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**EQUAL OPPORTUNITY ACT 1984**

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**DECISION OF THE EQUAL  
OPPORTUNITY TRIBUNAL OF W.A.  
(APPLICATION NO. 29 OF 1997)**



**IN THE EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA**

No. 29 of 1997

BETWEEN:

<b>MINISTER FOR EDUCATION</b>	<u>Applicant</u>
and	
<b>COMMISSIONER FOR EQUAL OPPORTUNITY</b>	<u>First Respondent</u>
and	
<b>STATE SCHOOL TEACHERS' UNION OF WA (INC)</b>	<u>Second Respondent</u>
and	
<b>WA SECONDARY DEPUTY PRINCIPALS' ASSOCIATION</b>	<u>Third Respondent</u>
and	
<b>DIRECTOR OF EQUAL OPPORTUNITY IN PUBLIC EMPLOYMENT</b>	<u>Fourth Respondent</u>
and	
<b>WESTERN AUSTRALIAN PRINCIPALS' FEDERATION</b>	<u>Fifth Respondent</u>

REASONS FOR DECISION

BEFORE: Mr L W Roberts-Smith, QC—Acting President  
 Ms R Kean—Member  
 Ms E Brice—Deputy Member

COUNSEL: For the Applicant—Mr D Matthews  
 For the First Respondent—Ms H Andrews  
 For the Second Respondent—Ms S Bird  
 For the Third Respondent—Ms L Street  
 For the Fourth Respondent—Ms G Braddock  
 For the Fifth Respondent—Ms M Foley

Date of Hearing: 8 September 1997

Reasons for Decision delivered: 25 September 1997

The Equal Opportunity Act 1984 (WA) ("the *EO Act*") came into operation on 8 July 1985.

On 6 July 1987 the Tribunal granted an application by the Minister for Education ("the Minister") made under section 135 of the *EO Act* for an exemption from the operation of the provisions of section 11 of the *EO Act*. (Minister for Education and Commissioner for Equal Opportunity and Ors, (1987) EOC 92-198. The latter made it unlawful for an employer to discriminate in employment against a person on the ground of the person's sex, marital status or pregnancy. No conditions were imposed in relation to the exemption (although there was an express power in section 135(6)(a) to impose terms or conditions on the grant of it) and it was made for the maximum period of 5 years. (Section 135(6)(d) *EO Act*).

Shortly before that period of exemption expired the Minister lodged an application seeking an extension of the exemption for a further 5 years, to 6 July 1997. That application was granted by the Tribunal on 29 April 1993 with retrospective effect from 6 July 1992. Although some parties had argued strongly for the imposition of conditions on the extension the Tribunal had regard to an undertaking by the Ministry to comply with those sought and to indications that appropriate steps were being taken to address the main areas of concern, and so did not impose formal conditions.

On 23 June 1997 the Tribunal received an application by the Minister for a further extension of the exemption to cover the period 6 July to 31 December 1997.

The exemption throughout has been from the provisions of Section 11 of the *EO Act* so as to allow the retention of gender-linked deputy principal positions in specified categories of schools throughout Western Australia. Under the Education Act Regulations 1960 ("the regulations") certain classes of schools are designated to have two deputy principals. These positions are gender-linked, in that one deputy principal of each sex is required. Certain other classes of schools are designated as having three deputy principals, two of whose positions are gender-linked.

In its reasons for decision in respect of both the original application for exemption and the first application for extension the Tribunal found that retaining gender-linked positions would give some women an advantage when promotion to these positions was considered. The Tribunal also found that, in the past, women had not been promoted to senior positions in the Education Department commensurate with their numbers or abilities and that this imbalance was so great that if the exemption was granted, that must have the effect of promoting the recognition and acceptance within the community of the equality of men and women.

In his affidavit in support of the application for a further extension, the Minister noted the concluding remarks of the Tribunal in its reasons given on 29 April, 1993:

"It was...significant that the application for further exemption was not directly opposed and that the areas of difference at the hearing were limited largely to the question of whether the Ministry was acting with sufficient speed and resolution to address concerns of the kind articulated by the

Commissioner and the other parties at the hearing. In that regard, the Tribunal considers that a number of significant remedial procedures are in motion...the Tribunal is not minded to impose conditions of the kind contended for by the interested parties having regard to the undertaking given by the Ministry and the indications that appropriate steps were being taken to address the main areas of concern".

The Minister stated that he was of the opinion that the exemption has served a useful purpose in providing role models of women in senior positions within the teaching service. However, it was his further opinion that the exemption is no longer a useful means of ensuring a pathway to promotion for women and that it is timely to allow it to lapse. He stated that a package of measures will be put in place, to build on work already underway, to increase the numbers of women in promotional positions. The package would include accountability, monitoring and evaluation strategies.

In that context, the application for a further extension to 31 December, 1997 was nonetheless still necessary because of the timing of the process for staffing schools for 1998. The departmental timetable for filling level 3 and level 4 transfers and promotional vacancies was intersected by the date on which the exemption lapsed (6 July, 1997). That would mean if (retrospective) approval were not granted to extend the exemption until the end of 1997, that some positions which are currently gender-linked would be filled on this basis and others not. Thus, in order to maintain consistency in staffing for 1998, the department considered it essential that the exemption be continued until the process for filling those positions have been completed, that is to the end of December, 1997.

This contention was supported by the affidavit of Mr Stephen Home, Executive Director, Human Resources Division of the Education Department. Mr Home also gave oral evidence before the Tribunal.

In his affidavit, Mr Home said that the extension of the exemption was sought because the department had commenced its process for filling promotional positions within schools for the 1998 school year and wished to maintain consistency in matters impacting on that process.

Primary and secondary school deputy principal positions are promotional positions, (being level 3 and level 4 positions respectively).

The level 4 secondary school deputy principal positions for 1998 were advertised for filling by way of transfer only, in the Education Department publication "School Matters" on 23 April, 1997.

Applications to fill those positions by way of transfer closed on 9 May, 1997 and those applications were then being processed by the Department.

As at 18 July, 1997, Mr Home anticipated that that process would be completed by the end of July and that soon thereafter the results would be published and the positions that remained vacant advertised for filling on the basis of merit.

The level 3 primary school deputy principal positions for 1998 were advertised for filling by way of transfer only in the "school matters" on 18 June, 1997. Applications to fill those positions by way of transfer closed on 4 July. Those applications were also then being processed by the Department and it was anticipated that, that process would be completed by mid-September, 1997 and that soon thereafter the results would be published and the positions remaining vacant advertised for filling on the basis of merit. By the time of the hearing he thought the process would be completed by the end of September.

The Department anticipates that all promotional positions for the 1998 school year will be filled by 31 December, 1997.

In his affidavit, Mr Home went on to say that the transfer system for the filling of promotional positions, currently in place within the Department, provides that all promotional positions be filled, in the first instance, by way of transfer rather than merit. When a metropolitan promotional position becomes available, it is usually filled by the most senior appropriate person by way of transfer from a country posting. Few metropolitan positions remain vacant after the transfer process to be filled by way of merit selection.

Mr Home acknowledged that the operation of the transfer system disadvantages women seeking promotion within the Department because, on the whole, women are less able than men to move to country areas to take up promotional positions. Accordingly, not only are women under-represented in promotional positions in country areas due to their lack of mobility but they cannot, in turn, take advantage of the transfer system to win promotional positions in the metropolitan area and are therefore under-represented in those positions also.

He believed however that the exemption has to an extent provided a counter-balance to the way in which the transfer system operates in favour of men.

Mr Home explained that it is intended that the transfer system will change as at 1 January, 1998. The intention is that it will be phased out altogether by January, 2000. Thereafter, all positions will be filled according to a merit base selection process. The Department's current intention is to fill, by transfer, 50 percent of the positions advertised in 1998 for the 1999 school year, to fill, by transfer, 25 percent of the positions advertised in 1999 for the 2000 school year and to fill vacancies occurring thereafter by merit.

