

**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION  
SEX DISCRIMINATION ACT 1984 (Cth)  
Section 44(1)**

**NOTICE OF REJECTION OF APPLICATION FOR EXEMPTION**

By this instrument, the Human Rights and Equal Opportunity Commission (the "Commission") declines to grant to the Catholic Education Office, Archdiocese of Sydney (the "CEO") a temporary exemption pursuant to section 44(1) of the *Sex Discrimination Act (Cth) 1984* (the "Act"), in relation to the operation of sections 21(2)(a) and 22(1) of the Act.

**1. BACKGROUND**

- 1.1 The CEO applied, by letter to the Commission dated 30 August 2002, for a temporary exemption under section 44 of the Act. A supplementary application was made by letter dated 16 October 2002. The original application and the supplementary application will be collectively referred to herein as the "Exemption Application".
- 1.2 The Exemption Application was made in respect of a proposal to offer teacher training scholarships to male students only. The proposed scholarships are to be offered to male students completing the Higher School Certificate in 2002. The scholarships, providing financial support and incentives, aim to encourage male students to enroll in primary teacher training at university for the 2003 academic year. Male students accepting the scholarships would commit to working within Catholic primary schools for a fixed period following completion of the teaching degree.
- 1.3 The Exemption Application relates to sections 21(2)(a) and 22(1) of the Act.
- 1.4 The exemption sought in the Exemption Application is for a period of five years. The CEO indicated in the Exemption Application that the provision of male-only scholarships may form part of a longer term strategy to encourage males into primary teaching and that its impact may not be immediate. The CEO further suggested that the advertising of scholarships in 2002 may result in increased male applicants in subsequent years.
- 1.5 The CEO stated that the underlying goal of the Exemption Application was to increase the number of male primary school teachers so that boys have male role models. It was further suggested by the CEO that having access to male role models will help improve the 'substantive equality of boys and girls' in primary schools. Underpinning this argument are a number of

assumptions (which are not clearly articulated in the Exemption Application), including that:

- male and female teachers have different teaching styles, employ different discipline techniques and interact with boys differently;
- there is a relationship between the gender of the teacher and the academic achievement of the student; and
- boys suffer a disadvantage in primary schools due to the paucity of male teachers.

1.6 As the Exemption Application raised issues of wider public concern, the Commission considered it necessary and appropriate to seek public comment. A Notice of Inquiry was posted on the Commission's website at [http://www.humanrights.gov.au/legal/sda\\_exemption.html](http://www.humanrights.gov.au/legal/sda_exemption.html) on 7 November 2002 seeking submissions by 3 December 2002. Extensions were granted in respect of four submissions provided to the Commission after that date.<sup>1</sup>

1.7 Eleven submissions were received, six opposing the grant of the exemption sought in the Exemption Application<sup>2</sup> and five supporting it.<sup>3</sup> With one partial exception, copies of those submissions have been provided to the CEO. The partial exception is material, provided as an attachment to one submission,<sup>4</sup> which the submitter requested not be made public or distributed outside the Commission. The Commission has determined that it will not have regard to that material in considering the Exemption Application.

1.8 Those submissions supporting the grant of the exemption contended, amongst other things, that male teachers are necessary for the sound development of boys, that male and female teachers teach differently, and that boys need male role models.

1.9 The matters raised by those opposing the grant of the exemption included the contention that the exemption sought would subvert the fundamental purpose of sex discrimination legislation to ensure equitable opportunities

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<sup>1</sup> Those four submissions were: a submission prepared by the Victorian Institute of Teaching dated 3 December 2002; a submission prepared by the Independent Education Union of Australia dated 13 December 2002; an undated submission prepared by Ms Christine Crothers and an undated submission prepared by Mr Peter West.

<sup>2</sup> Being the submission prepared by the Victorian Institute of Teaching dated 3 December 2002; the submission prepared by the Independent Education Union of Australia dated 13 December 2002; the undated submission prepared by Ms Christine Crothers; a submission prepared by Chris Fraser dated 29 November 2002; a submission prepared by Jo Platt received 27 November 2002 and a submission prepared by David Hawkes dated 18 November 2002.

<sup>3</sup> Being the undated submission prepared by Mr Peter West; a submission prepared by M Bell dated 25 November 2002; a submission prepared by DJ Knowles received 28 November 2002; a submission prepared by Ross Farrelly dated 23 November 2002 and a submission prepared by Peter Whitfield dated 26 November 2002.

<sup>4</sup> Being the submission prepared by the Victorian Institute of Teaching dated 3 December 2002.

and economic parity between the sexes. A number of the submissions opposing the grant of the exemption pointed to what was said to be a lack of evidence showing that financial hardship is the barrier preventing a higher number of males from enrolling in primary teacher training.

