

Submission to the Senate Legal and Constitutional Legislation Committee on the Sex Discrimination Amendment (Teaching Profession) Bill 2004

1 Outline of submission

1. The Commission does not support the Sex Discrimination Amendment (Teaching Profession) Bill 2004 (Cth) (the “Bill”), for three reasons.
2. First, the Bill is unnecessary because it is unlikely to achieve its stated purpose; that is to address the problem of the imbalance in the number of male and female school teachers and the assumed effect of that imbalance on the education of male school students. In that regard the Commission notes that there is little available evidence which suggests that proposed amendment would increase the proportion of male teachers. Similarly there is little evidence which demonstrates that any gap in educational outcomes of boys and girls is a result of an imbalance of male primary school teaching staff. Both the number of male teachers and the gap in educational outcomes appear to be the result of a number of factors and are unlikely to be resolved by discrimination in favour of men, in the manner proposed.
3. Second, the Bill is inconsistent with the purpose and objectives of the *Sex Discrimination Act 1984* (Cth) (the “SDA”). The purpose of the Act is to address discrimination and disadvantage. The Act is not aimed at securing equal numbers of men and women in the areas in which discrimination is proscribed under the Act. Numerical inequality may be one indicator of substantive inequality. In this case however there is no evidence to suggest that the numerical inequality between men and women in the teaching profession is as a result of gender based discrimination or disadvantage.
4. Third, the Bill stands to put Australia in risk of breaching the important international obligations it assumed under the *Convention on the Elimination of All Forms of Discrimination Against Women* (“CEDAW”).¹
5. The remainder of the Commission’s submission addresses these three areas of principle concern in detail, and is organised as follows:
 - Section 2 sets out the reasons why the Commission considers the Bill unnecessary.
 - Section 3 sets out the objects and structure of the SDA.
 - Section 4 sets out an overview of the proposed operation of the Bill.
 - Section 5 contains a discussion of the ways in which the Bill undermines the objects and structure of the SDA.

¹ Opened for signature on 18 December 1979, [1983] ATS 9, (entered into force for Australia on 27 August 1983).

- Section 6 sets out the ways in which the Bill stands to put Australia in breach of its obligations under CEDAW.
- Section 7 contains some concluding comments.

2 The Bill is unlikely to achieve its purpose

6. The Explanatory Memorandum to the Bill states the Bill as having a dual purpose: ‘to facilitate measures to address the problem of the imbalance in the number of male and female school teachers, and the effect of that imbalance on the education of male school students’.²
7. Accordingly, the Committee needs to consider whether the proposed amendment will lead to an increase in the number of male teachers and if so, whether this will improve educational outcomes for boys. It may be that a scholarship scheme would improve the imbalance of male and female teachers but would not improve educational outcomes for boys, or that more male teachers would improve educational outcomes for boys but scholarships are unlikely to achieve any increase in male teachers. If either of these statements is correct, then the proposed Bill is ill suited to its purpose.

2.1 Reasons why men do not enter into the teaching profession

8. There is no evidence that the low proportion of male teachers is the result of disadvantage or discrimination affecting men. Overwhelmingly, research on this issue indicates that there are a number of other reasons which account for the low proportion of male teachers.
9. The House of Representatives Standing Committee on Employment, Education and Workplace Relations’ (the “Standing Committee”) inquiry into the education of boys found that there were a number of reasons discouraging men entering the teaching profession. The inquiry’s report, *Boys: Getting it Right*, identified these as being, ‘generally, the status of teaching in the community, salary, career opportunities and child protection reasons’.³ Similarly the Attorney-General in the Second reading speech for the Bill stated that, ‘research shows that teaching is not an attractive career option for men for reasons including concerns about salary and the perception of a risk of allegations of abusing children in schools’.⁴
10. The Standing Committee’s report, *Boys: Getting it Right*, stated 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 outside

² See Explanatory Memorandum to the Sex Discrimination Amendment (Teaching Profession) Bill 2004, p 1.

³ See House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting it Right*, Commonwealth of Australia, Canberra, 2002, p 155.

⁴ See Second Reading Speech to the Sex Discrimination Amendment (Teaching Profession) Bill 2004, House of Representatives Hansard, 10 March 2004, p 26369.

teaching’.⁵ A submission to that inquiry stated that, ‘essentially a teacher’s salary is only seen as an adequate second income for a family. Hence the dearth of males’.⁶ In relation to that issue the Standing 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’.⁷

11. In addition, some education academics have suggested that men do not choose to become teachers for fear that they will be labelled as homosexual or effeminate.⁸
12. The Commission also notes that there are a disproportionate number of male primary school principals and deputy principals given the number of female primary school teachers. The seemingly rapid promotion of men into these positions and out of the classroom (what some academics have referred to as the ‘glass escalator’)⁹ also contributes to the lack of male teachers in the classroom.¹⁰
13. In light of the above, permitting otherwise discriminatory scholarship schemes appears unlikely to have any significant impact on the gender imbalance in the teaching profession. Nor will the proposed amendment address the need for inducements for men to remain in teaching, the disproportionately high number of males promoted out of the classroom or allay men’s concerns about effeminacy or low professional status.

2.2 The effect of the gender imbalance in teaching on the educational outcomes of boys

14. The Commission notes that there are two assumptions underlying the linking of the teaching imbalance to educational outcomes. First, that the gender imbalance in teaching negatively impacts on the educational outcomes of boys. Second, that gender overwhelms the other factors (such as socioeconomic status) in determining the educational outcomes of boys and girls.¹¹ Both of these

⁵ See House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting it Right*, Commonwealth of Australia, Canberra, 2002, p 157.

⁶ Ibid.

⁷ Ibid, p 158.

