggested that government should consider a truly drastic measure in enforcing compliance, namely the power to withdraw permission for teams to compete nationally or internationally.²⁵ It appears that the Amendment Bill is part of the culmination of a process which has been long in the coming and in part seeks to strip away the current restrictions in the Act on interference by the Minister.

“Universality” v “Merit”

63. It appears that the definition of transformation does not distinguish between amateur and professional sport as far as the application or meaning of “*transformation*” is concerned. In this regard it is unclear how one can employ the International Olympic Committee’s efforts to ensure universality in the Olympic Games as justification for transformation in sport.

²⁵ Louw: “Transforming South African Professional Sport: Some observations on recent developments” (supra)

64. The IOC's concept of universality is explained as a principle that applies "to ensure fair participation of all countries in the Olympic Games".
65. Louw²⁶ argues that the central issue in the evaluation of the legitimacy of transformation measures in sport is the distinction between amateur and professional sport. He argues that measures and policies that seem to function unproblematically and uncontroversially in the context of amateur sport cannot necessarily be applied legitimately in the professional arena, which functions as an entertainment-based industry. The objections here relate not only to the economic effects on the industry of measures that ignore the importance of merit, but also the impact such measures may have on the (employment) rights of other participants in the industry.
66. Louw argues further that the interest in promoting the fair participation of all countries in the Olympic Games is part and parcel of amateur sport. For competitions to be fair, all potential participants should be able to compete for a place on the playing field. It is unclear how this principle is to be applied in professional sport, however, where the nature of the industry (specifically its revenue generating entertainment role) and the interest of parties outside the team or league system (notably sponsors) require that merit, as a determinative of the competitive value of participants, should be the basis for participation.

²⁶ "Transforming South African Professional Sport: Some observations on recent developments" (supra)

67. The current debate raised surrounding the Amendment Bill is reminiscent of the earlier statement by former President Mbeki, who proposed that South African teams should resign themselves to losing international competitions for the next few years in the interest of bringing persons from disadvantaged groups into these teams and building “a 100% South African team rather than a 30% one”.²⁷
68. Unlike the provisions of our Constitution dealing with the application of affirmative action,²⁸ we do not see an explicit contextualisation of transformation policies as a means to redress past disadvantage. Our courts have held that affirmative action programmes should be “adequate”, in the sense of having the goal or promoting the achievement of equality as envisaged by the Constitution.²⁹
69. In the absence of clear evidence of previous unfair disadvantage, it would be hard to rationalise measures and policies by means of unequal treatment of individuals or groups. It is submitted that such link is a *sine qua non* for the legitimacy of affirmative action in this context.³⁰

²⁷ President Thabo Mbeki, speaking at the Presidential Sports Awards, 8 March 2002 (as quoted by Peters M & Hooper-box in the Cape Argus of 9 March 2002 – available online at www.iol.co.za).

²⁸ See the wording of section 9(2) of the Constitution.

²⁹ See for example *Public Servants Association v Minister of Justice* 1997 (5) BCLR 577 (T).

³⁰ See the views of Louw in “Transforming South African Professional Sport: Some observations on recent developments” par. 3.4.

70. Louw argues³¹ that the focus when dealing with transformation should rather be on assuring transformation to a system of fair access to opportunities at all levels. The efforts at transforming sport should concentrate on eradicating the pervasive inequalities inherited from an unjust system in the past and respective infrastructure, social and economic inequality and lack of opportunities for previously disadvantaged athletes, in the hope that these efforts will serve to attain more equitable representation of all groups in the near future. Although that may take time, it is an outcome worth waiting for.
71. He further argues that we should avoid unworkable attempts at justifying a process of transformation aimed purely at ensuring a token representation based on demographics, which smacks of a “*quick fix*” solution in a highly charged political climate. He contends that the government’s notion of moving beyond the prohibition of discrimination by enforcing the positive advancement of certain groups (on the basis of race demographics) in professional sport, in defiance of the role of merit, would not find favour among right-thinking persons anywhere in the world. The route which the Amendment Bill seeks to follow appears to disregard the applicable clauses contained in the constitutions, by-laws and regulations of the various international sports bodies which explicitly deal with discrimination based on race and political interference.