1.10 The Commission is of the view that the Exemption Application should be declined on the basis that the granting of that application would be inconsistent with the objects of the Act and unreasonable in that the discriminatory effects that would be caused by the proposed scholarship scheme outweigh the reasons advanced in favour of it (which, for reasons discussed below, have not been established by the CEO at this stage).

1.11 The Commission's findings are based upon the following material before the Commission:

1.11.1 The Exemption Application.

1.11.2 Material provided by the CEO in support of the Exemption Application, being:

- statistics produced by the NSW Catholic Education Commission demonstrating the disparity between numbers of male and female primary school teachers in NSW and ACT schools, with female teachers numbering 4265 and male teachers numbering 937 in 2001;
- statistics from the New South Wales State Government commissioned report by Dr Gregor Ramsay entitled *Quality Matters: Report of the Review of Teacher Education in New South Wales*, which indicated that, in 1999, only 12 per cent of new primary teachers employed by the New South Wales Department of Education and Training were male; and
- a copy of a 1999 study jointly conducted by the Australian Catholic University and the CEO entitled *Men in Primary Schools: An Endangered Species?* in which it was contended that the 'feminisation' of teaching as a profession is continuing to occur. The study concluded that the decline in males enrolling and completing teaching training is a 'cause of concern to educational administrators and systemic policy makers and [has] wide-ranging educational and social ramifications'. The study made a number of recommendations, including increasing awareness among educational administrators, systemic policy makers and school executive staff of the 'difficulties experienced by males entering primary teaching, especially in relation to child protection issues';

raising the status of teaching; and investigating the factors related to male applicants' choice of careers in primary school teaching, including the development of recruitment strategies.

- 1.11.3 Eleven submissions received from individual members of the public, the Victorian Institute of Teaching and the Independent Education Union of Australia, referred to at 1.7 to 1.9 above.
- 1.11.4 Statistics from the Graduate Careers Council of Australia Graduate Destination Survey 2001<sup>5</sup> which also show a disparity between the numbers of male and female education graduates in full time employment: 4,180 females versus 1,369 males.
- 1.11.5 The report of the House of Representatives' Standing Committee on Employment, Education and Workplace Relations' inquiry into boys and education entitled *Boys: Getting It Right*.<sup>6</sup> The existence of that inquiry was drawn to the Commission's attention in a number of the submissions referred to at 1.7 to 1.9 above.

## **2. FINDINGS ON MATERIAL QUESTIONS OF FACT**

- 2.1 Based on the evidence referred to in paragraph 1.11, the Commission's findings on material questions of fact relating to the Exemption Application are as follows.
  - 2.1.1 A significantly higher number of females than males are employed as primary school teachers in Australia.
  - 2.1.2 The reasons for the gender imbalance in the primary teaching profession are many and complex, with the material before the Commission indicating that those reasons include status of teachers in the community, child protection issues and the pay and conditions of primary school teachers relative to other occupations.<sup>7</sup>
  - 2.1.3 However, there is insufficient evidence before the Commission to support a finding that the gender imbalance in the primary teaching profession is caused by matters, factors or circumstances that might be remedied by the proposed scholarship scheme.

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<sup>5</sup> Graduate Careers Council of Australia Ltd Graduate Destination Survey 2001: A National Survey of the Activities of Year 2000 University Graduates, Graduate Careers Council of Australia Ltd, Melbourne, 2002, p23.

<sup>6</sup> House of Representatives' Standing Committee on Employment, Education and Workplace Relations *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002.

<sup>7</sup> See, by way of example, the House of Representatives' Standing Committee on Employment, Education and Workplace Relations' inquiry into boys and education entitled *Boys: Getting It Right*, particularly, paragraphs 6.80-6.85 of that report at pp 155-157.

- 2.1.4 There is also insufficient evidence before the Commission to support a finding that the gender imbalance in the primary teaching profession will have adverse social or educational effects or will detrimentally affect school culture or the education of boys enrolled as students in primary schools.