⁸ See M Mills, W Martino and B Lingrad, *Issues in the Male Teacher Debate: Masculinities, Misogyny and Homophobia*, Paper presented to the Hawaii International Conference on Education, Honolulu, Hawaii, 7 – 10 January 2003. A revised version of this paper will be published in the *British Journal of Sociology of Education* in 2004; Jim King, *Uncommon Caring: Learning from men who teach young children* (1998, Colombia, Teachers College Press).

⁹ See M Mills, W Martino and B Lingrad, *Issues in the Male Teacher Debate: Masculinities, Misogyny and Homophobia*, Paper presented to the Hawaii International Conference on Education, Honolulu, Hawaii, 7 – 10 January 2003. A revised version of this paper will be published in the *British Journal of Sociology of Education* in 2004.

¹⁰ See Commonwealth Sex Discrimination Commissioner, *Statement on Sex Discrimination Amendment (Teaching Profession) Bill 2004*, Media Release, 9 March 2004 available on the Commission’s website at: <http://www.humanrights.gov.au/media_releases/2004/12_04.html>

¹¹ See Commonwealth Department of Education, Science and Training, *Addressing the Educational Needs of Boys* (2002, Canberra, AGPS); M Mills, W Martino and B Lingrad, *Issues in the Male Teacher Debate: Masculinities, Misogyny and Homophobia*, Paper presented to the Hawaii International Conference on Education, Honolulu, Hawaii, 7 – 10 January 2003, p 10. A revised version of this paper will be published in the *British Journal of Sociology of Education* in 2004.

assumptions are, in the Commission's view, problematic. Evidence available to the Commission does not persuasively support the causal connection between male teachers and boys' education outcomes.

The effect of an imbalance between male and female teachers on the educational outcomes of boys

15. The Commission notes that there does not appear to be any evidence which demonstrates that the gender imbalance in the teaching profession has a negative impact on the educational outcomes of boys.¹² While there is a continuing debate as to the academic achievement of boys vis-à-vis girls, research consistently indicates that it is the quality of the teacher (and school curriculum), not the gender of the teacher which makes the difference to the educational outcomes of both male and female students. A report commissioned by the Commonwealth Department of Education, Training and Youth Affairs, *Declining Rates of Achievement and Retention*,¹³ concluded, on the basis of the interviews that the researchers had conducted with male students, that:

A uniformly repeated view [by the boys] is that a 'good' teacher changes everything. One good teacher alone is enough to make a bad lot tolerable and achievement in an otherwise repressive, oppressive environment, seem possible. ...

The participants in this study have been clear, constructive and detailed in defining the constituting factors of good teaching from their perspective; providing more than 60 defining features of a 'good teacher'. Interestingly their focus is always placed on the skills of teachers; their ability and willingness to establish relationships of mutual respect and friendship with their students.¹⁴ ...

Interestingly, **'good teachers' might be male or female**. They are not necessarily young, but it helps.¹⁵ (emphasis added)

16. Although some believe that it would be desirable for there to be a balance, there is no evidence which demonstrates this affects educational outcomes. In a report commissioned by the Commonwealth Department of Education, Science and Training ("DEST"), *Addressing the Educational Needs of Boys*, researchers concluded that:

Teachers and their practices are central to good outcomes for students. Those teachers who were firm, friendly, made learning fun, related well to their students, made the work interesting and had a sound knowledge of their subject were celebrated by students. Such teachers appeared to feel a real sense of responsibility for their students' learning and also a sense of efficacy in achieving desirable outcomes. Good schools seemed to evidence similar senses of responsibility and efficacy within their cultures.

¹² See Commonwealth Department of Education, Science and Training, *Addressing the Educational Needs of Boys* (2002, Canberra, AGPS); S Gorard, G Rees and J Salisbury, "Reappraising the apparent underachievement of boys at school" (1999) 11(4) *Gender and Education* 441; M Mills, "Shaping the boys' agenda: the backlash blockbusters" (2003) 7(1) *International Journal of Inclusive Education* 57; M Mills, "Troubling the 'failing boys' discourse" (2000) 21(2) *Discourse: studies in the cultural politics of education* 237.

¹³ F Trent and M Slade, *Declining Rates of Achievement and Retention*, (2001, Canberra, AGPS).

¹⁴ Ibid, p 27.

¹⁵ Ibid, p 29.

According to the Case Study research, the gender of the teacher was not a significant factor in determining positive learning outcomes for students, although the survey data suggested that some boys who self-classified as of high ability preferred male teachers. Students in their articulation of the ideal teacher also did not place any great emphasis upon the gender of the teacher, but rather stressed the significance of the type of person the teacher was and their pedagogical practices. Students saw the gender of the teacher as only significant in relation to being able to talk to them about personal problems, with some boys and some girls saying that they would prefer to talk to a teacher of the same sex about personal matters.¹⁶ (emphasis added)

17. Similarly in its report, *Boys: Getting it Right*, the Standing Committee stated that:

It is desirable, if not always possible, to have a balance of men and women teaching and in positions of authority in schools.¹⁷

However it qualified this by saying:

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 teacher ... many teachers recognise the positive effect the right type of men can have when they work with boys, **but the emphasis is on the right kind of men.**¹⁸ (emphasis added)

18. In light of that finding the Standing Committee recommended that the Commonwealth provide a substantial number of HECS-free scholarships for equal numbers of males and females to undertake teacher training rather than male only scholarships, so as to 'attract high quality students into teaching'.¹⁹

19. The proposition underlying the concerns about the educational outcomes for boys appears to be that a 'lack of male role models' in schools has a detrimental effect on the educational outcomes of boys:

The imbalance in the number of male and female teachers in schools, in particular in pre-schools and primary schools means that boys and girls are without enough male role models in schools.²⁰

¹⁶ See B Lingrad, W Martino, M Mills and M Bahr, *Addressing the Educational Needs of Boys*, (2002, Canberra, AGPS), p 125.