³¹ Louw: “Transforming South African Professional Sport: Some observations on recent developments” (supra) at Chapter 5.

72. It should be noted that the view adopted by Louw is not necessarily universally adopted or supported and for example, the authors of *Sport and the Law in South Africa* contend³² that due to our peculiar history there is justification for state intervention to ensure the “*levelling of the playing fields*”.
73. It is also true that even where there is discrimination it does not necessarily imply that such discrimination is unfair (as contradictory as the statement may sound). Our courts have held that where discrimination is designed to achieve a legitimate objective, then such discrimination would not be unfair – see for example *ex parte BOE Trust Limited 2009 (6) SA 470 (WCC) at 475C-D*.

ANALYSIS OF THE AMENDMENT BILL

74. It would not be practical to analyse each and every proposed amendment contained in the proposed Amendment Bill. It is therefore our intention to deal with the most contentious issues raised therein, which appear to include (but are not limited to) the following:
- 74.1. The criminalisation of non-compliance with the provisions of the Act – section 6;
- 74.2. The appointment of inspectors to enforce compliance (see section 8A), which would include:

³² Chapter 2, part 6.

- 74.2.1. search and seizure without a warrant issued pursuant to judicial oversight;
- 74.2.2. potential infringement upon constitutional rights in the process;
- 74.3. The extension of powers to the Minister to initiate investigations in terms of section 13;
- 74.4. The creation of offences and penalties in respect of non-compliance with the Act in terms of section 13M; and
- 74.5. The shift of the right to decide policy exclusively to the Minister.

In general – the shift and focus

- 75. It appears from a reading of the Amendment Bill that the proposed amendment is directed at a substantial shift in the intention of the Act as it stands, and the Bill provides for a dramatic centralisation of power in the hands of the Minister.
- 76. The purpose of the amendment is stated as follows in the preamble to the Amendment Bill:

“To amend the National Sport and Recreation Act, 1998, so as to delete, amend and insert certain definitions; to provide for the promotion and development of sport and recreation; to establish a Sport Arbitration Tribunal to resolve disputes between sport or recreation bodies; to

*provide for and regulate combat sport; to provide for and regulate the fitness industry; to provide for the procedure in bidding for and hosting of international sports and recreation events; to provide for the delegation of powers; and to provide for offences and penalties; and to provide for matters connected therewith.*³³

(Own underlying applied.)

The Memorandum on the Objects of the National Sport and Recreation Amendment Bill

77. Together with the publication of the Amendment Bill an explanatory memorandum was issued dealing with the contents of the proposed amendment. A copy of this memorandum is attached hereto as Annexure “B”.
78. In the introductory paragraph, the statement is made that the Bill recognises that there is a need for sport in South Africa to create a new dispensation that will govern and regulate the sport and recreation industry for the best interest of all the role players by clarifying the roles of Sport and Recreation South Africa, the Sports Confederation and the national federations, respectively.
79. The memorandum indicates that the Amendment Bill seeks to achieve the improved regulation of the sport and recreation industry, to provide for the

³³ Although these issues are not directly addressed in this submission, the changes relating to the regulation of the fitness industry and the procedure in respect of the bidding for and hosting of international sports and recreation events should not be ignored. It is clear that large amounts of money are involved in sport and that it has an economic impact as well as a social and cultural impact. Civil society should remain mindful to ensure that there is proper oversight and countermeasures to ensure the protection of constitutionally enshrined principles in all matters, also extending to sport.

establishment of the Sport Arbitration Tribunal, to appoint the inspectors to carry out routine inspections to ensure compliance with the Act, to empower the Minister to oversee sport and recreation and facilitate the improvement of the operations of sport or recreation bodies.

80. The comments in respect of the following sections of the Bill need to be emphasised:

80.1. Clause 3

“Clause 3 of the Bill seeks to amend section 4 of the Act which provides for the determination of sport and recreation policy. This clause seeks to amend subsection (3) of the Act to give the Minister powers to determine and publish policy objectives to be achieved by Sports and Recreation South Africa, the Sports Confederation and sports and recreation bodies.”