### **3. THE COMMISSION'S REASONS FOR DECLINING TO GRANT AN EXEMPTION ARE AS FOLLOWS:**

#### ***Introduction***

- 3.1 The Commission has developed criteria and procedures to guide the Commission in considering applications for temporary exemption (the "Guidelines"). The Guidelines are published on the Commission's website at [www.humanrights.gov.au/legal/sda\\_exemptions.html](http://www.humanrights.gov.au/legal/sda_exemptions.html). The discussion below follows the structure of the Guidelines.
- 3.2 Amongst other things, the Guidelines state (in section 2):

*The Commission will have regard to the following criteria in exercising its discretion:*

1. *The applicant must show at least an arguable case that the circumstances or activities might constitute discrimination to which the SD Act applies. If the circumstances are not at least arguably discriminatory within the terms of the SD Act, then there is no need for the Commission to grant an exemption. In considering this question, the Commission will have regard to:*
  - *Whether the circumstances are within the jurisdiction of the SD Act (see s.9);*
  - *Whether any of the permanent exemptions apply (see s.13; ss.30 to 43);*
  - *Whether the circumstances can be brought within the special measures provision (see s. 7D).*
  
2. *The exemption must be appropriate in light of the objects and scheme of the SD Act. In considering this question, the Commission will have regard to:*
  - *Whether the circumstances, while not falling precisely within any of the permanent exemptions to the SD Act, bear a close resemblance to any of those exemptions so as to be within the spirit or broad scheme of those exemptions. Where an exemption is sought for reasons wholly unrelated to the objects*

*of the SD Act (such as to gain commercial advantage), an exemption will not be appropriate.*

- *The particular circumstances of the case; and*
- *The reasonableness of the exemption sought - the Commission will weigh up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption.”*

***First criterion: Arguable case of discrimination.***

3.3 For the reasons set out below, the Commission is of the view that the CEO has demonstrated that there is an arguable case that the circumstances and activities that are the subject of the Exemption Application might constitute discrimination to which the Act applies.

3.4 In considering whether the circumstances that are the subject of the Exemption Application are arguably within the jurisdiction of the Act, the Commission particularly notes section 9(10) of the Act, which provides:

*If the Convention is in force in relation to Australia, the prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention.*

The “Convention” is defined in section 4 of the Act to mean the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>8</sup> (“CEDAW”), which is in force in Australia.<sup>9</sup> Sections 21(2)(a) and 22(1) are prescribed provisions of Part II of the Act (see section 9(1) of the Act). The exemption is sought in relation to possible discrimination claims that might be brought by women under those provisions. Such possible claims would be arguably within the jurisdiction of the Act by reason of section 9(10).

3.5 The Commission considers that it is arguable that the scholarship scheme might contravene sections 21(2) and 22(1) of the Act:

Section 22(1), which is contained in Division 2 of Part II of the Act, provides:

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<sup>8</sup> ATS 1983, No. 0009, UNTS 1249 page 13.

<sup>9</sup> CEDAW entered into force for Australia on 27 August 1983. Australia initially entered a reservation in respect of CEDAW regarding paid maternity leave and the Commonwealth Defence Force Policy excluding women from combat and combat related duties. On 14 April 2000, Australia withdrew that part of the reservation that related to Defence Force Policy. It deposited a new reservation that was limited to the exclusion, under such a policy, of women from combat duties.

- (1) *It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:*
- (a) *by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
  - (b) *in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
  - (c) *in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.*

“Services” is non-exhaustively defined in section 4 of the Act so as to include:

“services relating to ...the provision of grants...”

The Commission considers that it is arguable that the granting of scholarships involves the provision of “services” for the purposes of section 22(1) of the Act. The Commission further considers that it is arguable that the activities and circumstances referred to in the Exemption Application may contravene section 22(1).

Section 21(2), which is contained in Division 2 of Part II of the Act, relevantly provides:

*It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, marital status, pregnancy or potential pregnancy:*

- (a) *by denying the student access, or limiting the student's access, to any benefit provided by the educational authority...*

Section 4 of the Act defines “educational authority” to mean a school, college, university or other institution at which education or training is provided.

Section 21(2) appears to contemplate a situation in which a student attending or enrolled at the educational authority in question is denied a benefit (arguably including a future benefit) provided by that educational authority. The CEO stated, in the Exemption Application, that it is responsible for the operation of 148 schools falling within the jurisdiction of the Archdiocese of Sydney. However, it has not suggested to the

Commission that it is responsible for the operation of the universities at which the scholarship recipients would attend.

In those circumstances, it is unclear to the Commission how the CEO anticipates that section 21(2) would apply to the proposed scholarship scheme. The Commission is nevertheless prepared to assume, in favour of the CEO, that it may be possible to identify hypothetical claims that might arise from the circumstances described in the Exemption Application. For example, it may be that female students enrolled at the secondary schools administered by the CEO will bring actions alleging breaches of section 21(2) of the Act in respect of the denial of future benefits (being the provision of financial assistance in the following year). The Commission therefore considers it at least arguable that the scholarship scheme may contravene section 21(2) in certain circumstances.