In support of the application for the extension to the 31 January, 1997, Mr Home said it is considered that removal of the exemption, in circumstances where the transfer system continues to operate, may lead to the erosion of the current position in relation to promotional positions being filled by women. However, as from January, 1998, when the transfer system would begin to be dismantled, it will not represent the same threat to the equality of opportunity for women within the Department that it currently does.

In addition to the proposed dismantling of the promotional transfer system, Mr Home deposed that a range of measures have been approved for implementation within the Department to promote equality of opportunity. Some of the more important measures he described as follows:

- A. Making equality of opportunity a specific responsibility of all line managers so that they are accountable in relation to promoting equal opportunity of women in the areas they manage.

- B. Making gender balance a requirement of administrative teams in schools and requiring line managers to aim for specific outcomes in relation to the filling of promotional positions by women.
- C. Removing the requirement of the four year qualification as an eligibility criteria for level 3 promotional positions.

These and other measures have already been approved by the Department Senior Executive for implementation.

Finally, Mr Home deposed that the Minister did not wish the exemption to operate beyond 31 December, 1997, because, he considered that, (amongst other reasons), the existence of the exemption gives a false sense of achievement of a gender-balance in promotional positions and that the exemption had not, in fact, led to a great increase in the number of promotional positions over the past four years and women remain under-represented in senior school based positions. Thus, rather than continuation of the exemption, the Minister's contention is that it is time to develop and implement other strategies, including those mentioned above, to ensure there is real progress towards equality of opportunity.

#### POSITION OF COMMISSIONER FOR EQUAL OPPORTUNITY

The Commissioner for Equal Opportunity, ("the Commissioner"), did not oppose the application for an exemption in so far as it applied to female gender-linked deputy principal positions but did oppose it in respect of those that applied to male gender-linked positions. In so far as the continuation of the female gender-linked positions exemption might continue, she argued that there would be monitoring required of the measures referred to in the Minister's affidavit as to the effectiveness of those measures.

The Commissioner pointed out that when the Minister was granted the exemption and extension in 1987 and 1993 respectively, she had not specifically opposed the applications although, on both occasions, she had expressed considerable concern about whether there were effective policies in place to address equal opportunity for women in the Department. She specifically requested that the exemptions be granted with conditions attached to ensure her concerns were addressed.

Having now reviewed the situation, it was the Commissioner's view that her concerns have been shown to be justified and, that after ten years of the exemption being in place, women are still considerably under-represented in these positions.

She suggested that there are policies and practices of the Department which clearly prevent women from being able to obtain promotional positions. She described these as being:

**The transfer policy:** Under the present system, persons holding promotional positions in country areas have priority for promotional positions in the metropolitan area and are transferred in on a seniority basis. This significantly decreases the pool of metropolitan promotional positions available. Traditionally, women are less mobile than men. This means that they are less likely to apply for promotional positions in country areas and less likely to benefit from the transfer policy. In addition, she noted (as the Tribunal had found in *Kemp v Minister for Education*, (1991) EOC 92-340),

that using seniority as a criteria for transfer discriminated against women.

**Four year trained teachers:** The Commissioner's understanding is that positions at level 3 and above require four-year trained persons. Far more men than women can comply with that requirement. She further deposed to her understanding that there are some very competent women who are not four-year trained who act in promotional positions but will not be able to obtain them substantively. In her view, the reasonableness of this requirement needs to be examined as it may indirectly discriminate against women.

**Part-time Work:** The Commissioner believes there are still problems in relation to promotional positions being filled on a part-time basis or being held in tandem. Any restriction on positions being able to be filled on a part-time basis will discriminate against women. (See *Nicholls v Minister for Education*, (1994) EOC 92-573).

In her affidavit, the Commissioner went on to point out that although the Minister is applying only for an exemption for six months, the effect of the application would be that the exemption would, in fact, apply for 18 months.

As to the Department's contention that exemption is requested to ensure that the filling of promotional positions for 1997/98 is dealt with consistently the Commissioner said what this means, in effect, is that the removal of the exemption will not occur until 1999.

The immediate point of departure of the Commissioner's position from that of the Minister's application is the Commissioner's opposition to any further exemption in respect of Deputy Principal positions which are exclusively for males. Her reason for that is because, in view of the statistical evidence that women are severely under-represented in promotional positions she can see no justification for excluding them from applying for 50 percent of the Deputy Principal positions, especially when they represent significantly more than 50 percent of the teaching workforce. Thus, to continue the exemption in relation to males cannot be justified on equal opportunity grounds.

Finally, the Commissioner stated that she continues to be concerned that the grant of a further exemption in relation to female gender-linked Deputy Principal positions will continue to obscure the true position of women teachers in the education system, even though she is aware that evidence from other States suggests that the removal of this exemption would result in women being even more under-represented in promotional positions.

In a further affidavit, the Commissioner made reference to the evaluation report of the Director of Equal Opportunity in Public Employment, ("the DOEPE Report—see below). In particular, the Commissioner noted that report's findings that the improvement in the overall position of women in promotional positions over the last four years is 0.3 percent. She says this supports her expressed concerns about the Education Department's progress in addressing the position of women since the commencement of the *EO Act*.

The Commissioner referred to material in the DOEPE Report which showed that at primary and secondary school levels women are massively under-represented at all promotional levels. Of particular concern to the Commissioner is the figures for primary school teachers where women represent 92 percent of the workforce at level one, but have no representation at level 6.

She contended that the statistics in the DOEPE Report support her objection to the exemption being continued for males. She said it is clear that in the pool of persons who may be eligible to apply for promotional positions, (that is, levels 1 and 2), women significantly outnumber men and, accordingly, the continuation of the exemption for males effectively gives men a greater share in promotional positions than they could otherwise expect. She further noted the Director has identified the operation of the transfer system as being potentially discriminatory. She referred to the affidavit of Stephen Home in which he acknowledged that the operation of the transfer system disadvantages women and yet the Department does not propose phasing out the system altogether until January, 2000. She said the applicant provides no explanation as to why the transfer system has to be phased out and she noted that on the previous application for an exemption the transfer system was acknowledged by the applicant to be an area of potential discrimination that was then being addressed.

In so far as Mr Home, in his affidavit, referred to a number of measures that have been approved for implementation to promote equality of opportunity within the Department, the Commissioner noted that these proposals do not set out the strategies to be used to achieve those measures nor that on important measures such as the removal of a four year qualification does it provide any timetable for implementation.

Consequently, in view of the lack of progress of women in promotional positions over the last ten years of the exemption and the failure, (as she puts it), of the Department to implement effective policies in spite of assurances to the contrary, she asked the Tribunal to impose conditions to the grant of any extension to the exemption. The conditions she sought are conditions which would require the Department to provide an effective timetable of implementation of strategies to address the matters identified by the applicant and other parties as preventing women reaching their full potential in employment with the Department.

#### STATE SCHOOL TEACHERS' UNION OF WA (INC)

The State School Teachers' Union of WA (Inc), ("the Teacher's Union"), initially took the position that the exemption should be granted but should be for a period of five years from 6 July, 1997 with provision for annual review and analysis of the strategies implemented and proposed to improve the position of women in promotional positions within the government school system. That review, the Teachers' Union contended, should be held before the Tribunal and parties to the application.

It will be apparent that the Teachers' Union position immediately raised the question whether or not a party other than the applicant could, in law, apply for an extension of an exemption for a period longer than that sought by the applicant.