¹⁷ See House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Boys: Getting it Right*, Commonwealth of Australia, Canberra, 2002, p 160.

¹⁸ Ibid, p 162. The Commission notes that this recommendation was **rejected** by the Federal Government on the basis that: '... other means of achieving the objective of this recommendation should be explored. ... The Government ... rejects the proposed ... scholarship mechanism, because:

- it is **likely to have little impact on the gender imbalance** among teachers in schools, because such scholarships will inevitably be limited in number and many would probably go to students (whether male or female) already committed to teaching;
- the evidence suggest that HECS is not a major determinant in student choices; and
- **such scholarships would set an undesirable precedent**, as the same principle could apply to other University courses which have unequal gender representation. (emphasis added)

See, *Report to the House of Representatives Standing Committee on Education and Training: Boys: Getting it Right: The Government Response to the Report*, p 23.

¹⁹ Ibid, p 158 – 9.

²⁰ Second Reading Speech, Sex Discrimination Bill 2004 (Cth), *House of Representatives Hansard*, 10 March 2004, p 26369.

The Commission notes that there is no consensus amongst education academics as to the validity of this proposition.²¹ Many academics argue that the call for more ‘male role models’ is based on the assumption that men will be better able to ‘control boys’ or relate to them as ‘boys’, which suggests that the characteristics being looked for in male teachers are those drawn from traditional forms of masculinity. Some argue that the employment of such male teachers may reinforce those stereotypical masculine behaviours, which they suggest lie at the heart of some boys’ lower literacy and numeracy rates. Hence the employment of more men *per se* will not necessarily lead to better educational outcomes for those students.²² Rather they suggest that to positively affect the educational outcomes of such students, consideration must instead be given to **what** it is that teachers ought to be modelling and the kinds of men that should be encouraged into teaching.²³

20. It is also erroneous to assume that any gender effect (to the extent it exists) might overwhelm the other factors which impact on the educational outcomes of boys and girls. In relation to their education outcomes, male and female students are not homogenous groups. Some boys and some groups of girls have better literacy and numeracy rates and lower rates of suspension and truancy than others.²⁴ Consequently, education academics point out that the question which needs to be asked is ‘which boys and which girls’ have lower literacy and numeracy rates and higher suspension and truancy rates.²⁵ For instance, the research considered in the DEST report, *Addressing the Educational Needs of Boys*, indicated that as a group boys (and girls) from low socio-economic backgrounds in regional areas have comparatively higher truancy and suspension rates and lower literacy rates in relation to most other students.²⁶ This illustrates that the aggregation of boys’ and girls’ literacy or numeracy rates and comparison of them with each other without taking into account social class, ethnicity and race disregards the fact that many boys are doing well at school. Hence, to the extent it has any impact, the gender imbalance in the teaching profession is only one of a number of factors which may impact on the educational outcomes of students and cannot be considered in isolation to those other factors.²⁷
21. Consequently, it would be erroneous to assume that an increase in the number of male teachers will prove to be a panacea. More complex factors are clearly at work in this area.²⁸

²¹ See M Mills, W Martino and B Lingrad, *Issues in the Male Teacher Debate: Masculinities, Misogyny and Homophobia*, Paper presented to the Hawaii International Conference on Education, Honolulu, Hawaii, 7 – 10 January 2003, pp 9 - 14. A revised version of this paper will be published in the *British Journal of Sociology of Education* in 2004.

²² Ibid.

²³ Ibid. See also, M Mills and K Roulston, “Male Teachers in Feminised Teaching Areas: marching to the beat of the men’s movement drums?”, (2000) 26(2) *Oxford Review of Education* 221.

²⁴ See B Lingrad, W Martino, M Mills and M Bahr, *Addressing the Educational Needs of Boys*, (2002, Canberra, AGPS), p 131.

²⁵ Ibid, p 87.

²⁶ See M Mills, W Martino and B Lingrad, *Issues in the Male Teacher Debate: Masculinities, Misogyny and Homophobia*, Paper presented to the Hawaii International Conference on Education, Honolulu, Hawaii, 7 – 10 January 2003, p 10. A revised version of this paper will be published in the *British Journal of Sociology of Education* in 2004.

²⁷ Ibid, p 25.

²⁸ Ibid.

3 The SDA – objects and structure

22. Not only are the amendments in the proposed Bill unnecessary, they also stand to significantly undermine the objects and carefully crafted structure of the SDA. To understand that point, it is necessary to briefly outline the relevant provisions of the SDA and the Bill.

3.1 Objects and rationale of the SDA

23. The objects and purposes of the SDA are set out in s3 of the Act as being, relevantly:

- (a) give effect to certain provisions of the Convention on the Elimination of all Forms of Discrimination Against Women; and
- (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex ... in the areas of work, ... education, the provision of goods, facilities and services; and
- ...
- (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.²⁹

24. It is not an object of the SDA to secure an equal number of men and women in every area in which discrimination is proscribed under the Act.

3.2 Forms of discrimination proscribed by the SDA

25. Part I of the SDA defines two forms of discrimination, direct and indirect discrimination. Direct discrimination arises under the Act when a person is treated (or proposed to be treated) less favourably on the basis of a proscribed ground of discrimination in comparison to a person without that characteristic, in circumstances which are the same or not materially different.³⁰ Indirect discrimination relates to the imposition of ostensibly neutral policies or practices but which in their operation have disparate effects on members of a group defined by a relevant ground of discrimination.³¹

26. The formulations of direct and indirect discrimination under the Act broadly reflect what are referred to as the ‘formal’ and ‘substantive’ models of equality. Formal equality embodies the notion of **equal treatment** and insists that people should be treated without regard to certain characteristics (such as sex or marital status).³² The focus on the equalisation of treatment is generally considered as being embodied in definition of direct discrimination. In contrast to formal equality, substantive equality is based on the notion that different treatment may be required to remedy systemic disadvantage. It therefore focuses on **equality of outcomes** rather than equality of treatment,³³ recognising that some differences

²⁹ See s3 of the SDA.