- 3.6 The Commission considers it arguable that the permanent exemptions do not apply to the activities and circumstances that are the subject of the Exemption Application.
- 3.7 Sections 37 and 38 of Division 4 of Part II of the Act provide permanent exemptions from the operation of Divisions 1 and 2 of the Act for religious bodies and educational institutions established for religious purposes, respectively.
- 3.8 Section 37 provides:

*Nothing in Division 1 or 2 affects:*

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;*
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;*
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or*
- (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*

3.9 While the CEO may be a body established for religious purposes, the material before the Commission does not suggest that the proposed scholarship scheme involves acts or practices that conform to the doctrines, tenets or beliefs of Catholicism.

3.10 Section 38(3) provides:

*Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's marital status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

3.11 Section 38(3) does not refer to discrimination on the ground of a person's sex, and as such, arguably does not apply to the circumstances and activities that are the subject of the Exemption Application.

3.12 Finally, the Commission considers it arguable that the special measures provision in section 7D of the Act does not apply to the circumstances and activities that are the subject of the Exemption Application.

3.13 Section 7D of the Act provides:

- (1) *A person may take special measures for the purpose of achieving substantive equality between:*
  - (a) *men and women; or*
  - (b) *people of different marital status; or*
  - (c) *women who are pregnant and people who are not pregnant; or*
  - (d) *women who are potentially pregnant and people who are not potentially pregnant.*
- (2) *A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).*
- (3) *A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:*
  - (a) *solely for that purpose; or*
  - (b) *for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.*

- (4) *This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.*

3.14 Substantive equality (or equality in fact<sup>10</sup>) is to be contrasted with “formal equality”. In a different statutory context, Brennan J explained the difference between those two concepts in *Gerhardy v Brown*<sup>11</sup> (*Gerhardy*) in the following terms:

*A discriminatory law or a discriminatory act done in due obedience to the law denies the human right of equality before the law, referred to in the third preamble to the Convention. The right to equality before the law without distinction as to race is guaranteed by the States Parties to the Convention (Art.5). The claim to equality before the law is, as Sir Hersch Lauterpacht wrote (An International Bill of the Rights of Man (1945), at p.115), "in a substantial sense the most fundamental of the rights of man ... It is the starting point of all other liberties". A distinction etc. based on race that is required by law nullifies the enjoyment of the human right to equality before the law.*

*But it has long been recognized that formal equality before the law is insufficient to eliminate all forms of racial discrimination. In its Advisory Opinion on Minority Schools in Albania (1935) Ser.A/B No.64, the Permanent Court of International Justice noted the need for equality in fact as well as in law, saying (at p.19):*

*"Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.*

*It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality of fact...<sup>12</sup>*

3.15 The CEO has suggested that the proposed scholarships to male students only may fall within the scope of section 7D of the Act as a special measure intended to achieve substantive equality. If this is correct, then it would be unnecessary for the Commission to grant a temporary exemption.

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<sup>10</sup> See item 17 of the *Supplementary Explanatory Memorandum to the Sex Discrimination Bill 1995*, which indicated that the terms are synonymous.

<sup>11</sup> (1985) 159 CLR 70.

<sup>12</sup> *Ibid* at 128.

- 3.16 There is limited jurisprudence on the meaning and operation of section 7D of the Act. In *Proudfoot v Australian Capital Territory Board of Health and Others*,<sup>13</sup> (*Proudfoot*) Sir Ronald Wilson (the then President of the Commission) considered the differently worded predecessor to that section<sup>14</sup> in the context of a health service limited to women. Sir Ronald first observed, applying the reasoning of the High Court in *Gerhardy*, that some degree of deference was to be paid to the reasoning process of the person undertaking the alleged special measure:

*Ultimately, it is not for the Commission to actually determine whether the challenged initiatives are in fact necessary or even wholly suitable for achieving the purpose of promoting equal opportunities as between women and men in the field of health care. All that [the predecessor provision to section 7D of the Act] requires is that those who undertake the measures must do so with that purpose in view and that it be reasonable for them to conclude that the measures would further the purpose. This approach to the section reflects that of the High Court in Gerhardy -v- Brown (1984-1985) 159 CLR 70.*

His Honour went on to find that the predecessor provision to section 7D of the Act applied to the facts before him, stating:

*Given the historic and continuing inequality which the evidence indicates has been experienced by women in Australian society, I consider that they are capable of being regarded by governments as requiring special initiatives in the field of health care.*

- 3.17 The Commission has published guidelines to the scope of section 7D of the Act, entitled “*1996 Guidelines for Special Measures under the Sex Discrimination Act 1984*”. Those guidelines include a chapter discussing the criteria to be applied in determining whether a special measure exists.<sup>15</sup>

- 3.18 The Commission there noted that:

*Those who wish to implement a special measure must have a clear idea of the problem which their action is designed to redress. This requires an analysis to determine whether, in the relevant area (service delivery, employment etc), there are practices which do, or tend to, exclude, disadvantage, restrict or result in an adverse effect upon people in those groups, or leave uncorrected the effects of past discrimination against them.... The most important aspect of*

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<sup>13</sup> (Unreported, HREOC, Sir Ronald Wilson, 17 March 1992), extract at (1992) EOC 92-417.