That issue was the subject of argument before the Tribunal at a preliminary hearing on 29 July, 1997, at which time the Tribunal ruled that it was not open for a party other than that benefiting from an exemption to seek such an order. As a consequence of that, the Teachers' Union took a somewhat different position, contending that if the exemption were extended to 31 December, 1997, then monitoring and review conditions should be imposed which would extend for a further two years thereafter.

The stance of the Teachers' Union before the Tribunal was founded on the policy of the Union to support the retention of the gender-linked positions for male and female deputy principal positions in all classes of schools which are presently staffed in this manner.

The General Secretary of the Teachers' Union, Mr Peter Quinn, said, in an affidavit, that it was his belief that in keeping with the objects of the *EO Act* in the interests of promoting equality between men and women, it is necessary to continue the exemption but with a regular report-back mechanism in place to allow review and, if necessary, alterations to the Department's strategies in this area.

It was Mr Quinn's belief that if the exemption were not granted, or granted only for a short period of time, the strategies alluded to by the Minister would not have had time to reach their full effect and the position of women in promotional positions within the Department would decline as a result.

In the submissions made on behalf of the Teachers' Union it was noted that in previous exemption applications both the Teachers' Union and the Commissioner had sought orders to include some form of monitoring or reporting mechanism beyond that specified under part 9 of the *EO Act*. It was the Union's submission that should the extension be granted, the terms of that extension should include orders for a review process to be established for the period of the exemption and for a period of two years following its expiry. It was submitted that the review might be in the form of a working party or review group comprised of representatives of the parties to the present application and chaired by the Director. Such group, it was suggested, would meet with the Department on a regular basis, (for example, quarterly), throughout the review period to monitor the progress of the strategies and provide advice on possible alternative strategies if appropriate.

The Teachers' Union stressed the importance of positive role models for girls in schools and the necessity for role models of women in senior positions within schools, and generally.

As had the Commissioner, the Teachers' Union referred to the DOEPE Report and drew attention to examples of concerns including, for instance, the exclusion of equal employment opportunity criteria and requirements in reporting and accountability mechanisms within the Department, exclusions of three-year trained teachers from accessing promotional positions on a substantive basis, and the general lack of detail in reports submitted to the Director.

The Union submitted that, given the significant level of change occurring within the Department at present and change planned for the near future, it would seem to be an ideal opportunity to redress the lack of stated equal employment opportunity goals and outcomes at all levels of the education system.

The Teachers' Union also sounded a note of warning. It was submitted that the significant levels of current and planned change present a danger to the position of women in senior positions within the Department. If current practices continue and are replicated in the new structures, there is a strong likelihood that the current culture will also be replicated and women will continue to be excluded from representation in promotional positions in a proportion that reflects their employment levels within the Department.

It was pointed out that the DEOPE review conducted in 1997 suggests that the exemption merely maintains the status quo and masks the discriminatory behaviour of the Department. To remove the exemption may expose the discriminatory behaviour but it does not provide any assistance to the women affected, nor to the Department, in addressing the problem. To provide a feedback mechanism as was suggested by the Teachers' Union would allow strategies to be developed, implemented, reviewed and changed, if necessary, to ensure the best possible outcomes for both the Department and women seeking promotion within the Department.

As to the Department's indication that it was implementing a major strategy to assist women by dismantling the current points transfer system and to have all promotional positions filled by merit selection, the Union expressed serious concerns about the manner in which this is apparently proceeding. It was suggested that industrial agreements between the Teachers' Union and the Department call for consultation on major issues affecting teachers but that had not occurred in this case. It was said there are issues relating to other industrial agreements where undertakings have been given or implied by the Department relating to priority transfer rights for teachers after service in remote schools which will be adversely affected by the total dismantlement of the transfer system. The Union submitted that there needs to be consultation between the Union and the Department in a detailed proposal addressing these issues for the teachers affected, and circulated prior to implementation.

Amongst other observations and submissions made on behalf of the Union, it was said that the practical impact of the strategy of removing the requirement for a four-year qualification from the level 3 selection criteria, (whilst commendable in itself), was merely to lift the "glass ceiling" one rung higher, as a four-year qualification is still essential for a level 4 position.

In conclusion, the Union submitted that the Department had had ten years to develop and implement these strategies and, as is apparent from the DEOPE review, very little has been done. It was the Union belief that a more detailed strategy including resource allocation, line management responsibility and review mechanisms need to be developed subject to a review process as contended for by the Union.

#### WA SECONDARY DEPUTY PRINCIPAL'S ASSOCIATION INC.

The Western Australian Secondary Deputy Principal's Association, ("the Association"), supported the continuance of the exemption—however, it also sought the establishment of a monitoring body with representatives from the parties participating in the hearing before the Tribunal to enable progress on the package of measures referred to by the Minister to be assessed over a five year period.

In the material put to the Tribunal, the Association expressed a number of concerns.

The first of these was that the Department has placed a low priority on promoting the recognition and acceptance within it and within the community of the equality of men and women as specified in the legislation. It was said that initiatives taken by the Department have been limited to changing regulations rather than changing the culture of the organisation.

A particular point made was that the current application by the Minister is necessitated by a lack of forward planning.

The Association said that prior to June, 1997, its members were not aware that any procedures had been developed to deal with the changes to the transfer and promotion system that would eventuate with the anticipated end of the exemption in that month.

It was said that an analysis of the progress made in increasing the proportion of women in promotional positions in Departmental schools, after ten years of exemption from the legislation, reinforces the Association's claim that there has been little system-wide action to encourage or support women in their aspirations to leadership positions.

The Association submission pointed out that at level 3, (head of department), only a fraction, (approximately 14 percent), of the positions are currently held by women. Many of the male incumbents have held these subject-based positions for many years. Originally, these appointments were based on seniority and occurred at a time when women of the same peer group were unable to compete due to forced broken service and loss of permanency, etcetera. The Association noted that positions at this level provide the opportunity to develop skills and gain the experience required to address selection criteria for promotion to level 4, (deputy principal).

In relation to level 4, the Association observed that the gender-linked position has permitted women to compete with each other on equal terms. Men and women have been able to combine raising a family with pursuing a career. This situation has allowed for the differential development in career patterns for men and women. In contrast, the level 4 non-gender-linked deputy principal position which has existed since 1991 has quickly become a male-dominated position with a ratio of 18 men to 7 women. This has occurred because positions have been mainly filled using the transfer system based on seniority. Men with unbroken service have an advantage where seniority is used as the criteria for appointments. The Association regards this as a critical issue. It contends that the removal of the exemption will result in the current male and female deputy principal lists being combined to the advantage of men with unbroken service records.

In relation to level 6, (secondary), positions, the Association notes there has been an improvement in the proportion of women winning promotion at this level. In 1986 there were only eight women holding the position of principal, senior high school. In 1997 there are 27 women holding level 6 positions, (28 percent). The majority of the women appointed to level 6 positions have used the gender-linked deputy

principal position at level 4 as a pathway. It is said that the increase of the number of women at level 6 can be attributed to a combination of changes to regulations, the introduction of the merit promotion system and the opportunity to experience leadership and develop skills at level 4.

The Association noted that the slow growth in the number of women in promotional positions is not unique to Western Australia. Research in other States of Australia, New Zealand, the United Kingdom and the United States in the past ten years has concluded that simply enacting legislation that declares equal opportunity to exist is unlikely to be successful. Women have continued to be hampered by family responsibilities and obstructed and discouraged by a culture that is accustomed to dealing with men. The Department has done too little to promote a change in this culture.

The Association acknowledged that the retention of the gender-linked level 4 position has possibly masked the Department's lack of forward planning and research into the development of policies and practices to ensure equal employment opportunity within the school system. The outward appearance to the community has been that women are able to share equally in all positions at all levels in schools. The Association observed that it was unaware of any consultation having occurred with community groups to determine their attitude to the removal of the exemption and its possible consequences. It suggested there may be grounds for judging the issue of maintaining an ongoing exemption on the basis of what is best for the school system - its students and staff—rather than on meeting the strict requirements of equal employment opportunity.