³⁰ See for instance ss5(1) of the SDA.

³¹ See generally C Ronalds and R Pepper, *Discrimination Law and Practice* (2004 Federation Press).

³² See H Collins, “Discrimination, Equality and Social Inclusion” (2003) 66 *Modern Law Review* 16, pp 16 – 17.

³³ *Ibid*, p 17.

are relevant differences, justifying differential treatment.³⁴ The focus on effects or outcomes is generally considered as being embodied in the definition of indirect discrimination.

3.3 Special measures: s7D

27. Special measures are aimed at achieving substantive equality. Section 7D does this by modifying the definitions of discrimination by providing that certain actions (“special measures”) taken for the purposes of achieving substantial equality do not constitute discrimination:

Sect 7D Special measures intended to achieve equality

- (1) A person may take special measures for the purpose of achieving substantive equality between:
 - (1) men and women; or
 - (2) people of different marital status; or
 - (3) women who are pregnant and people who are not pregnant; or
 - (4) 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 the purpose referred to in subsection (1) if it is taken:
 - (1) solely for that purpose; or
 - (2) for that purpose as well as other purposes, whether or not that purpose is the dominant one or substantial one.
 - (4) This section does not authorise the taking, or further taking, or special measures for a purpose referred to in subsection (1) that is achieved.
28. The Explanatory Memorandum to the then Sex Discrimination Amendment Bill 1995 which introduced s7D into the Act stated that:

This provision [s7D] seeks to achieve **equality of outcomes** and is based on Australia’s international obligations to achieve equality, as required by international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women.³⁵

In the Second Reading speech for the Sex Discrimination Amendment Bill 1995, the then Federal Attorney-General made the following comments in relation to special measures:

The amendment proposed in the bill makes two significant changes. First, it provides that special measures are not treated as a form of discrimination; instead, they would be considered as part of the threshold question of whether there is discrimination at all. Consequently, the ‘special measures’ provision will be moved from that part of the Act which provides exemptions. **Special measures should be presented and understood as an expression of equality rather than an exception to it.**

³⁴ See M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990, Oxford University Press), p 15.

³⁵ Explanatory Memorandum, Sex Discrimination Amendment Bill 1995, p 9 [40].

Second, the special measures provision currently focuses on the attainment of equal opportunities. This focus ignores the historical and structural barriers which impede women's utilisation of formal equal opportunities. The Convention for the Elimination of all Forms of Discrimination refers to measures 'aimed at accelerating de facto equality', and **our emphasis should be on measures to achieve real or substantive equality.**

To attain substantive equality, it is necessary to look at the end result of a practice that purports to treat people equally. **In this way structural barriers that prevent a disadvantaged group from attaining real equality can be taken into account. A narrow and formalistic interpretation of equality will not produce equality in fact and may entrench existing discrimination or create new discriminatory situations.**³⁶

29. Section 7D(1) requires that a special measure must be taken for the purposes of achieving substantive equality between the groups identified in s7D(1)(a)-(d), which groups include men and women.³⁷ In that regard the Commission notes that it is critical to recognise that gender imbalance is not always synonymous with substantive inequality. The fact that there are fewer men or fewer women working in a particular industry, gaining admission to a particular university or course or attaining leadership roles in a particular profession may or may not be indicative of substantive inequality. The real question is whether a particular gender imbalance has arisen by reason of the operation of structural or historical disadvantage or whether, as is often the case in female dominated professions, the imbalance is merely a reflection of the fact that men do not wish to enter into a profession which is comparatively low-paid and of a lower status to other more male dominated professions.

30. There has been no judicial consideration of s7D of the SDA to date.³⁸ Consequently there is no judicially expounded 'test' in relation to determining when a special measure exists. However the Commission notes that it publishes *Guidelines in relation to Special Measures*³⁹ to assist persons in determining whether a particular measure is a special measure for the purposes of s7D before taking that measure.

3.4 Relevant proscription provisions

31. Part II, Divisions 1 and 2 of the SDA proscribe direct and indirect discrimination (as defined in Part I of the Act) on particular bases,⁴⁰ in many areas of public life including, employment and superannuation,⁴¹ education⁴² and in the provision of

³⁶ Second Reading speech to the Sex Discrimination Amendment Bill 1995 (Cth), *House of Representatives Hansard*, 28 June 1995, p 2456.

³⁷ See s7D of the SDA.

³⁸ The Commission notes however that its predecessor s33 was considered by Sir Ronald Wilson as President of the Commission in *Proudfoot v ACT Board of Health* [1992] HREOCA 6 (17 March 1992) when the Commission exercised a hearing function.

³⁹ Human Rights and Equal Opportunity Commission, *Guidelines in relation to Special Measures*, 1996, available on the Commission's website at:
< http://www.humanrights.gov.au/legal/special_measures/1996_sex_guidelines.html>

⁴⁰ These are: sex (s5), marital status (s6), pregnancy or potential pregnancy (defined in s7) and family responsibilities (defined in s7A). The Commission notes that discrimination on the ground of family responsibility is made unlawful only in dismissal of employment.

⁴¹ See ss14 – 20 of the SDA.

⁴² See s21 of the SDA.

goods, services or facilities.⁴³ It appears to be envisaged that the proposed amendment will primarily operate as an exemption to the proscriptions of discrimination contained in ss21(2)(a), (c) and 22(1) of the SDA.