80.2. Clause 7

“Clause 7 of the Bill seeks to insert new sections 8A, 8B, 8C, 8D, 8E, 8F, 8G, 8H and 8I in the principal Act to provide for the appointment of inspectors, functions of inspectors, powers of entry, powers to question and inspect, cooperation with sport and recreation facilities, securing and undertaking compliance order limitation and order may be made order of court.”

80.3. Clause 8

“Clause 8 of the Bill seeks to amend section 9 which provides for programmes to promote equity in sport and recreation by inserting after subsection (2), the new subsections (3) and (4) of the Act to empower the Minister to make regulations for the vulnerable community to participate in sport and be protected from any sexual abuse and exploitation.”

80.4. Clause 13

“Clause 13 of the Bill seeks to amend section 14 of the Act which provides for the making of regulations, by extending the regulations in the Act to provide for the school sport development programme and the fees for a sport or recreation agent.”

A COMPARATIVE ANALYSIS BETWEEN THE EXISTING PROVISIONS OF THE ACT AND THE PROPOSED AMENDMENTS IN TERMS OF THE AMENDMENT BILL

81. This submission will proceed with a comparative analysis of selective portions of the Amendment Bill.

Section 2 of the Act

82. The existing section 2(2) of Act the provides that:

“The Sports Confederation may, from time to time, develop guidelines for the promotion and development of high performance sport.”

83. The proposed amendment of section 2(2) entails the following:

"(2) The Sports Confederation may, in consultation with the Minister, from time to time, develop guidelines for the promotion and development of high performance sport."; and

84. It is important to note that section 2 of the Act is to be amended to require that should the Sports Confederation develop guidelines for the promotion and development of high performance sport, that must be done in consultation with the Minister. In line with the spirit of the proposed Amendment Bill, the involvement and control of the Minister are dramatically expanded.

85. The insertion of section 2(7)(g) implies compliance with guidelines or policies in respect of the promotion of equity, 'representivity' and redress in sport and recreation as contemplated in section 13(a) of the Amendment Bill. Should the Sports Confederation fail to comply with its functions, the Minister may by written notice (see the proposed section 2(8)) insist on compliance within 30 days, failing which the Sports Confederation would risk suspension, withdrawal of its recognition and national colours or withdrawal of its funding.

86. A feature which repeatedly occurs in the Amendment Bill appears to be the potential interference of the national Minister in the sports affairs of the respective provinces which fall within the exclusive jurisdiction of the provinces in terms of the provisions of the Constitution.

Section 4 of the Act

87. The existing section 4 of the Act reads as follows:

“(1) The Minister may, after consultation with or after consideration of proposals made by the Sports Confederation in so far as high performance sport is concerned, from time to time, determine the general policy to be pursued with regard to sport and recreation.

(2) The policy determined by the Minister may, among others, relate to the following:

- (a) Confirming the roles and responsibilities amongst the various role-players in sport and recreation to ensure that all efforts are co-ordinated in an efficient manner;*
- (b) providing funds annually for the creation and upgrading of basic multipurpose sport and recreation facilities subject to the provisions of section 10 and according to priorities as determined, from time to time, by Sport and Recreation South Africa in consultation with provincial and local government and relevant sport or recreation bodies;*
- (c) maintaining the focus on the administration of sport and recreation, as well as the development of a volunteer corps, to assist in the implementation of the various mass participation programmes;*

- (d) *enhancing health consciousness by means of themed programmes aimed at specific interest groups in the society;*
 - (e) *identifying latent talent for sport;*
 - (f) *investing in the preparation of sport participants who are elected to represent the Republic in major competitions;*
 - (g) *helping in cementing the sports unification process; and*
 - (h) ***instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process.***
- (3) *The policy as determined by the Minister binds all sport or recreation bodies.”*

88. The Amendment Bill provides for the insertion of section 4(4) as follows:

“(4) The Minister may from time to time determine and publish policy objectives to be achieved by Sports and Recreation South Africa, the Sports Confederation and sports or recreation bodies.”.