The Association concluded with observations that gender stereotypes have not been removed by legislation.

#### DIRECTOR OF EQUAL OPPORTUNITY IN PUBLIC EMPLOYMENT

The Director relied upon an affidavit sworn by her and on a number of reports. In addition, she also gave oral evidence before the Tribunal.

She agreed with the extension of the exemptions sought until 31 December, 1997, but only with the imposition of certain conditions. The conditions originally sought were that

1. The Education Department amend its EEO management plan to:
  - (1) Achieve by 31 December, 1997, an end to the practice of filling vacant promotional positions through transfer; all promotional positions to be filled through merit-based selection.
  - (2) Allow three year trained teachers to apply for all promotional positions from 1 January, 1998.
  - (3) Revise all policies and procedures in schools and central office affecting promotional positions to ensure job descriptions, key outcomes and selection criteria are free from bias and provide scope for flexibility in the profile of school management teams in terms of roles and the ability to undertake those roles on a part-time basis.
  - (4) Ensure that for 1998 the performance management system is applied to all members of school management teams and includes accountability for—
    - implementing bias-free human resource practices including the valuing and utilisation of diversity in personnel and working styles;
    - the achievement of school management teams which better reflects the gender balance of the workforce;
    - the equitable allocation of responsibilities to ensure all staff have access to duties and experience needed to qualify for promotion.
2. That the Director review progress as of 31 December, 1997, and if any failure or omission be noted with respect to the implementation of the Department's management plan, (as amended in accordance with the above conditions), at that date, or any subsequent date, refer the matter forthwith to the Tribunal under section 147 of the *EO Act*.

The form in which the conditions sought were expressed—particularly their reference to the Department's EO management plan, and to section 147 of the *EO Act*—was the subject of strong argument from counsel for the Western Australian Principals' Federation. The Tribunal will advert to this below. In the meantime, it is sufficient to state that as a result of the conflicting submissions in relation to that aspect, counsel for the Director submitted that the reference to the amendment of the Department's EO management plan was unnecessary and, indeed, the more appropriate mechanism would simply be for the Tribunal to express those objectives as conditions simpliciter. The result would presumably be that should they in fact be complied with they would ultimately be reflected in the EO management plan in any event.

As already noted, the Department gave an undertaking at the 1992 hearing to report to the Director annually on specific issues affecting gender inequality in the Department.

The first of four yearly reports to DEOPE following the Tribunal decision was submitted in August, 1993. The Department completed a report entitled, "*Gender in Promotion*" in 1993. That established a baseline for collecting data relating to the progress of women in promotional positions and examined the problems of the culture of the Department which had been of concern to the Tribunal during the 1992 hearing. The Department's first report did not contain sufficient information to establish a baseline from which progress could be monitored. As a consequence, in September, 1994, DEOPE commissioned a report, "*Women in Promotion*", to assess the Department's progress against the five key questions set by the Tribunal, they being:

1. The education of staff in school and central office in relation to equal employment opportunity.
2. Measures to ensure principals of schools are accountable and demonstrably adopting principles of equal employment opportunity.



3. Progress of women seeking promotion, the rate of success and continued barriers preventing access to promotions.
4. Measures taken to address the continuing problem of mobility as a criteria for gaining promotion.
5. Measures taken to ensure part-time workers achieve permanency and access to promotion.

Both the Department's 1993 report and DEOPE's 1994 report identified a range of issues and problems requiring attention.

Finally, a further report was initiated in September, 1996 and completed in April, 1997, by staff of the office of DEOPE. Data required for the review was not available until early 1997. The report was entitled, *"Women in Promotion: The Question of Gender-linked Positions"*, ("the DEOPE Report").

The 1997 DEOPE Report commenced with an examination of the Department's strategic planning documents. The report noted that although the 1995/97 strategic plan included, as one objective:

"To develop an organisational culture that is characterised by trust, mutual respect, the acceptance of responsibility, participation and is free of discrimination and harassment"

which objective was affirmed in the 1996/98 strategic plan, neither document provided specific strategies and actions for its achievement; nor was there evidence of other corporate planning documents designed to achieve that end.

It was the Director's view that the yearly reports to her were cursory summaries of activity and were otherwise significantly deficient.

Furthermore, she noted that in recent periods, liaison between the Merit Selection Branch and the EEO Branch of the Department had not appeared to be productive in establishing equal employment opportunity as an integral part of the recruitment, selection and appointment process.

The recent decision to tender out the short-listing process for promotional positions to private companies was an opportunity for the Department to clearly reinforce its EEO commitment through the education and training of representatives from successful tendering companies and of the panel members who would brief the consultants. However, that appeared to have been overlooked by the Department and the Director regarded the absence of the clear EEO brief in the tendering process as a significant oversight. She observed that:

"The omission seems indicative of the ad hoc way in which EDWA has responded to the issue of staff education and cultural change programmes".

The observation was made that in the 1993, *"Gender in Promotion"* report it was revealed that gender stereo-typing of the primary female deputy role was limiting the access of women to experience that would allow them to demonstrate merit for promotion. Primary female deputy principals in gender-linked positions frequently complained of gender-based segregation of work duties and a deprivation of information. Various anecdotal examples were given including the following:

- "It's very hard to broaden your skill base when you're given first aid and lost property".
- "The nomenclature of gender-linked positions is a drawback: it engenders stereo typical roles".
- "Having a formalised job description has made no difference at all. Women still do first aid, girls' hygiene, morning teas, duty rosters and lost property. The male deputy does stock, budgeting, sports carnivals and anything to do with computers".

The report noted that recent initiatives have largely ignored the context of the concerns raised by the Tribunal and have focused on specific policy issues such as sexual harassment. The wording of the objectives should have been interpreted in the context of the Commissioner's comments about the dominant culture. Evidence supporting this assumption includes the fact that no specific education or public relations programme has been devised to address the overall issue of gender-equity in the workforce culture. With respect to the five specific areas of concern identified by the Tribunal the Director made the following points.

#### Measures To Ensure Principals of Schools Are Accountable And Demonstrably Adopting Principles Of EEO

In the 1995/97 Departmental Strategic Plan, the implementation of EEO accountability for school leaders was targeted for implementation by December, 1995. In the 1996/98 plan, the scope of the target is widened to include all staff but the target is delayed until December, 1997.

The report noted that current policy developments within the Department are directed towards the performance management framework rather than towards specific performance requirements. It is intended that performance criteria and targets be negotiated in the context of system-wide and school priorities and it is envisaged that some guidance in the establishment of performance criteria will be taken from job descriptions.

The then recently revised "Transfer and Promotions Guide, 1997", was criticised in the DEOPE Report in that, in the job description forms for principal positions at levels 3, 4, 5 and 6, there is no direct reference to EEO accountability, or diversity management, and nor was EEO identified as a key outcome.

Likewise, in the existing guide for establishing school management performance indicators, which is the publication "School Performance: a Framework for Improving and Reporting", in six key areas of accountability and five performance characteristics EEO accountability is not listed as a performance characteristic or a pointer towards achievement. The manager of the EEO Branch had in fact indicated to the review staff that this had been discussed but dismissed in the development of the document.

The DEOPE Report concluded that the omission of EEO references in the school performance reporting document was a significant missed opportunity. The document has had wide use and acceptance in schools. In this era of devolution such direction from central office is highly valued. The educative role

that an inclusion of EEO concepts may have applied through this document should not be underestimated. Central office has a crucial quality assurance role to play and clear parameters are needed if the Department is to achieve uniform outcomes in accordance with its strategic objectives from a devolved management model.

