



Chairperson
Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2600

7 May 2004

Dear Madam Chair

Inquiry into the Sex Discrimination Amendment (Teaching Profession) Bill 2004

Thank you for providing the proof Hansard of the Committee's hearing of 30 April 2004.

The Human Rights and Equal Opportunity Commission ("Commission") does not wish to make any corrections to the proof Hansard.

However, as discussed with Ms Dennett, there are a number of matters arising from the evidence of the Attorney-General's Department (the "Department") on which the Commission seeks to assist the Committee by providing some further information and clarification. As discussed with Ms Dennett, we considered it appropriate to copy this letter to the Department.

1. The Commission's function under s44 of the *Sex Discrimination Act 1984*

In his evidence before the Committee, the Acting Assistant Secretary of the Human Rights Branch of the Department, Dr Alderson, indicated that, in the Department's view, the amendment proposed in the Sex Discrimination Amendment (Teaching Profession) Bill 2004 ("Bill") is necessary because, *inter alia*:

The Human Rights and Equal Opportunity Commission was not prepared to grant a temporary exemption [under s44 of the *Sex Discrimination Act 1984*] to allow scholarships only for men. It was later prepared to grant an exemption where there were equal numbers of scholarships for males and females. What this amendment does, as opposed to what the human rights commission appears prepared to accept, is allow you to offer scholarships purely to males without coupling them with an equal number of scholarships to females. That is the difference.¹

This may be taken to suggest that, having declined to grant a temporary exemption under s44 of the *Sex Discrimination Act 1984* (Cth) ("SDA") to the Catholic Education Office ("CEO") in its decision of 27 February 2003, the Commission would never be prepared to grant a temporary exemption in relation to some similar

¹ See Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, Sydney, 30 April 2004, 39.

proposal, regardless of the evidence on which such an application might be based. If so, that is incorrect.

In that regard the Commission notes that, as it stated in its submission to the inquiry, temporary exemption applications under s44(1) of the SDA are determined on the basis of the evidence before the Commission at the time of making its decision and in accordance with the usual principles governing administrative decision makers.² Hence in its submission the Commission stated that:

So, while the material before the Commission at the time of making the [decision to decline to grant a temporary exemption to the Catholic Education Office] 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.³

For example, to the extent that the Commonwealth is concerned that the proposed scholarships referred to by Minister Nelson on 1 May 2004⁴ would infringe the SDA, the Commonwealth could make an application for a temporary exemption under s44(1) and seek to draw to the Commission's attention such evidence as the Commonwealth has available to address the evidentiary issues raised by the Commission in its decision to decline to grant a temporary exemption to the CEO on 27 February 2003.⁵ Those issues included:

- whether there was sufficient evidence to establish that the scholarship scheme would in fact result in more male teachers;⁶ and (if so)
- whether there was sufficient evidence to establish that more male teachers would affect the educational outcomes of male students.⁷

The Commission was not able to be satisfied that the evidence before it established either or those propositions. However, if the Commonwealth is able to provide more compelling material in support of a future application, it would be open to the Commission to conclude that the reasons advanced in favour of such a scheme outweighed the discriminatory effects.⁸

This further illustrates that the Bill is unnecessary if the aims said to require the granting of male only scholarships are in fact able to be supported by appropriate evidence. Section 44(1) of the SDA already allows the Commission to exempt such schemes in a manner which is flexible and able to be directed far more precisely than via the permanent exemption proposed in the Bill.

² See paras 39, 41 and 57 of the Commission's submission.

³ See para 57 of the Commission's submission.

⁴ Dr Brendan Nelson, Minister for Education, Science and Training, Media Release, *Scholarships for 500 Male Primary Teachers*, available on the Minister's website at:
<<http://www.dest.gov.au/Ministers/Media/Nelson/2004/05/n694030504.asp>>

⁵ A copy of that decision is available on the Commission's website at:
<http://www.humanrights.gov.au/legal/sda_exemption.html#dec2>

⁶ See paras 2.1.2-2.1.3, 3.29-3.33, 3.44 of the Commission's Notice to decline the grant of a temporary exemption to the CEO, 27 February 2003 available on the Commission's website at:
<http://www.humanrights.gov.au/sex_discrimination/exemption/decision.html>

⁷ *Ibid*, paras 2.1.4, 3.21-3.22, 3.36-3.41.

⁸ See Part 2, para 2 of the Commission's *Guidelines on applications for temporary exemptions under the Sex Discrimination Act 1984* available on the Commission's website at:
<http://www.humanrights.gov.au/legal/sda_exemptions.html>

If no such evidence is available, then the Commission reiterates its opposition to the introduction of a discriminatory measure on the basis of unsupported claims.

2. Length of time taken to consider an application for a temporary exemption under s44 of the SDA

Dr Alderson also stated that the CEO's application for a temporary exemption 'took 18 months from the initial application to the ultimate outcome'.⁹ The Commission would like to clarify this issue.

The CEO made its initial application for a temporary exemption on 30 August 2002 and a supplementary application on 16 October 2002. In accordance with its *Guidelines on applications for temporary exemptions*, the Commission determined to seek public comment in relation to the CEO's proposal as it raised issues of wider public concern.¹⁰ Public comment was sought in the period 7 November 2002 to 3 December 2002. The Commission then issued its Notice to decline to grant a temporary exemption on 27 February 2003, some 4 months after the CEO's supplementary application.