89. Provision is made for the Minister to determine and publish policy objectives which in turn the Sports Confederation would be obligated to give effect to or face the proposed sanctions set out in the proposed section 2(9)(b).

Section 6 of the Amendment Bill

90. The Amendment Bill includes, *inter alia*, the insertion of a new section 6(2A), which provides that:

"(2A) Sport or recreation bodies must fulfil the obligations imposed on them by the relevant international controlling body for their respective codes of sport.

91. It specifically is provided in terms of section 2B that sport or recreation bodies must ensure compliance and that (see section 2B(a)(iii)) “*any person who fails to comply with the obligations of the international controlling body is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years.*”
92. The criminalisation of failure to comply is worrying. Whereas the general tendency was to provide for a sanction of suspension, exclusion or withdrawal of funding, the Amendment Bill imposes a criminal sanction which includes imprisonment and a fine. The implication lingers that should strict effect not be given to the Minister’s policies, such individuals may face a criminal sanction.

Section 6B of the Amendment Bill

93. Section 6B of the Amendment Bill provides that the Director-General must issue a certificate recognising a sport or recreation body (note the proposed expansion of the definitions relating, *inter alia*, to “recreational activity”) as the

only sport or recreation body for a particular sport or recreational activity and that (section 6B(3)) the Minister must prescribe criteria for the recognition of sport and recreation bodies as the only sport or recreation body for a particular sport or recreational activity.

94. The impression lingers that the Minister appears to be tightening his hold on sport and ensuring that sport entities are strictly forced to comply with and fall within the bodies created for that specific sport or recreational activity. This may be directed at avoiding the recognition by international sport bodies of parallel sport bodies as happened with the South African Table Tennis Union in the apartheid era.
95. Insofar as voluntary sport and recreation relates to persons participating without the intention of actively engaging in organised sport, the attempt to infringe on those individuals' rights is likely to amount to an unreasonable infringement of their constitutional rights. The Amendment Bill does not appear to make any such distinction.

Section 8A of the Amendment Bill

96. Section 8A of the Amendment Bill provides as follows:

8A. (1) The Minister may—

- (a) appoint any person in the public service as a sport and recreational facilities inspector; or
- (b) designate any person in the public service or any person registered as a sport or recreation agent in terms of section 6A to perform any prescribed function of a sport and recreation facilities inspector.

(2) Any person appointed or designated under subsection (1) must perform his or her functions as sport and recreational facilities inspector subject to the direction and control of the Minister.

(3) The Minister must provide each sport and recreational facilities inspector with a signed certificate in the prescribed form, stating—

- (a) that the person is a sport and recreation facilities inspector; and
- (b) which of the functions of a sport and recreation facilities inspector such inspector may perform.

(4) The Minister must prescribe, in order to promote, monitor and enforce compliance with this Act—

- (a) the functions of a sport and recreation facilities inspector, which may include the power to enter and inspect any sport and recreation facility during business hours;

(b) that a sport and recreation facilities inspector may—

- (i) question any person at a sport and recreation facility who the inspector believes may have information relevant to the inspection;

(ii) require the person in charge of such sport and recreation facility to produce for inspection, or for the purpose of obtaining copies or extracts thereof or therefrom, any document, including any record which such person is required to maintain in terms of any law; and

(iii) take samples of any substance or photographs relevant to the inspection;

(c) provide that a sport and recreation facilities inspector may issue a compliance order to the owner of a sport or recreational facility requiring such owner to comply with that compliance order; and

(d) provide that the Director-General may apply to a court of law in order to make a compliance order contemplated in paragraph (c) to be made an order of that court of law.

(5) The regulations referred to in subsection (4) must provide that any entry upon or search of any sport and recreation facility in terms of a provision of the regulations referred to in that subsection must be conducted with strict regard to decency and good order, including—

(a) the right of a person to dignity;

(b) the right of a person to freedom and security; and

(c) the right of a person to privacy."