When turning to the evaluation of progress in relation to this issue, the DOEPE Report noted that in light of the delay in implementation of any performance management structure, the indirect nature of reference to EEO in the performance management framework and the complete omission of EEO accountability from the school performance document, it was difficult to identify any positive developments over the last five years in response to the Tribunal's concern about accountability. It further noted that the EEO Branch at the Department appeared to have been unsuccessful in establishing structures capable of co-ordinating and monitoring and of a reporting framework during the exemption period. The superficial and unsubstantiated nature of the EEO Branch's yearly reports suggest that this has been a major problem for the Branch over the four years to April, 1997.

#### Progress of Women Seeking Promotion, The Rate Of Success And Continued Barriers Preventing Access To Promotions

The DOEPE Report noted that the failure of the Department to develop alternate strategies and to the generally slow progress of women beyond the linked positions, particularly in the primary sector, suggests that the Department has placed undue reliance on the gender-linked positions as the only special measure to achieve equal employment opportunity.

It went on to say that data cited by the Department at the last Tribunal hearing as evidence of the increase in numbers of women gaining promotion, "appears to have been misleading". The data included numbers of women in acting or higher duties roles in addition to those in substantive promotional positions and hence gave an overly positive impression.

The DOEPE Report observed that the 1993 "*Gender In Promotion*" report had found that the Department had no system in place for recording the progress of women in the merit selection system used for school based promotions. Nor did it have accurate data on the number of women in substantive promotional positions. That report established a baseline from which the Department could measure subsequent progress.

According to the DOEPE Report, the September, 1994, "*Women in Promotion*" report found that the statistical framework established in the 1993 report had not been continued and that there was no systematic annual collection and analysis of data in relation to women and promotion. The 1994 report had urged regular data collection and analysis but the DOEPE Report found that the collection and use of such data was singularly deficient.

From the data which the Director was able to obtain from the Department for the purpose of the 1997 review, various findings and conclusions were arrived at.

It was found, for example, that when the increase in the total numbers of women in the school workforce in the four years since the granting of the last exemption were taken into account the improvement, in real terms, for women in promotional positions was only 0.3 percent and it was significant that the representation declined from the lower to the higher promotional levels.

It was found that women in schools are heavily clustered in the lower levels of the workforce despite the ten year operation of gender-linked positions. Thus, relative to the higher proportion of women in the workforce, their (hierarchical) distribution continued to indicate the presence of promotional barriers to women.

The DOEPE Report noted that the greatest improvement within the schools over the four year period to 1997 was found in the secondary sector at level 6. Ironically, it was observed that in primary level 6 positions, (which are 80 percent metropolitan and include four newly created positions), there are no women at all!

It was noted that the effect of gender-linking of positions at level 3 in Education Support and Primary and level 4 in Secondary can be seen as a measure which assists women only in the Secondary sector. In the Education and Primary sectors the fact that 50 percent of the linked positions are female positions, appears to act as a barrier and may be inherently discriminatory. More than 80 percent of the potential applicant pool for these positions is female—therefore the proportion of promotional positions available to women is less than the proportion available to men as a result of the exemption.

Interestingly, the DOEPE Report found a "quite modest", improvement in the situation with respect to the non-gender-linked deputy and principal promotional positions over the five year period. In 1992, 14.5 percent of non-gender-linked promotional positions were held by women. In 1997, 19.7 percent of the same positions were held by women.

Although the DOEPE Report found that the success rate of women in the promotional selection process was encouraging, it also found that unfortunately no information had been collected to establish a direct link between the gender-linking of positions and the rate of success of women in selections above the linked positions.

The issues of permanency, three or four-year training as a pre-requisite for promotion and the lack of promotional vacancies, were all found to be continuing barriers preventing access to promotion for women.

The DOEPE Report noted that the inability of women to declare themselves available for statewide postings impacted heavily on their ability to win permanency within the Department in the past.

The removal of permanency as an eligibility criterion for Departmental promotional positions in 1996 was a significant positive step towards removing barriers for women. It was noted that in *Nicholls v Minister for Education*, the Tribunal found that the Department had denied Ms Nicholl's promotion because she was temporary. The DOEPE Report commented that it was regrettable that the Department took three years to action any change to remedy that discriminatory practice.

The DOEPE Report further found it to be another significant oversight that the communication of the policy change was not listed in the, "Changes for 97", section of the transfer and merit promotion guide. It was also unfortunate that the Department did not review the effect of the policy change in the 1996/97 promotional rounds for the purpose of ongoing workforce planning.

As to the issue of three or four year training as a pre-requisite for promotion, the DOEPE Report noted that despite the fact that all new graduates will be four-year trained, a significant number of teachers still have three-year qualifications. In the 1994 report it was estimated that 52 percent of females in the teaching workforce were less than four-year trained compared with 22 percent of men. Many of these women have considerable skills and abilities. The maintenance of the four-year trained eligibility criterion for promotion does have a greater impact on women than it does on men.

So far as the lack of promotional vacancies issue is concerned, the DOEPE Report noted there is a common perception that the low number of vacancies in promotional positions would explain the time taken for the gender exemption to bring about any re-distributive effect for women in promotion. Despite that common perception however, the DOEPE Report observed that the 1997 figures suggest that the turnover of positions per year as a proportion of total vacant promotional positions should have been sufficient to bring about a noticeable change over a four year period if the gender-linked positions had been an effective strategy.

Overall, the DOEPE Report concluded that the general improvement in the progress of women into promotional positions in schools is poor, that without any clear targets established in the Department's equal employment opportunity management plan it is difficult to assess how the Department judges its own performance in this regard, and the fact that the Department did not report any established performance indicators against this area of its strategic plan was a matter of concern.

Importantly, it was also concluded that in assessing the impact of barriers, the gender-linking of male and female positions in equal numbers could be concluded to be inherently discriminatory while equal numbers of male and female positions are gender-linked and 70 percent of the workforce is female, (80 percent in the primary sector). It was submitted that data on the success of women in non-gender-linked positions suggests that if the Department dismantled the promotional transfer system, based on seniority, women would compete favourably and in greater numbers for the increased numbers of metropolitan vacancies that would arise.

Finally, on this issue, the DOEPE Report concluded that the continuing barriers for women appear to be:

- the lack of promotional opportunities in the metropolitan area (due to transfer and seniority taking precedence over merit promotion);
- the perception that the current role models are poor educational leaders;
- the ineligibility of three-year trained teachers, (the majority of whom are women), to apply for promotion;
- the lack of part-time promotional positions;
- problems with the organisational culture of schools, especially with primary school, which adversely impact on women.

#### Measures Taken To Address The Continuing Problem Of Mobility As A Criterion For Gaining Promotion

According to the DOEPE Report the location of the vacancies that arise each year has a tendency to impact more on women than it does on men. It is the operation of the transfer system that determines the location of vacancies. According to the report this is the crux of the problem for women: mobility exists as a de-facto criterion for promotion in the Department and it affects women more than it does men. This is due to family commitments, the remoteness of many locations and the limits this places on employment opportunities for partners.

The differing impact of the mobility criterion can be illustrated by analysing the drop-out rate at stage two of the selection and appointment process. Until 1997, at stage one of the process, potential applicants registered their interest in promotion and their eligibility credentials were checked. At stage two of the process, vacancies are known and interested applicants proceeded with their applications.

Even on the limited data available within the Department at the time, the DOEPE review was able to ascertain that at all levels in both the primary and secondary sectors, the drop-out rates were higher for women than for men, indicating that they are not able to consider the same number of locations. The DOEPE Report concluded that Departmental teachers are required to have statewide mobility if they wish to gain promotion, given that, in 1997, 94 percent of all promotional vacancies were in country locations. The conclusion was that the current system does not serve the Department well, it was noted, in 1977, 29 level 3 promotions, (out of a total of 58), were unable to be filled. Evidence suggests that men increasingly do not wish to go to the country for promotion. At present, a strong female applicant who is ranked highly on the short-list may not receive a promotion if she has applied to a limited number of locations, whereas a weaker male applicant ranked near the bottom of the short-list could receive a promotion and later transfer into the city. Hence, the current system is not a true merit promotion system that results in the promotion of the best available mobile person.