On 25 March 2003 the CEO lodged an application with the Administrative Appeals Tribunal ("AAT") seeking a review of the Commission's decision. The hearing of that matter was delayed by matters including the CEO's opposition to a joinder application made by a third party. The resolution of that issue required a preliminary hearing on 13 August 2003, which was followed by a decision handed down on 12 September 2003. It should also be noted that the CEO did not at any time apply to the AAT to have the matter dealt with on an expedited basis.

The matter was finally set down to be heard by the AAT on 14 April 2004. On 18 March 2004 the CEO lodged a second application for a temporary exemption with the Commission, which application was determined by the Commission on 19 March 2004. Also on 19 March 2004, the CEO withdrew its application to the AAT for review of the Commission's initial decision.

Consequently, the bulk of the period referred to by Dr Alderson relates to the litigation process following the CEO's application to the AAT for review of Commission's initial decision.

It should also be noted that there is no charge for the filing of temporary exemption applications with the Commission and that the Commission does not require such applications to be in any particular form.

3. Provisions of the Sex Discrimination Act 1975 (UK)

In response to a question by the Chair as to whether any other countries are taking similar measures to allow male only scholarships Dr Alderson stated that:

⁹ See Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, Sydney, 30 April 2004, 39.

¹⁰ See Part 4 of the Commission's *Guidelines on applications for temporary exemptions* available on the Commission's website at: <http://www.humanrights.gov.au/legal/sda_exemptions.html>

... we have looked at comparative laws in different jurisdictions ... If it is useful to the Committee, we have a piece of paper with a UK provision. It is not directed specifically at teaching but in their antidiscrimination law it allows gender discrimination in the numbers in professions generally. We could provide a copy of that to the committee secretariat if that would be helpful.¹¹

The Commission assumes that Dr Alderson was there referring to s47 of the *Sex Discrimination Act 1975* (UK). A copy of that provision is attached as Attachment One to this letter.

That provision has never been judicially considered. Consequently, it is unclear as to whether that provision would allow a scholarship scheme of the kind proposed to be exempted by the Bill.

The Commission would like to make some short observations in relation to s47. First the circumstances in which discriminatory training may be taken are very narrow. That section only permits training bodies to afford men only or women only access to training in circumstances where, at any time within the 12 months immediately preceding the doing of that act, there were no persons of the sex in question among those doing that work or the numbers of the particular sex doing the work were comparatively small. In contrast, as noted in the Commission's submission, the exemption proposed in the *Sex Discrimination Amendment (Teaching Profession) Bill 2004* appears to apply wherever there is a departure from a one to one gender ratio. The Commission reiterates that this will almost invariably be the case. Indeed, it will by definition be the case for any school with an odd number of teachers.

Second, s47 is required to be interpreted in accordance with the European Council Equal Treatment Directive.¹² A copy of that Directive is attached as Attachment Two to this letter. Article 2(1) of the Directive provides that the 'principle of equal treatment shall mean that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status'. Article 2(4) permits the taking of special measures in certain circumstances. It provides that the prohibition on discrimination is, 'without prejudice' to measures to 'promote equal opportunity for men and women'.

The European Court of Justice interprets Article 2(4) strictly, as it derogates from the individual rights contained in Articles 1(1) and 2(1). The Court has interpreted Article 2(4) as permitting the use of preferential systems as a special measure when taken to 'remove inequality', in certain circumstances.¹³ Whether s47 of the *Sex Discrimination Act 1975* (UK) is compatible with the Equal Treatment Directive has not been judicially considered. However, the Commission notes that commentators have suggested that the *Sex Discrimination (Election Candidates) Act 2002* (UK), which amended the *Sex Discrimination Act 1975* (UK) by allowing political parties to

¹¹ See Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, Sydney, 30 April 2004, 40.

¹² See European Council Directive, 76/207/EEC of 9 February 1976. That Directive has effect in the UK by virtue of s2 of the *European Communities Act 1972* (UK) c 68.

¹³ See *Kalanke v Freie Hansestadt Bremen* (C-450/93) [1995] ECR I-3051; *Marschall v Land Nordrhein - Westfalen* (C-409/95) [1997] ECR I-6363; *Badeck v Hessischer Ministerpräsident* (C-158/97) [2000] ECR I-1875.

impose sex based quotas in the selection of electoral candidates may be incompatible with the Equal Treatment Directive.¹⁴

In light of the above, any suggested analogy between the exemption proposed in the Bill and s47 of the *Sex Discrimination Act 1975* (UK) is tenuous.

Thank you again for the opportunity to provide the Committee with information regarding this inquiry.

Yours faithfully



Pru Goward
Sex Discrimination Commissioner

Cc: Dr Karl Alderson, Acting Assistant Secretary, Human Rights Branch, Attorney-General's Department

¹⁴ See for instance, N Busby, "Sex Equality in Political Candidature: Supply and Demand Factors and the Role of Law (2003) 66 *Modern Law Review* 245; P Jepson "The need for more women members of Parliament" Vol 150, No. 6930 *New Law Journal* 501.