97. The provision for inspectors with wide-ranging powers is a novel concept within the ambit of the existing Act.
98. Although the proposed section 8A(5) appears to pay lip service to the protection of the constitutional rights of individuals who may be affected by the exercise of the powers envisaged in terms of this section, it is disconcerting that the inspectors would have such far-ranging powers without the incorporation of counterbalances to ensure the protection of the rights of individuals, organisations and entities who may be affected by the exercise of such dramatic powers.

99. It is specifically disconcerting that there is no limitation on the type of sport or recreational facility which the proposed inspectors may enter as well as the wide-ranging powers to interrogate, require to produce or even seize with the purpose of obtaining copies or extracts.
100. Fortunately, there is the limited fail-save in the proposed section that the Director-General (see proposed section 8A(4)(d)) may apply to a court of law for a compliance order contemplated in paragraph (c) to be made an order of court. At least to this extent the impression is that there would be a degree of judicial oversight when dealing with compliance orders.

Section 11D of the Amendment Bill

101. Suffice it to state that it appears that the Minister intends to extend his regulatory powers to the fitness industry, and this section also provides for offences, penalties and dispute resolution mechanisms.³⁴

³⁴ See proposed section 11D(1)(f).

102. It is not the intention of this submission to deal extensively with the provisions relating to the fitness industry.

Section 13 of the Act

103. The existing section 13(4) of the Act deals with investigations and provides as follows:

“(4) The Sports Confederation may, at any time, of its own accord, cause an investigation to be undertaken to ascertain the truth within a sport or recreation body, where allegations of-

- (a) any malpractice of any kind, including corruption, in the administration;*
- (b) any serious or disruptive divisions between factions of the membership of the sport or recreation body; or*
- (c) continuation or maintenance of any institutionalised system or practice of discrimination based on gender, race, religion or creed, or violation of the rights and freedoms of individuals or any law,*

have been made, and may ask the Minister to approach the President of the Republic to appoint a commission of inquiry referred to in section 84 (2) of the Constitution.”

104. The proposed Amendment Bill would provide, *inter alia*, as follows:

104.1. The Minister and not the Sports Confederation (see the proposed change to subsection (4)) may, at any time, and on his or her own accord cause an investigation to be undertaken in terms of the section.

104.2. Provision is also made for the insertion of new subsections (9) to (16) as follows:

"(9) The Minister may, if he or she deems it fit, appoint a Ministerial Committee of Inquiry to investigate matters contemplated in subsection (4)(a) or (b) or any matter that may bring a sport or recreational activity or body into disrepute.

(10) (a) The Ministerial Committee of Inquiry appointed by the Minister in terms of subsection (9) may investigate, make findings and recommendations and must report its findings and recommendations to the Minister.

(b) The report to the Minister may include information relating to—

- (i) compliance with all relevant safety and security measures in place for a sport or recreational event in terms of the Safety at Sports and Recreational Events Act, 2010 (Act No. of 2010);
- (ii) any failure to comply with the provisions of section 13A of this Act and the Transformation Charter as endorsed and approved by the Minister; and

(iii) any failure to comply with the principles of good governance by a sport or recreation body.

(11) The Ministerial Committee of Inquiry must be chaired by a retired judge and assisted by any members appointed by the chairperson in consultation with the Minister.

(12) At any time during an investigation being conducted in terms of subsection (1) the Ministerial Committee of Inquiry may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject—

(a) to appear before the Ministerial Committee of Inquiry to be questioned at a time and place specified in the summons; or

(b) to deliver or produce to the Ministerial Committee of Inquiry any book, document or other object referred to in this subsection at a time and place specified in the summons.

(13) A summons contemplated in subsection (12)—

(a) must be signed by the chairperson, or by a member of the Ministerial Committee of Inquiry designated by the chairperson; and

(b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court.

(14) The chairperson may require a witness, before giving his or her evidence, to take an oath or to make an affirmation which oath or affirmation must be administered by the chairperson or

such member of the Ministerial Committee of Inquiry as the chairperson may designate.

(15) Any person who has been summoned to appear before the Ministerial Committee of Inquiry as a witness or who has given evidence before the Committee is entitled to the same witness fees from public funds in the same manner as in criminal proceedings.