#### Measures Taken To Ensure Part-Time Workers Achieve Permanency And Access to Promotion

The report found that the number of women in part-time employment at levels 1 and 2 has increased significantly over the last five years. In 1993 part-time women at levels 1 and 2 represented 15.3 percent of the total school workforce. That figure is now 19.9 percent.

Over the same period there has been an increase of six level 3 part-time positions in the Department's teaching workforce although, it noted, there has been a reduction in the number of part-time arrangements in 1997.

Access to permanency for part-time employees has been possible since April, 1993, but no statistics on the take-up rate from this group exist to indicate the impact that this policy change has had on opportunities for women.

The removal of permanency as an eligibility criterion for promotion addresses the issue of access to promotion for part-time women seeking promotion, but the lack of opportunity to be in a promotional position part-time remains as a barrier.

Finally, on this issue, the DOEPE Report noted that the failure of the Department to submit policy drafts with the yearly report made an accurate assessment of progress difficult. The fact that the number of positions available had increased by only six and the fact that part-time positions are held at very few levels suggest that very little progress has been made in this area. The DOEPE Report concluded that the removal of permanency as a pre-requisite for promotion eliminated one barrier previously facing temporary women, some of whom are part-time, however, the lack of suitable vacancies/opportunities remains a barrier for women seeking part-time work in promotional positions.

Overall, and in a general vein, the DOEPE Report noted that the Department's annual report to the Director on progress against the five indicators were cursory and simplistic in nature. Although some commitment to improving the position of women in school-based promotional positions was evidenced in the Department's strategic plans, the objectives in those plans did not translate into any actions or operational planning.

Whilst the five indicators impacted directly on the business of each of the five human resources divisions of the Department, there was little evidence of any concerted effort to adopt a strategic integrated, planned approach to the problem. Internal memos from the EEO Branch to the Executive revealed attempts by the former to secure Executive commitment for reform but appeared to have been largely unsuccessful under previous administrations. The DOEPE Report concluded that it was clear that the EEO Branch was not positioned to play a strategic role within the organisation.

Interestingly again, the DOEPE Report noted that:

"There was an acknowledgment from several interviewees in senior positions that the granting of the last five year exemption came as a surprise to senior EDWO staff and that in itself, the exemption is a barrier to women as, "it masks the real barrier—transfer", and induces a *laissez faire* attitude. The exemption itself, instead of providing a bridging period for reform, is seen by some as the only affirmative action strategy necessary. As one director commented:

"Why would you expect us to achieve anything in this area when we haven't done anything new since the last exemption?". Other interviewees commented that if a lengthy exemption was sought and granted, then no reforms would occur".

After making further observations in relation to the issue of three-year trained teachers, the DOEPE Report made some final comments in respect of the dismantling of the transfer system. It was noted that any support for the removal of the exemption was conditional upon the perceived need to dismantle the current transfer system. It was said most interviewees considered that the number of women in promotional positions would decline sharply if the exemption alone was dismantled. If all gender-linked positions were to go at the end of 1997, and transfer remained, men in the country would be more likely to transfer into vacant positions previously held by women. The further observation was made that senior staff in the personnel division of the Department considered the demise of the transfer ranking system for promotional positions would be a major streamlining exercise and result in significant cost savings.

#### WESTERN AUSTRALIAN PRINCIPALS' FEDERATION

The Western Australian Principals' Federation, ("the Federation"), is an incorporated association representing the WA Primary Principals' Association, the WA District High School Principals' Association, the WA Secondary Deputy Principals' Association, the WA Primary Deputy Principals' Association, the WA Education Support Principal's Association, the Heads of Department Association of WA and the WA District High School Secondary Deputy Principals' Association.

It should be noted that in the application before the Tribunal, the Federation did not purport to be acting on behalf of the WA Secondary Deputy Principal's Association which, of course, was separately represented.

The Federation was not opposed to the application by the Minister for an extension of the exemption order until 31 December, 1997, but did oppose the proposal by the Commissioner that the exemption for male gender-linked positions be ended immediately. Likewise, the Federation generally opposed imposition of the conditions sought by the Director.

The first ground of opposition to the conditions sought by the Director was that those conditions concerned amendments to the Department's equal employment opportunity management plan and that such an application would properly have to be brought under section 147 of the *EO Act* and not as an adjunct to an application for exemption under section 135(2). The Federation pointed out that, significantly, the processes in relation to applications under section 147 of the *EO Act* had not been followed.

The second ground of objection to the conditions sought by the Director was that had a reference in relation to amendment of the EEO management plan been made under section 147, the Tribunal would not have had power to make the order sought. The *EO Act* specifically contemplates the process by which variation of an EEO management plan may be sought. The order sought by the Director is properly a matter on which the Minister may make a direction. It was submitted that the Tribunal does not have power to make such an order pursuant to section 135 or that, alternatively, it ought not to make such an order given the provisions of sections 147, 152 and 153 of the *EO Act*.

The third ground of objection to the conditions sought by the Director was that the proposed conditions operate beyond the life of the exemption order and that was not what was contemplated by section 135 nor the objects of the *EO Act*.

In the course of the hearing before the Tribunal, the position of the Federation, in relation to the conditions sought by the Director, was put rather more succinctly by Ms. Foley as being first, that the Tribunal has no power to make the order sought and, alternatively, even if there were such a power, it would be inappropriate to exercise it in the circumstances of this case.

The Federation further, in more general terms, opposed the conditions sought by the Director that the Department amend its EEO Management Plan to achieve by 31 December 1997 an end to the practice of filling vacant promotional positions through transfer and that all promotional positions be filled through merit-based selection on the ground that the time frame was too short. It was submitted that in position of such a sudden change would disadvantage members of the Federation's constituent bodies who have made personal sacrifices and undergone hardship in the legitimate expectation that they would be able to transfer to more favourable locations or to the city from country positions. The Federation argued that it would be reasonable and appropriate for these people to be given time to adapt to changes in the transfer system.

The Federation also opposed the conditions sought by the Director that the Department amend the plan to allow three-year trained teachers to apply for all promotional positions from 1 January, 1999 on the grounds that:

- A. The Tribunal has no evidence before it on which to make an assessment of the value in promotional terms of a four-year qualification as opposed to a three-year one.
- B. It is inequitable to lower the requirement to three years training as this does not recognise the expense and time taken by current employees to obtain four-year qualifications and the current standard adopted by tertiary institutions is that students are required to complete four-year qualifications. In relation to the latter, it was said the time and expense taken by these students and the current tertiary standards obtained by them it would, in the end, not be recognised.
- C. There are other means by which a three-year qualified person may be recognised as equivalent to a four-year qualified person and these alternative means should be explored.

The Federation opposed the proposal by the Commissioner that the male gender-linked positions be ended immediately on the ground first, that the Commissioner was effectively seeking a different exemption. It was submitted the current exemption is from the provisions of section 11 of the *EO Act* in respect of the appointment of deputy principals at certain classes of schools whereas the Commissioner is seeking an exemption which is not directed at achieving gender balance in these roles but rather to achieving greater access for women to these positions. It was argued that it was not proper for the Tribunal to impose "a new and different exemption".

The second ground on which the abolition of the male gender-linked position was opposed was that the exemption sought by the Commissioner is in effect wider than that originally imposed by the Tribunal. This was said to be because the current exemption operates so as to seek 50 percent of gender balance whilst the exception sought by the Commissioner would have the effect of giving females a greater share in promotional positions than they could expect under operation of the exemption and that the Tribunal ought not to impose an exemption wider than that sought to be retained by the applicant.