32. Sections 21(2)(a) and 21(2)(c) proscribe discrimination in the area of education and relevantly provides:

It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex ...

- (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;
- (b) ...; or
- (c) by subjecting the student to any other detriment.

33. The proposed amendment will operate as an exemption to that section only in the event that the 'person' offering the proposed scholarships is an 'educational authority' for the purposes of the SDA.⁴⁴

34. Section 22(1) proscribes discrimination in the area of making facilities available or providing goods and services and relevantly provides:

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 ... :

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; [or]
- (b) in the terms and 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.

35. The proposed amendment will operate as an exemption to that section regardless of the whether or not the person offering the proposed scholarship is an educational authority.

3.5 Exemptions

Permanent exemptions

36. Part II, Division 4 of the SDA creates a series of exemptions or statutory defences to the provisions of the SDA which make discrimination unlawful. However those exemptions do not operate in a blanket fashion – they are designed to cover only particular sets of circumstances and areas of activity, while maintaining the unlawfulness of acts of discrimination falling between the exemptions.⁴⁵ In addition, many of the exemptions are specific to a particular ground or grounds of discrimination.⁴⁶

⁴³ See s22 of the SDA.

⁴⁴ 'Educational authority' is defined under s4 of the SDA as meaning: 'a body or person administering an educational institution'.

⁴⁵ See generally the Commonwealth Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS Canberra 1992.

⁴⁶ See ss30, 31, 32, 34(2), 35(1), 35(2), 38, 39, 41, 41A, 41B, 42 and 43 of the SDA.

37. As a general principle permanent exemptions are undesirable. This is for the reason that they conflict with the overall spirit and objects of the Act, which, as set out above, includes eliminating discrimination, 'so far as is possible'.⁴⁷ As noted by the Sex Discrimination Commissioner in *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*:⁴⁸

As the impact of the SDA is felt in various sections of the society, the areas and people which are not covered by it stand out in stark contrast to the areas and people which are covered. It is a fundamental precept of human rights legislation that it applies equally to all citizens of a State. **It is undesirable for the exemptions to create a situation where members of the Australian public have unequal rights as citizens.**⁴⁹ ...

The objects of the [SDA] make it clear ... that exemptions are to be extraordinary and as limited in their scope and duration as possible. Section 3 twice indicates that the objects of the Act are to eliminate discrimination 'so far as is possible'.⁵⁰ (emphasis added)

38. Those concerns are reflected in the fact that exemptions which restrict the rights conferred by anti-discrimination legislation such as the SDA are narrowly construed by the courts.⁵¹ This approach has been applied in the context of Part II, Division 4 of the Act.⁵²

Temporary exemptions

39. In addition to the permanent exemptions, s44 of the SDA empowers the Commission to grant a temporary exemption on application,⁵³ for a limited period of time⁵⁴ and where appropriate, on certain conditions.⁵⁵ Temporary exemptions are granted by the Commission on a case by case basis. However the Commission notes that temporary exemptions will rarely need to be granted. This is for the reason that the permanent exemptions and special measures provisions of the SDA significantly limit the circumstances in which temporary exemptions will need to be sought.⁵⁶ This was highlighted by the Sex Discrimination Commissioner in *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*:

The third class of exemption is that provided by section 44 which authorises the Commission to grant exemptions for periods not exceeding five years upon such terms and conditions as it considers appropriate. These exemptions are rare and limited. ...

⁴⁷ See Commonwealth Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS Canberra 1992, p 18 [1.30].

⁴⁸ Ibid.

⁴⁹ Ibid, p.10 [1.13].

⁵⁰ Ibid.

⁵¹ *X v Commonwealth* (1999) 200 CLR 177 at 223 per Kirby J; *Qantas Airways Limited v Christie* (1998) 193 CLR 280 at 333 and footnotes 168-169 per Kirby J.

⁵² See for instance, *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28 at [19], [23]-[24] per Raphael FM; *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739 at [89] per Wilcox J.

⁵³ See s44(1) of the SDA.

⁵⁴ Section 44(3)(c) limits the duration in respect of which a temporary exemption can be granted to 5 years.

⁵⁵ See s44(3) of the SDA.

⁵⁶ See Commonwealth Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS Canberra 1992, p 12 [1.13].

The last means for granting exemptions ... recognises the extraordinary nature of exemptions and the fact that they should be subject to conditions, limited in duration and capable of being monitored and reassessed at regular intervals. ...

By contrast the ... permanent exemptions in the Act [do] not [prescribe] any process of review or monitoring to keep [them] as narrow as possible and subject to further refinement over time.⁵⁷

40. Once granted, a temporary exemption, (like the permanent exemptions), provides a complete defence to a subsequent complaint of discrimination falling within the scope and nature of the exemption ultimately granted by the Commission. Hence the grant of a temporary exemption makes it lawful to do a discriminatory act which is the subject of the exemption.
41. Section 44 does not expressly prescribe the matters to be taken into account by the Commission when determining whether to grant a temporary exemption, it merely provides the Commission with the discretion to grant such exemptions. However the Commission has adopted *Guidelines on applications for temporary exemption under the Sex Discrimination Act* (“Guidelines”)⁵⁸ which set out the criteria which will be applied by it in considering whether to grant a temporary exemption. The Guidelines reflect current case law in relation to similar exemption provisions in State and Territory anti-discrimination legislation.⁵⁹ Temporary exemption applications are therefore determined in accordance with the Guidelines, and on the basis of the evidence before the Commission at the time of making its determination.