(16) Any person who—

(a) willfully interrupts the proceedings of the Ministerial Committee of Inquiry; or

(b) willfully hinders or obstructs the Ministerial Committee of Inquiry in the performance of its functions.

is guilty of an offence."

105. It appears that the effect of the proposed amendment would be to divest the Sport Confederation of the right to initiate an investigation and to place this right solely in the hands of the Minister. This appears to be a clear indication of a high risk of political interference in these affairs. This must be juxtaposed to the prohibitions in respect of political interference provided for by the various international sport bodies.

The insertion of sections 13D, 13E, 13F, 13G, 13H, 13I, 13J, 13K, 13L, 13M and 13N

106. The proposed new sections provide for the establishment and composition of a Sport Arbitration Tribunal. For the sake of brevity, the context of the proposed sections is not covered in this submission..

107. The members of the Tribunal would be appointed by the Minister and would deal with disputes in the first instance and decide on appeals against decisions made in terms of section 13.
108. It is interesting to note that the proposed section appears to provide that a party may approach the Tribunal directly and does not require internal appeals and processes to be finalised first. This much is gleaned from the proposed section 13D(1).

Section 13M of the Amendment Bill

109. Section 13M of the Amendment Bill provides as follows:

Offences and penalties

13M. (1) Any person who—

(a) contravenes or fails to comply with section 6(3)(a)(i) or (ii) and (e);

(b) contravenes or fails to comply with sections 11A and 11B,

is guilty of an offence,

(2) A person who—

(a) manipulates the outcome of a sport or recreational match event;

(b) accepts, agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person;

(c) gives, agrees or offers to give any person any gratification, whether for the benefit of another person in return for—

(i) engaging in any act which constitutes a threat to undermine the integrity of any sporting event, including in any way, influencing the run of play or outcome of sporting event; or

(ii) not reporting the act contemplated in this section to the authority or to any other person holding a senior position in the sport and recreation body or to the Minister or

(d) gives effect to any scheme which constitutes a threat to or undermine the integrity of any sporting event, including, in any way, influencing the run of play or outcome of a sporting event,
is guilty of an offence,

(3) A person convicted of an offence in terms of—

(a) section 13(16)(a) or (b) is liable to a fine or imprisonment for a period not exceeding one year, or both a fine and such imprisonment; or

(b) this section is liable to a fine or imprisonment for a period not exceeding 20 years, or both a fine and such imprisonment.

110. This appears to be a major departure from the approach adopted in the Act, specifically by creating specific offences and penalties in respect of non-compliance and enforcement of the Act in its proposed amended form.

Section 14 of the Act

111. Section 14 of the Act provides as follows:

*“The Minister may, **after consultation with the Sports Confederation** in so far as high performance sport is concerned, make regulations –*

- (a) as to any matter which by this Act is required or permitted to be prescribed;*
- (b) as to the implementation of various programmes for sport and recreation;*
- (c) as to the training of sport and recreation leaders;*
- (d) relating to mass participation in sport and recreation;*
- (e) providing for resources for sport and recreation;*
- (f) providing for a sport support services;*
- (g) providing for recreation support services;*
- (h) as to the programmes to promote engagement in sport and recreation;*
- (i) as to the funding of sport and recreation;*

- (j) relating to the incentives for high performance sport achievers and recreation practitioners;
- (jA) for kickboxing, boxing, karate, wrestling, taekwando, judo and any other form of combat sport;
- (jB) to minimize the chances of injury in any sport or recreational activity other than boxing, kickboxing, karate, wrestling, taekwando, judo and any other form of combat sport;
- (jC) as to hosting of and bidding for major international sports events;
- (jD) as to the awarding of national colours;
- (jE) as to the recognition of sport or recreation bodies;
- (jF) as to the control of foreign sports persons in South Africa;
- (jG) as to the fitness industry;
- (jH) as to dangerous sports and recreational activities;
- (jI) as to the procedure for negotiating a service level agreement and other matters to be dealt with in such an agreement; and
- (k) **generally, as to any other matter in respect of which the Minister may deem it necessary or expedient to make regulations in order to achieve the objects of this Act.**” (Own emphasis.)