It is convenient at this point to deal with the Federation's submissions as to the statutory power of the Tribunal to impose conditions of the type sought by the Commissioner and/or the Director.

#### Exemption For Female Deputy Positions Only

The Tribunal does not accept the Federation's submission that the Commissioner is effectively seeking a different exemption than that which has obtained to 6 July 1997. The present discriminatory practice which is exempt from constituting a breach of section 11 is the practice of male and female gender-linkage with certain promotional positions. Should the Tribunal be minded to limit the exemption to the female linked positions only, that would be simply a more confined exemption than that previously granted but it would not in the view of the Tribunal be a "new and different exemption".

Nor is it right to say that such a more restricted exemption would be in effect wider than that originally imposed. Whilst in one respect it is true to say that the current exemption operates so as to seek a 50 percent gender balance, that of course is true only in relation to those particular positions. The Tribunal has already adverted above to some of the evidence which suggests that overall the exemption has operated in combination with the non-gender-linked positions to in fact disadvantage women. The Tribunal does not accept that the exemption sought by the Commissioner would have the effect of giving females a greater share in promotional positions than they could expect under operation of the exemption - indeed the more reasonable conclusion is that were the variation sought to result in a greater proportion of women attaining such positions that would be a desirable end and not in itself discriminatory against men because the proportion of women within the teaching workforce is significantly higher than men and they should therefore, (all other things being equal), be expected to occupy proportionally more promotional positions.

#### Conditions Sought By The Director

In substance the Federation's argument in this regard is that because there are specific provisions in the *EO Act* which provide a process for the Director to refer the EEO Management Plan of a public authority to the Tribunal for investigation and gives the Tribunal power to make recommendations to the Minister that such plan be amended (with a further power in the Minister to direct amendment) the Tribunal has no power to itself impose conditions directing or requiring the amendment of an authority's EEO Management Plan under section 135(2). Put shortly, this submission really amounts to an argument that the Tribunal cannot do indirectly what it has no power to do directly.

It is necessary to consider the relevant statutory provisions.

Part IX of the *EO Act* deals with equal opportunity in public employment.

There is no question but that the Department is a relevant authority within the meaning of that term for the purposes of that part.

The objects of part 9 are contained in section 140 which provides that they are—

- (a) “To eliminate and ensure the absence of discrimination in employment on the ground of sex, marital status, pregnancy, family responsibility, or family status, race, religious or political conviction, impairment or age and;
- (b) To promote equal employment opportunity for all persons in the authorities to which this part applies”.

The position of Director of Equal Opportunity in Public Employment is established by section 142. The functions of the Director are set out in section 143 and they include advising and assisting authorities in relation to equal opportunity management plans, evaluating the effectiveness of such plans in achieving the objects of the Act and making reports and recommendations to the Minister in relation to them and such other matters as the Director thinks appropriate relating to the objects of part IX.

Division 3 of part IX deals specifically with equal employment opportunity management plans for public authorities.

By section 145 each authority is required to prepare and implement an EO Management Plan in order to achieve the objects of part IX. The section sets out “specific aspects” which must be covered by such a plan and requires each authority to send a copy of its management plan or any amendment of it to the Director as soon as practicable after it has been prepared.

Section 146 requires each authority to report to the Director at least once each year as to the EO activities and programmes undertaken and intended.

Significantly, section 147 provides that:

“Where the Director is dissatisfied with any matter relating to the preparation or implementation of a management plan by an authority, or any failure or omission or failure of an authority with respect to the preparation or implementation of a management plan, the Director may refer the matter to the Tribunal”.

Where such a reference is made the Tribunal is required by section 148 to determine the reference and for that purpose may hold an investigation into it.

Neither the Director nor an authority in respect of which a reference is made is entitled to be represented by counsel or a solicitor during the holding of an investigation into such reference. (Section 149).

The Tribunal is given certain powers in the conduct of an investigation under part IX. (Section 150).

Section 152 then provides that:

“At the conclusion of an investigation in relation to a reference the Tribunal may do either or both of the following—

- (A) Make recommendations to the Director or to the authority in respect of which the reference is made;
- (B) Furnish a report with or without recommendations to the Minister in relation to the reference”.

Finally, on receipt of a report from the Tribunal under section 152 the Minister may direct an authority to amend its management plan in such manner as the Minister may specify and the authority is thereupon required to comply with such direction. (Section 153).

It can be seen from a consideration of these provisions that they do not in any way empower nor authorise the Tribunal to impose conditions or make orders going directly to the amendment of an authority's EO Management Plan.

On the face of it the power to impose terms and conditions under section 135(6) is unfettered other than by the general principle of statutory construction that a general statutory power is exercisable only for the purposes of and within the limitations of the objects of the legislation: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24,39.

The significant consideration is that section 135 is in fact a provision of general application and the powers of the Tribunal to deal with the EO Management Plans of authorities are the subject of specific provisions in the same legislation.

In *Anthony Hordern and Sons Pty Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, Gavin Duffy CJ and Dixon J at page 7 said:

“When the legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power”.

And further at page 8:

“An affirmative grant of such power so qualified appears necessarily to imply a negative. It involves a denial of a power to do the same thing in the same case free from the conditions and qualifications prescribed by the provision”.

Likewise, in *R V Wallis: Ex parte Employer's Association of Wool Selling Brokers* (1949) 78 CLR 529, Dixon J at page 550 said, (in relation to the *Commonwealth Conciliation and Arbitration Act, 1904*):

“If it confers a specific power with respect to a limited subject or specifies a manner of dealing with it or otherwise provides what the duty or authority of the arbitrator shall be, then upon ordinary principles of interpretation the provision in that which is done should be treated as the source of his authority over the matter, notwithstanding that otherwise the same or a wider power of the same matter might have been implied in or covered by the general authority given by section 38. This accords with the general principles of statutory interpretation embodied in the maxim *expressum*

facit cessare tacitum and in the proposition that an enactment in affirmative words appointing a course to be followed may usually be understood as importing a negative, namely that the same matter is not to be done according to some other course. This applies especially where the power or duty affirmatively conferred is qualified by some condition, limitation or direction”.

(And see generally Morling J in *Herald Sun TV Pty Limited v Australian Broadcasting Tribunal* (1984) 57 ALR 309 at 328; Dawson J in *Downey v Transwaste Pty Ltd* (1991) 99 ALR 402 at 412; and McHugh J in *Saraswati v R* (1991) 100 ALR 193 at 208.

Accordingly, having regard to the legislative provisions themselves and the above principles of statutory construction the Tribunal is of the view that it has no power to impose conditions nor give directions going expressly or specifically to the amendment of the Department's EO Management Plan.

That is not to say however that no conditions could be imposed under section 135 merely because they were of a nature which would realistically be likely to see them eventually incorporated into such a plan.

In the present case counsel for the Director has expressly stepped back from the proposition that the conditions sought by the Director should be imposed upon the Department by way of amendment to the EO Management Plan—rather she has put it on the basis that they should simply be made as conditions. Whether or not they would eventually be included in the EO Management Plan is a separate issue and is something which would be for the Department and perhaps the Director but not the Tribunal.

### OBSERVATIONS AND FINDINGS

#### The Exemption

No party opposed the extension of the exemption to 31 December 1997 although the Commissioner opposed it to the extent it related to male gender-linked positions.

The lack of objection and/or positive support from interested parties is a significant factor but not decisive. It is still incumbent on the Tribunal to make an assessment of the merit or otherwise of the application.

As already pointed out, we do not accept the submission that what the Commissioner is seeking is a different exemption. In our view it would simply be a less extensive exemption than hitherto has applied. We therefore propose to deal with the question of the exemption as it applies to male and female gender-linked positions separately.