4 Overview of the operation of the Bill

42. The Bill inserts a new permanent exemption into Part II, Division 4 of the SDA which, as discussed above, creates a series of exemptions to the Act. The proposed s38A provides as follows:

38A Preference to address gender imbalance in school teaching

- (1) Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against another person, on the ground of the other person’s sex, by offering scholarships to persons of the opposite sex in respect of their participation as students in a teaching course if the scholarships are offered in order to redress a gender imbalance in teaching.
- (2) In this section:

gender imbalance in teaching means an imbalance in the ratio of male to female teachers:

- (a) in schools in Australia generally; or
- (b) in a particular category or categories of schools in Australia; or
- (c) in a particular school or schools in Australia.

⁵⁷ Ibid, p 11 [1.13].

⁵⁸ Human Rights and Equal Opportunity Commission, *Guidelines on applications for temporary exemption under the Sex Discrimination Act* available on the Commission’s website at: <http://www.humanrights.gov.au/legal/sda_exemptions.html>

⁵⁹ See *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782.

scholarship includes assistance or support that is similar to a scholarship.

school includes a pre-school.

teaching course means a course of study that leads to a qualification for teaching students at schools in Australia

43. The proposed exemption authorises ‘any person’⁶⁰ to offer sex specific scholarships to students enrolled in a teaching course for the purposes of redressing a gender imbalance in teaching, be it an imbalance in Australia generally, in a particular category of schools or a particular school. As stated above, it appears that the proposed exemption will primarily operate as an exemption to ss21(2)(a), (c) and 22(1) of the SDA, the proscriptions of discrimination on the ground of sex in the areas of education and the provision of goods, services and facilities.

5 The Bill undermines the objects and structure of the SDA

5.1 Breadth and nature of the proposed exemption

44. As already stated, permanent exemptions are generally undesirable as they conflict with the overall spirit and objects of the SDA, which presuppose that exemptions are to be ‘extraordinary’ and ‘as limited in their scope and duration as possible’.⁶¹ In light of this the Commission considers the breadth of proposed exemption to be problematic.
45. The definition of ‘gender imbalance in teaching’ in the Bill is broadly expressed and includes an imbalance in the ratio of male to female teachers, whether in schools generally, in a particular school or a particular category of school. Consequently, the exemption will operate wherever there is a numerical imbalance between men and women in a particular school, regardless of whether or not there is generally a numerical parity of men and women in the teaching profession in Australia generally. That is, wherever there is an odd number of teachers in a particular school (which necessarily means that there will be more teachers of one sex than another), the exemption will potentially apply – regardless of the reasons for that disparity. This is an odd result.
46. In addition the Bill does not specify any relevant conditions on which the proposed scholarships are required to be offered. For instance, the Bill does not require that the recipients of the scholarships commit to teaching in Australian schools.⁶² Similarly there is no requirement that the recipients of scholarships offered to remedy a gender imbalance in a particular school, commit to working in

⁶⁰ A person is defined in s22 of the *Acts Interpretation Act 1901* (Cth) as including a natural person, a body corporate and a body politic.

⁶¹ See Commonwealth Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS Canberra 1992, p 10 [1.13].

⁶² The Commission notes that the House of Representative’s Standing Committee on Education and Training report, *Boys: Getting it Right* recommended HECS-free scholarships which would effectively only entitle recipients to a HECS rebate (or the benefit of the scholarship) whilst they taught in Australian schools: p 162.

that particular school. The Commission has set out above the reasons it considers an exemption to the SDA allowing otherwise discriminatory scholarships is unlikely to achieve the nominated aims of the proposed Bill. However, were such ends achievable through the exempting of sex specific scholarships, the absence of any relevant conditions would significantly diminish the prospects of those ends being achieved.

5.2 The Bill focuses on numerical gender equality rather than substantive inequality

47. It appears to have been suggested that the Bill will allow for ‘affirmative action’ which is somehow seen to be consistent with the objects or purposes of the SDA.⁶³ This proposition is incorrect; the Bill does not address any identified discrimination or disadvantage that affects men wanting to become teachers.
48. The proposed amendment focuses upon the comparative numbers of male and female teachers and appears to aim to equalise those numbers. However, as set out above, 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 object of the promotion of the ‘principle of the equality of men and women’⁶⁴ has been held to recognise that, ‘every human being is equal in dignity and worth and therefore entitled to equal enjoyment of fundamental freedoms and human rights’.⁶⁵ It does not require the imposition of rigid quotas in each area covered by the Act.
49. As discussed above, to the extent that some form of affirmative action is permitted under the Act, the Act has been quite deliberately drafted so that such measures will only be able to be taken for the purposes of achieving substantive equality between the groups identified in s7D(1)(a)-(d). That is, s7D requires the existence of some prior disadvantage or discrimination. This reflects the position under CEDAW, which only permits affirmative action in similarly limited circumstances. Article 2(e) of CEDAW requires States Parties to ‘take all appropriate measures to **eliminate discrimination** against women by any person, organisation or enterprise’. Article 4 deals directly with special measures and provides that:
 1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

⁶³ See, for instance, comments made by the Hon Mr Baird MP, House of Representatives, *Hansard*, 24 March 2004, p 26046 – 7; comments made by the Hon Mr Bartlett MP, House of Representatives, *Hansard*, 24 March 2004, p 26052.

⁶⁴ See s3(d) of the SDA.

⁶⁵ *Tully v Ceridale* (1990) EOC 92-319 at 78-169.