112. The Amendment Bill provides, *inter alia*, that the first part of the section be amended as follows:

"The Minister may, [after consultation with the Sports Confederation in so far as high-performance sport is concerned,] make regulations—";

113. Once again, the Minister's power to make regulations would, if the proposed amendment succeeds, imply that the Minister when making regulations would no longer even have to consult with the Sports Confederation as far as high performance sport is concerned.
114. It is puzzling, in a democratic society which espouses as core values open processes and participation, that consultation with the Sports Confederation would be excluded. One would have expected that the degree of participation would be increased rather than further limited.

CONCLUSION

115. There can be no doubt that the issue of politics in sport is a contentious one. South Africa has a long history of political interference and the consequences thereof in sport. In general, unreasonable interference by government in sport has historically resulted in negative consequences for South Africa.
116. If one is to take a page from the history books an approach of political interference and racialism in sport has resulted in a systematic but dramatic counterreaction from the international sporting community which ultimately resulted in the exclusion of many South African teams from international sporting events.

117. It is also pertinently ironic that the now ruling party appears to have adopted a dramatically different approach from the views which they expressed to the international community and the United Nations during the liberation struggle period.
118. The state does have the right to legislate, within the bounds of the Constitution, and to regulate sport. However, that does not imply that the international sporting bodies would be bound to accept what may well be interpreted as political interference and race-based policies.
119. How these international bodies will approach the formal complaints will only be revealed by time. However, there appears to be a universal principle that there should be no discrimination based on race nor political interference. The way in which such complaints are to be dealt with varies from body to body. In some of the examples a complaint which would require the ultimate sanction of expulsion from the body would in certain cases be presented to the general assembly of members for a vote, which might be guided by a number of factors other than purely legal considerations. In any event, a sanction by these bodies would not necessarily influence the question whether the legislation itself could be impugned in our courts or would be deemed unconstitutional. This being said, adverse reaction by international bodies would be part of what a court may consider in evaluating the constitutionality of the proposed legislation as part of a value-based assessment.

120. In respect of the issue of constitutionality, it appears that our Constitution, save for the specific delegation of powers relating to provincial sport, does not deal directly with fundamental rights relating solely to sport. Owing to the very nature and categorisation of sport, other individual rights may be indirectly affected. That being said, in so far as the national Minister's proposed powers would infringe upon the rights of provinces in respect of provincial sport, this may in itself warrant a constitutional challenge to those provisions.
121. Where the subject matter relates to discrimination, the second part of the inquiry goes to whether such discrimination is justifiable within an open and democratic society and whether such discrimination would be unfair where it seeks to attain legitimate objectives – in this case the redress of past injustices based upon gender and/or race.
122. It appears that the Amendment Bill may in itself require judicial scrutiny as to whether its provisions unduly encroach upon the rights of citizens. It is more likely that the regulations which the Minister may promulgate could be the trigger of a potential constitutional challenge. Considering the content of the Amendment Bill and the general approach of dramatically expanding the Minister's powers as well as criminalisation of non-compliance, there clearly is cause for concern.
123. It is our opinion that the degree of political intervention and the apparent proposed intention to impose policies by the Minister relating to team selection

along racial lines would amount to a contravention of most if not all of the international bodies' constitutions, by-laws and/or regulations.

124. In closing, the issue of transformation in sport is a contentious one which is politically loaded and is likely to result in a protracted and unpredictable course of litigation.³⁵ There are wide-ranging views in respect of the rationality and justification for such an approach towards transformation in sport and this type of issue (the issue of transformation) has previously resulted in dramatically different views being adopted by the courts.
125. It is likely that the highest court in the land will ultimately have to decide whether the discrimination embodied in the proposed legislation (to be considered with any subsequent regulations) is justifiable or whether the moral high ground will win the day that there should be no discrimination in sport at all and that preference will be given to the Olympic Principle.

³⁵ As yet, there are no reported cases in the register of legislation judicially considered which deals with the provisions of the NATIONAL SPORT AND RECREATION ACT 110 OF 1998.