<sup>14</sup> Section 33 of the SDA, which then provided: “*Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act*”.

<sup>15</sup> HREOC, “*1996 Guidelines for Special Measures under the Sex Discrimination Act 1984*” (1996). See chapter 2, commencing at p16.

*identifying substantive inequality is to look at the **overall effect** of current practices and to trace unequal outcomes to their source. (original emphasis)<sup>16</sup>*

3.19 The Commission also accepted that Sir Ronald Wilson's approach in *Proudfoot* was applicable to section 7D of the Act.<sup>17</sup> That is, that it need not be established that the special measures are in fact necessary or even wholly suitable for achieving the purpose of achieving substantive equality. Rather, it need only be demonstrated that the person undertaking the alleged special measure did so for the purpose of achieving substantive equality and that it was reasonable for them to conclude that the measure would further that purpose. The Commission went on to state:

*It is more likely that a person who undertakes a measure will meet this requirement if they have:*

- *a comprehensive analysis of the inequality which the measure is designed to address;*
- *a carefully planned and implemented measure;*
- *an explanation of the way in which the measure will achieve the purpose;*
- *ongoing methodology to determine whether equality has been achieved.*<sup>18</sup>

3.20 Although not entirely clear, it does not appear to be suggested by the CEO that the scholarship scheme is aimed at addressing alleged substantive inequality between male and female teachers. If such a suggestion is advanced, the Commission notes that the CEO has not sought to identify any "practices said to exclude, disadvantage, restrict or result in an adverse effect" upon male primary teachers or "leave uncorrected the effects of past discrimination against them".<sup>19</sup> Although not conclusive of this issue, the Commission has before it evidence which indicates that any such practices may, in fact, disadvantage female primary teachers. For example, statistics provided on the NSW Catholic Education Commission's website indicate that, during the period 1995 to 2001, female principals as a proportion of female teachers in Catholic primary schools in NSW has decreased each year from 5.36 in every 100 female teachers in 1995 to 4.54 in every 100 in 2001. Conversely, over the same period, male principals as a proportion of male teachers in Catholic primary schools in NSW has increased each year (except for 1996) from

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<sup>16</sup> Ibid, at page 17.

<sup>17</sup> Ibid, at page 19.

<sup>18</sup> Ibid, at page 19.

<sup>19</sup> Ibid, at page 17.

- 15.79 in every 100 male teachers in 1995 to 17.74 in every 100 in 2001.<sup>20</sup> Moreover, the CEO in its Exemption Application stated that male teachers are over-represented in leadership roles; a former Commissioner for Public Employment in the Northern Territory contended (in a submission to the Commission) that male teachers do better in the promotion stakes than female teachers; and a former deputy principal of a Catholic school stated (in a submission to the Commission) that male teachers are favoured with promotions and privileges. In those circumstances, it is not at all clear that the CEO would be able to identify an “overall effect” that amounts to substantive inequality favouring female teachers.
- 3.21 In any event, the CEO’s suggestion that section 7D might apply to the scholarship scheme appears to be based more upon alleged substantive inequality between male and female students enrolled in primary schools.<sup>21</sup> As regards that issue, there is material before the Commission that suggests that male primary students may suffer some disadvantage as compared to their female counterparts, as evidenced by a relatively poorer academic performance in the area of literacy.<sup>22</sup> However, other quantitative data, such as numeracy benchmark data, shows small disparities between boys and girls,<sup>23</sup> with 0.1 per cent more girls achieving the national benchmark in Year 3 than boys in 2000, and with 0.4 per cent more girls achieving the benchmark in Year 5 than boys.<sup>24</sup>
- 3.22 Assuming that some or all of the material referred to in paragraph 3.21 might be relied upon to demonstrate some form of substantive disadvantage suffered by male primary school students in comparison to their female peers, the Commission doubts whether it could be said that it would be reasonable for the CEO to conclude that the scholarship scheme would further the purpose of achieving substantive equality between those classes of people. The state of the material presented by the CEO simply does not indicate that:

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<sup>20</sup> <http://www.cecnsw.catholic.edu.au>. It should be noted that the number of female teachers over this time period increased from 4779.2 in 1995 to 5370.72 in 2001, while the number of male teachers decreased from 1044.5 in 1995 to 1003.2 in 2001.