50. It is possible that the implementation of quotas or targets⁶⁶ may constitute a special measure for the purposes of the SDA and CEDAW in particular circumstances, to remedy a particular substantive imbalance. This has been explicitly recognised by the Committee on the Elimination of All Forms of Discrimination Against Women (“CEDAW Committee”), the expert body having responsibility for considering the progress made by States Parties in the implementation of CEDAW. In 1988 the CEDAW Committee recommended that, ‘States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics and employment’.⁶⁷ However whether implementation of quotas or targets is appropriate in a particular case under s7D is ultimately a matter to be determined by a Court, having regard to all the circumstances of the case.⁶⁸ The Commission notes that, in its view, the implementation of quotas or targets, require particular scrutiny. This is because they are somewhat rigid tools, focusing primarily on numbers and redressing statistical imbalance which may not be the result of substantive inequality.
51. As to the question of substantive equality of male and female teachers, there appear to be no practices or policies which exclude, disadvantage, restrict or adversely affect men wanting to become teachers. Rather, as is often the case in female dominated professions, men simply do not go into a comparatively low paid and low status profession that has limited career opportunities. In the Commission’s view, in the absence of any such substantive inequality between men and women wishing to enter the teaching profession, offering sex specific scholarships for the purposes of redressing the gender imbalance in teaching will effectively give males or females (whatever may be the case at any one time), a ‘premium’ over members of the opposite sex at the beginning of their teaching careers.
52. There also appears to have been some suggestion that the Bill constitutes an ‘affirmative action’ measure aimed at achieving substantive equality between male and female students.⁶⁹ However, as discussed above, there is little evidence to suggest that the gender imbalance in teaching has an adverse effect on the educational outcomes of boys.

5.3 Special measures and temporary exemption provisions provide flexibility to the SDA

⁶⁶ It appears that the legislative quota or target is a ratio of 50:50 male to female teachers. See the proposed definition of ‘gender imbalance’ in the proposed s38A contained in Schedule 1, Item 1 of the Bill.

⁶⁷ General Recommendation No 5, Seventh Session 1988, available at:

<<http://www.un.org/womenwatch/daw/cedaw/recomm.htm#recom5>>

See also, General Recommendation No 25, thirtieth session 2004, available at:

<[http://www.un.org/womenwatch/daw/cedaw/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/General%20recommendation%2025%20(English).pdf)>

⁶⁸ This is of course only after a complaint has been through the usual complaint process of the Commission where the matter may be resolved through conciliation or the Commission might be satisfied that a particular measure is a ‘special measure’ for the purposes of s7D and that compliant terminated under s46PH(1)(a) of the *Human Rights and Equal Opportunity Act 1986* (Cth) as not being ‘unlawful discrimination’ or terminated under any of the other bases on which the Commission might terminate a compliant.

⁶⁹ See, for instance, the comments of the Minister for Education, Dr Nelson, *House of Representatives Hansard*, 25 March 2004, p 26182 – 4, 26186, 26187 – 8.

53. Even if the granting of sex specific scholarships could be seen as a means of addressing relevant substantive equality, the special measures provision (s7D) and temporary exemption provision (s44) provide elasticity and flexibility to the SDA and might more appropriately accommodate the aims underlying the Bill.
54. It is perhaps relevant to note in that regard that, on 27 February 2003, the Commission declined to grant a temporary exemption under s44(1) of the SDA to the Catholic Education Office (“CEO”) in relation to its proposal⁷⁰ to offer 12 scholarships to male HSC students enrolling in a primary teacher education course at university (the “Initial Decision”).⁷¹
55. On 25 March 2003 the CEO made an application for a review of the Initial Decision to the Administrative Appeals Tribunal (“AAT”). Prior to the hearing of that application the CEO made a second application for a temporary exemption to the Commission to offer 24 sex specific scholarships to HSC students who enrol in primary teaching courses at university.⁷² It was proposed that of those 24 scholarships, 12 would be offered to male and 12 to female students. The Commission granted a temporary exemption in respect of that second application.⁷³ The CEO also discontinued its application for review of the Initial Decision by the AAT.
56. For the purposes of this submission, the Commission does not propose to repeat the reasoning which underpinned the Initial Decision or the second decision. Those reasons appear in full on the Commission’s website.⁷⁴
57. The Commission notes that it does not have before it any other application for a temporary exemption in relation to a proposed scholarship scheme of the nature contemplated in the Bill. However, were the Commission to receive such an application, the Commission would consider it in accordance with the Guidelines and the usual principles which guide administrative decision makers. So, while the material before the Commission at the time of making the Initial Decision may not have been sufficient to justify the granting of a temporary exemption under s44(1), the Commission may in the future receive an exemption application in respect of a similar scheme supported by sufficient material to allow the Commission to grant a temporary exemption.

⁷⁰ See Catholic Education Office, Temporary Exemption Application, 30 August 2002, available on the Commission’s website at:

<http://www.humanrights.gov.au/sex_discrimination/exemption/letter1.html> and Catholic Education Office, Temporary Exemption Supplementary Application, 16 October 2002 available on the Commission’s website at:

<http://www.humanrights.gov.au/sex_discrimination/exemption/letter2.html>

⁷¹ See Human Rights and Equal Opportunity Commission, Notice of Rejection of Temporary Exemption Application, 27 February 2003, available on the Commission’s website at:

<http://www.humanrights.gov.au/sex_discrimination/exemption/decision.html>

⁷² See Catholic Education Office, Temporary Exemption Application, 19 March 2004, available on the Commission’s website at: <http://www.humanrights.gov.au/legal/sda_exemption/ceo_application.pdf>

⁷³ See Human Rights and Equal Opportunity Commission, Notice of Grant of Temporary Exemption, 19 March 2004, available on the Commission’s website at:

<http://www.humanrights.gov.au/legal/sda_exemption/ceo_exemption.html>

⁷⁴ See n75 and n77 above.

58. In its initial application for a temporary exemption, the CEO contended the scholarship scheme proposed by it ‘may be a special measure’. As stated already, this is not a matter to be ultimately determined by the Commission. Rather it is a matter for the courts.⁷⁵ However the Commission does (and did in that case) have regard to the likelihood that s7D will apply in considering whether to grant a temporary exemption under s44(1). This is to ensure there is utility in granting the relevant exemption (for if s7D applies, there is no need for an exemption). In its Initial Decision the Commission found that it was unlikely that the scholarship scheme proposed by the CEO would be considered by a court as a ‘special measure’ for the purposes of s7D, again on the basis of the material before the Commission.