<sup>21</sup> See the CEO’s letter of 30 August 2002, numbered paragraph 1 under the heading “Reasons why the exemption should be granted”.

<sup>22</sup> Nationally, the gender gap in results in Year 3 Literacy Benchmark tests for 1999 was 4.1 per cent in favour of girls, and in Year 5 it was 5 per cent in favour of girls. However, this gender gap decreased to 3.4 per cent in 2000 for Year 3 students, and to 4.4 per cent for Year 5 students. See House of Representatives Standing Committee on Employment, Education and Workplace Relations *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, pp221-224. The Committee also noted that “[t]here are also likely to be social, biological or developmental reasons why boys’ levels of attainment are lower than girls”. See House of Representatives Standing Committee on Employment, Education and Workplace Relations *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p8.

<sup>23</sup> House of Representatives Standing Committee on Employment, Education and Workplace Relations *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p94.

<sup>24</sup> House of Representatives Standing Committee on Employment, Education and Workplace Relations *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, pp225-226.

- the CEO has performed a comprehensive analysis of the nature and causes of any substantive inequality said to be suffered by male students;
- the CEO has investigated and is able to explain, upon reasonable grounds, how it is that the scholarship programme will achieve the purpose of achieving substantive equality between male and female students; or
- the CEO has established that there is a verifiable link between any disadvantage suffered by boy students and the gender of their teachers.<sup>25</sup>

In those circumstances, the Commission considers that it would be arguable that section 7D of the Act does not apply to the scholarship scheme on the basis of any substantive inequality said to be suffered by male primary school students.

***Second criterion: Is the exemption “appropriate” in light of the objects and scheme of the Act?***

3.23 As it is at least arguable that the circumstances and activities that are the subject of the Exemption Application might constitute discrimination to which the Act applies, the Commission has (in accordance with the Guidelines) considered whether the exemption sought in the Exemption Application is appropriate in light of the objects and scheme of the Act.

3.24 As a preliminary matter, the Commission notes that the CEO has not suggested that the exemption sought in the Exemption Application requires that the Commission consider the matters outlined in the first dot-point under the second criterion extracted from the Guidelines above – that is:

*Whether the circumstances, while not falling precisely within any of the permanent exemptions to the SD Act, bear a close resemblance to any of those exemptions so as to be within the spirit or broad scheme of those exemptions. Where an exemption is sought for reasons wholly unrelated to the objects of the SD Act (such as to gain commercial advantage), an exemption will not be appropriate.*

The Commission has noted above that it is arguable that the exemptions set out in sections 37 and 38(3) do not apply to the activities and circumstances that are the subject of the Exemption Application. To avoid doubt, the Commission further finds that those circumstances do not bear

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<sup>25</sup> The Commission discusses those issues in further detail in paragraphs 3.36 to 3.43 below.

a sufficiently close resemblance to those permanent exemptions so as to be within their “spirit or broad scheme”.

3.25 As a further preliminary matter, the Commission observes that the question of whether the exemption is appropriate in light of the objects and scheme of the Act cannot be simply answered on the basis that there are in fact less male than female primary teachers. It is not an object of the Act to secure an equal number of men and women in every field of endeavour covered by the Act. The promotion of the “principle of equality between men and women” (being the object set out in section 3(d) of the Act) requires consideration of the broader notions of equality discussed in paragraph 3.14 above. That object recognises that “every human being is equal in dignity and worth and therefore entitled to the equal enjoyment of fundamental freedoms and human rights”.<sup>26</sup> It does not, however, require the imposition of rigid “gender quotas” in each area covered by the Act.

3.26 As an illustration of that point, the Commission notes the example of temporary exemptions granted under Western Australian legislation in relation to gender identified positions for female deputy principals in primary and high schools.<sup>27</sup> It was found, in those matters, that there was a significant imbalance between the numbers of males and females filling senior positions within the Western Australian Department of Education. However, that imbalance did not, of itself, provide the basis for the decision by the Western Australian Equal Opportunity Tribunal to grant the temporary exemption sought in that case. Rather, the Tribunal reasoned as follows:

- the imbalance was found to be the result of historically based discrimination against women, whereby women were not promoted to senior positions in a manner commensurate with their numbers or abilities;
- in that context, the granting of the exemptions could be justified, in part, on the basis that they were necessary to eliminate the consequences of past discrimination;
- a further reason for granting the exemptions was that it would be of benefit to students to have women in senior positions, or else narrow views of the position of women in society would be reinforced.

3.27 Similarly, in the context of the Exemption Application, the imbalance between numbers of male and female primary teachers which the

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<sup>26</sup> *Tully v Ceridale* (1990) EOC 92-319 at 78-169.

<sup>27</sup> The decisions in those matters are reported as *Minister for Education v Commissioner for Equal Opportunities & Ors* (1993) EOC 92-517 and *Minister for Education and Commissioner for Equal Opportunity & Ors* (1987) EOC 92-198.

Commission has found to exist is not, in itself, sufficient to justify the granting of the exemption sought. The CEO appears to accept that that is so and has sought to draw the Commission's attention to the alleged substantive effects of the proposed scholarship, such as the contention that it will "improve the substantive equality of boys and girls in primary classrooms". That issue is discussed in further detail below.<sup>28</sup>

3.28 In the Commission's view, the determination of the question raised by the second criterion turns largely on the issue of the "reasonableness" of the exemption sought in the Exemption Application. As noted in the extract from the Guidelines above, that factor requires the Commission to weigh the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption sought.

3.29 Whilst it is indisputable that there is a disparity between the numbers of male and female primary school teachers and this imbalance has been increasing,<sup>29</sup> the CEO provides insufficient evidence that the underlying cause of that imbalance is one that might be addressed through a scholarship programme. For example, there is nothing before the Commission demonstrating that the gender imbalance was caused by or related to one or more of the following matters that might be said to be rectified through the proposed scholarship programme:

- financial hardship suffered by all students seeking to obtain qualifications to enter the primary teaching profession;
- financial hardship suffered particularly by prospective male students seeking to obtain qualifications to enter the primary teaching profession;
- lack of financial inducements for training courses for primary school teaching; or
- particular obstacles preventing male students from accessing financial inducements for training courses for primary school teaching.

3.30 The CEO/Australian Catholic University report entitled *Men in teaching: An endangered species?* (referred to above) recommended further investigation into why young men are not seeking a career in primary teaching. The CEO has not advised the Commission whether such further

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<sup>28</sup> See paragraphs 3.36-3.43.

<sup>29</sup> Nationally, the proportion of male primary teachers fell from 26.3 per cent to 21.3 per cent between 1991 and 2001: ABS 4221 *Schools Australia* February 2002, p26, quoted in Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p155.

- investigations have been carried out or, if they have, the outcome of those investigations.
- 3.31 However, that report did include the results of a focus group discussion of eight male primary teaching students at the Australian Catholic University. The focus group investigation found that there were three key issues which emerged in relation to the participants' decisions to study primary teaching and their experiences as trainee primary teachers: social issues; issues involving masculinity, often related to child protection; and issues involving the status and working conditions of teachers.
- 3.32 The Standing Committee on Employment, Education and Workplace Relations' inquiry into the education of boys found that there were a number of factors discouraging men from entering the teaching profession. The Committee's report, *Boys: Getting It Right* (referred to above) stated that 'generally, the status of teachers in the community, salary, career opportunities and child protection issues are significant reasons advanced by teachers' as to why fewer men want to become teachers.<sup>30</sup> The report went on to state that 'starting salaries for teachers are generally comparable to other public sector opportunities for graduates. However, once employed, salary progression and promotional opportunities for teachers do not keep pace with the opportunities available outside teaching.'<sup>31</sup> A submission to the inquiry stated that '...essentially a teacher's salary is only seen as an adequate second income for a family. Hence the dearth of males'.<sup>32</sup> In relation to that issue, the Committee recommended that 'State and Territory Governments urgently address the remuneration of teachers with the payment of substantial additional allowances for skilled and experienced teachers as an inducement for them to remain in teaching and to attract new teachers by offering more attractive career paths'.<sup>33</sup>
- 3.33 The Commission is unable to be satisfied, on the material before it, that the proposed scholarship scheme would address any of those matters identified as causes of the gender imbalance in the primary teaching profession.
- 3.34 Even if there was before the Commission material indicating that one or more of the causes of the gender imbalance in the primary teaching profession might be rectified through a scholarship programme, the CEO

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<sup>30</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p155.

<sup>31</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p157.

<sup>32</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p157.