59. This finding is not determinative of the matter. It is always open to a person to implement special measures should they consider those measures as falling within the terms of s7D. As noted above, the Commission has published guidelines to assist people considering implementing such measures.⁷⁶

5.4 The aims of the Bill can be achieved in other non-discriminatory ways

60. The Commission considers that there are alternative non-discriminatory strategies which could be instead implemented to achieve the aims of the Bill.⁷⁷ For example, the Commonwealth Sex Discrimination Commissioner has already suggested that:

... there are many programs that could encourage young men into teaching. For example, sending young male teachers to schools to encourage young men to consider the career, or supporting career counsellors to promote the benefits of a teaching career could be useful beginnings.

One of the problems is that male teachers either leave the profession mid-career because of poor remuneration, or they are promoted out of the classroom to become Principals or Assistant Principals. Programs to stop this exodus and programs to encourage the promotion of a representative number of women teachers into senior administrative positions in schools would result in more male teachers in the classroom.⁷⁸

6 The Bill may place Australia in breach of its international obligations under CEDAW

61. As noted above, an object of the SDA is to implement certain of Australia’s obligations under CEDAW, the principal international human rights convention dealing with the human rights of women. CEDAW imposes the following relevant international obligations upon Australia:

⁷⁵ See n72 above.

⁷⁶ See paragraph 25 above.

⁷⁷ The Commission notes that the Government rejected the Standing Committee’s proposal that HECS free scholarships be granted to male and female students enrolled in teaching courses on the basis saying that: ‘... **other means of achieving the objective of this recommendation should be explored**’. See, *Report to the House of Representatives Standing Committee on Education and Training: Boys: Getting it Right: The Government Response to the Report*, p 23.

⁷⁸ See Sex Discrimination Commissioner, Statement on Sex Discrimination Amendment (Teaching Profession) Bill 2003, Media Release, 9 March 2004.

- (2) States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality between men and women the same opportunities to benefit from scholarships and other study grants.⁷⁹
- (3) States Parties to condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
- to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;⁸⁰
 - to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;⁸¹
 - to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;⁸² and
 - to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.⁸³
- (4) States Parties shall take all appropriate measures to modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles of men and women.⁸⁴
62. The proposed exemption stands to put Australia in risk of breaching all or some of those obligations under CEDAW, in particular, the obligation to ensure men and women have ‘the same opportunities to benefit from scholarships and other study grants’.⁸⁵ This is a matter on which Australia would be required to report to the CEDAW Committee in its next country report.⁸⁶ In these circumstances, the proposed amendment may cause considerable embarrassment to Australia in an important international forum.

⁷⁹ See article 10(d) of CEDAW.

⁸⁰ See article 2(b) of CEDAW.

⁸¹ See article 2(c) of CEDAW.

⁸² See article 2(d) of CEDAW.

⁸³ See article 2(e) of CEDAW.

⁸⁴ See article 5 of CEDAW.

⁸⁵ See article 10(d) of CEDAW.

⁸⁶ The Commission notes that Guideline E.4 of the *Guidelines on the form and content of reports to be submitted by States Parties on International Human Rights Treaties* adopted by the CEDAW Committee require Australia to report on changes which may have occurred in the ‘political and legal approach affecting Convention implementation’. See Committee on the Elimination of All Forms of Discrimination Against Women, *Guidelines on the form and content of reports to be submitted by States Parties on International Human Rights Treaties*, 5 May 2003 UN Doc HRI/GEN/2/Rev.1/Add.2.

7 Concluding Comments

63. The Commission believes a number of important points need to be stressed in the consideration of this Bill.
64. It is a serious step to depart from the important protections from discrimination conferred by the SDA, which celebrates its twentieth anniversary this year. Such steps should be taken on the basis of clearly established need and appropriately supported. As discussed above, the purposes said to be achieved by the Bill are not supported by the available evidence.
65. Women as a group have historically been disadvantaged in their participation in public life. In many areas of life this disadvantage continues. It presents continuing barriers to women's engagement in paid employment and leads to the ongoing undervaluation of women's work. The undervaluation of work that is considered to be 'women's work' is a major disincentive for men to enter and remain in female dominated professions (such as teaching).
66. Focussing on numerical outcomes may be a temptation for legislators because they are easily measured. Numerically equal outcomes may be one indicator of equality but under the SDA, they are not an aim in themselves. To collapse equality into a numerical gender balance is to misunderstand the principle of equality at the heart of the SDA. The SDA rather looks to promote the more fundamental concept of substantive equality. Perhaps for this reason, despite the manifest disadvantages faced by women in employment, neither the original Act nor later amendments to it have sought to introduce numerical outcomes.
67. A measure such as that envisaged by this Bill, which is intended to assist members of one sex and not based upon evidence of a discriminatory barrier that disadvantages members of that sex, is not an affirmative action measure. This is the case whether the measure is cast as a special measure under s7D of the SDA or as a legislated exception to the SDA as in the case of the current Bill. Consistency with the scheme of the SDA requires that such measures be devised to address a specific and defined substantive inequality.
68. The broad purpose of anti discrimination legislation is to improve social and economic efficiency. Measures which aim to advantage one sex without evidence of disadvantage are discriminatory, rather than anti discriminatory, and likely to distort social and economic equality rather than enhance them.
69. The Commission reiterates that there is insufficient evidence of any substantive inequality that this Bill would be able to address. Moreover the Bill has the potential to reinforce existing inequalities.