<sup>33</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p158.

has not identified any reason why such the scholarship scheme could not be provided on a less discriminatory basis. A recommendation for such a scheme was made in *Boys: Getting It Right* (referred to above), where it was stated:

*the Committee recommends that the Commonwealth provide a substantial number of HECS-free scholarships for equal numbers of males and females to undertake teacher training. These would be based on merit...*<sup>34</sup>

- 3.35 In light of the above, it is the Commission's view that the exemption sought is unreasonable in that the discriminatory effects that would be caused by the proposed scholarship scheme outweigh the reasons advanced in favour of the exemption (which, for the reasons outlined above, have not been established at this stage).
- 3.36 While it is unnecessary to go further, the Commission has noted above that it was contended (in support of the Exemption Application) that the presence of male teachers is important in creating a school culture which values learning and the pursuit of knowledge equally by males and females. It was also contended that the imbalance between numbers of male and female teachers in the primary teaching profession has wide-ranging educational and social ramifications. The Commission has referred to that issue in relation to section 7D of the Act (see paragraphs 3.12-3.22 above).
- 3.37 It appears to be suggested by the CEO that educational outcomes for boys in primary education may be addressed by ameliorating the gender imbalance in teaching. On that basis, the CEO appears to contend that the benefits flowing to male primary students from the proposed scholarship scheme would justify any discrimination involved in its implementation and that the exemption is therefore "appropriate".
- 3.38 One submission supporting the Exemption Application argued that equal numbers of male teachers do matter, particularly due to the different teaching styles of male and female teachers.

*Female teachers talk 'motherese'. Caring, mothering and teaching are easily conflated by female teachers as one activity. Male teachers are more commonly talking about power, sport and the outside world. They do it in jokey and blokey ways, with a much stronger use of humour to deflect conflict and irritation among boys. Males provide some of the structure and guidelines that boys seem to need. Male teachers seem less surprised by boyish exuberance*

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<sup>34</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p162.

*and energy. They have strategies for dealing with the noise and energy that boys have in the years before, during and after puberty. They have, after all, been boys themselves.*<sup>35</sup>

- 3.39 In the House of Representatives' Standing Committee on Employment, Education and Workplace Relations' report into the education of boys entitled *Boys: Getting It Right* (referred to above), it was stated that:

*[i]t is desirable, if not always possible to have a balance of men and women teaching and in positions of authority in schools. This allows all students to be exposed to both men and women in leadership positions, and both men and women sharing authority and recognising the legitimate authority of others.*<sup>36</sup>

However, the Committee qualified those comments by stating:

*In supporting the presence of more men in schools, the Committee is not suggesting that female teachers should be displaced in favour of men or that women are not equally good teachers. The Committee agrees that the quality of the teacher is more important than the gender of the teacher...*<sup>37</sup>

- 3.40 The following views on this issue were also put to the Commission in submissions:

- A number of submissions opposing the grant of the Exemption Application argued that no evidence was supplied by the CEO to support its contention that more male teachers will help decrease discipline and learning problems. It was argued that the assumption of a relationship between teacher gender and student outcomes is unverified.
- The Independent Education Union of Australia in its submission rejected the view that the performance of boys in school is being adversely affected by the 'feminisation' of the teaching profession, which is implied in the Exemption Application. The union argued that more men are needed but so are more females in leadership roles in schools and education systems. The union suggested that one appropriate strategy for redressing the gender imbalance and overall teacher shortage would be the granting of equal numbers of

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<sup>35</sup> Peter West, Research Group on Men and Families, University of Western Sydney "Do role models matter? Submission to the Human Rights and Equal Opportunities (sic) Commission", pp 1-2.

<sup>36</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p160.

<sup>37</sup> Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting It Right*, Commonwealth of Australia, Canberra, 2002, p162.

scholarships to enter primary teacher training for both male and female secondary school leavers.

- 3.41 To the extent it is necessary to do so, the Commission has found (in paragraph 2.1.4 above) that there is insufficient evidence before it to support a finding that the gender imbalance in the primary teaching profession will have adverse social or educational effects or will detrimentally affect school culture or the education of boys enrolled as students in primary schools. Certainly, there is a continuing debate about the reasons that boys appear to be lagging behind girls in academic achievement. However, there is little agreement that a proportional increase in the number of male teachers could remedy that situation. Material indicating that male and female teachers may teach and interact differently with boys does not, of itself, provide evidence sufficient to reach such a conclusion.
- 3.42 In the Commission's view, that finding provides an alternative basis for concluding that the exemption sought is unreasonable, in that the discriminatory effect that would be caused by the proposed scholarship scheme outweighs the reasons advanced in favour of the exemption.
- 3.43 In those circumstances, it is the Commission's view that it would be inappropriate to grant the exemption.

### ***Alternative Strategies***

- 3.44 The Commission encourages the CEO to conduct further investigations into the reasons underlying the gender imbalance in the primary teaching profession. To the extent that a scholarship scheme or other recruitment strategy is pursued, the Commission would recommend that the CEO consider means of implementing such strategies in a manner that does not discriminate on the ground of sex.

Dated this 27th day of February 2003

Signed by the President, Professor Alice Tay AM, on behalf of the Commission.

**Please note**

Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of a decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.