#### Retention Of Gender-linked Positions For Females

It seems clear that notwithstanding the opportunity afforded by the exemption for the last ten years, apart from reliance on it in respect of male and female gender-linked positions the Department has done very little about equal employment opportunity in any practical or constructive sense.

Quite apart from evidence to which reference has already been made, that was apparent from the testimony of Stephen Home and Ms Val Marsden.

When asked whether the exemption had had any effect in counter-balancing the prejudice that women suffer under the transfer system Mr Home said—

“I think it's had a major effect. Whether it's had an effect in terms of changing the overall picture for the opportunities for women to obtain promotion is questionable but certainly it has guaranteed a certain number of positions within the promotional hierarchy for women which the Department believes has been certainly a positive consequence”.

In elaborating upon the recent Departmental decision to devolve responsibility for equal employment opportunity issues to “line managers” (by which Mr Home meant school principals and perhaps district principals) he said that whilst the line managers would be responsible for seeking to achieve targets or particular outcomes in terms of gender balance within the administrative teams for which they are responsible, those targets would still be set by the Department. He went on to explain that:

“The pointy end of the advice that was sent to principals...was that line managers would be held accountable in a financial sense as well as for any adverse impacts that might occur if they breached the Equal Opportunity Act”.

Expanding further he said that if there was an award against the Department for a breach of the *EO Act* or for a discriminatory incident then it would be that particular line manager's budget that would be debited so that accountability was quite clear as to who was responsible in the managerial sense for the failure.

Questioned why these equal employment opportunity initiatives were not taken earlier particularly having regard to the long-standing exemption and the general awareness of the factors operating within the Department to the promotional disadvantage of women, he was asked:

“you've indicated that there would be serious difficulties for the Department were the Tribunal not to grant a further exemption at the end of this year. I suppose that really raises two questions in the context of the evidence you've already given. One, is given the knowledge of the Department that the exemption was going to expire in June why was that fact not accommodated by the Department and, I suppose in similar vein, how is it or why is it that sorts of measures you're talking about now were not in fact implemented earlier to accommodate that?”

A. “I don't have a particularly good response to that, sir. I think it probably should have been anticipated. I think there was a level of expectation that the exemption would be retained and certainly there was a body of thought that we should continue to seek the exemption in the long term. We had fairly lengthy discussions with the parties around this table about some of these things.

Obviously we could have commenced all of that earlier and been better prepared for July the 6th than we were. Be that as it may, we find ourselves now in the situation where we would probably be unable to staff schools in terms of administrative positions for 1998. Without the exemption we

would probably have a substantial number of acting arrangements that would have to be put in place if we didn't have the exemption until December 31".

Asked by Mr Matthews why the exemption was not being sought beyond 31 December, 1997 Mr Home said because the Department accepted that for a variety of reasons it was not tenable to seek it again. He said that the Department accepted the tenor of some of the submissions being advanced by other parties that perhaps the exemption has been a prop that has disguised a lack of more substantial achievement in terms of changing the culture of the organisation and the behaviour of it in relation to equal employment opportunity. And he added:

"The fact that we also understood there was perhaps a low likelihood that we would gain it in any event has been a factor but clearly we now have to stand on our two feet and we believe we can achieve that and deliver results, and in that sense we see ourselves as being like any other public sector employer in terms of its obligations under the Act. We will work to meet them and will continue to develop strategies and procedures and mechanisms to do that".

In cross-examination when asked what he was able to say about when the issue of the transfer system really began to be addressed by the Department, his answer was he was not able to say. He had taken up his appointment only at the beginning of 1997 and was not aware that it had been addressed in any concerted way before this year.

Questioned about the rationale as to why the Department does not allow promotional positions to be filled on a part-time basis, Mr Home said he was not sufficiently well-briefed to be able to answer that. Nor was he sure what had been done specifically in response to concerns identified in earlier decisions of the Tribunal about the adverse impact of the full-time work requirement on women.

So too, when asked about the system of monitoring equal employment opportunity contemplated by the Department in respect of the accountability proposed for line managers, Mr Home replied that although clearly there is a need to maintain monitoring at a departmental, school and district level, that is something which is not in place presently. He acknowledged it was something that the Department clearly needed to do as part of its overall strategy. Asked whether it was likely to be in place by 31 December, assuming the exemption is continued until that date, he responded simply:

"It will have to be".

Asked whether there had been any detailed planning for implementing the various strategies referred to in his Affidavit including the nomination of time frames, resourcing implications and monitoring of outcomes, Mr Home said there was not any such detailed planning and would not be until the Department had gone through the consultation process necessary with the Teachers' Union and other relevant representative bodies. He added that those are matters that the Department wishes to talk about rather than just unilaterally put them in place and tell people what they are doing.

Asked by the acting President whether the Department had a time frame for the consultations and production of the plan, Mr Home said:

"I have spoken already, sir to the Principals' Federation, the Secondary Principals' Association and the Union and indicated that we need to do it as soon as possible. I think the fact that the exemption and the move towards full-merit selection might be impacted upon by these proceedings has led us to wait but I am aware that one or some of the parties will be making submissions today that the transfer system is not something which specifically is subject to consideration here today and therefore should not be the subject of a ruling or a finding or an opinion. Obviously we'll wait to see if that's the case but I think some of those varying submissions and a bit of the uncertainty that's created related to the exemption has had us hold off the formal commencement of those negotiations today".

Q: "And if the continuation of the exemption were not granted, what time frame would you be looking at then?"

A: "We would have to work very fast, sir, to put the mechanisms in place for full merit selection for all promotional positions as soon as possible and resolve what we should do or could do with those which have already been...announced since the 6th of July. Clearly it would become critical that we move fast".

Concerning that prospect that removal of the transfer system might create difficulties for the Department in relation to various industrial agreements, Mr Home explained that what the Department has signalled is that it would not renew any agreement anything that is inconsistent with the intention to phase out the transfer system and would not agree to or would withdraw from any agreement that is inconsistent with the intention to move towards merit selection.

Significantly, when asked what the Department proposed to do with people who under the current agreements and system have an expectation that they are going to be able to transfer back to the metropolitan area or the city, Mr Home said:

"Well, those persons...those persons are no different from...from anyone who has gone to the country or...or...are no different from any of the people I've...I've made reference to in my earlier evidence...the clear consequence of moving towards merit selection is that people who believe they have transfer rights will be affected. There's not getting around that. I...I haven't thought of an alternative answer as to how you introduce merit selection and protect the rights...of all existing rights of everyone under the transfer system".

In a more general vein, Mr Home acknowledged that the exemption had given a false sense of achievement in the context that the figures might convince one that the Department has some sort of endemic regard for equal opportunity which he did not believe is really the case. He thought there are underlying problems that are perhaps disguised by the figures thrown up by the exemption.

The evidence given by Ms Val Marsden, Senior Policy Officer, Human Resource Policy and Planning for the Department, was to much the same effect as Mr Home's evidence.



She joined the Department shortly after the Tribunal handed down its decision granting the first extension of the exemption. She said she had read the decision and prepared a briefing of the implications of it for the senior personnel within the Department but she did not believe that was ever discussed at senior executive level or, if it was, she never heard the results of those discussions.

It is clear from Ms Marsden's evidence that equal employment opportunity policy and training within the Department was very much ad hoc.

So far as she was aware the issue of the transfer system did not start to be addressed until last year.

It was pointed out in cross-examination of her that the issue of the Department's culture had been raised as long ago as 1987 as a significant problem for women seeking to gain promotion within the Department. She was asked what sort of measures since then the Department had put in place to address some of the cultural issues. Her response was:

"Nothing direct. I would say that any work that we do in relation to equal employment opportunity will have the effect eventually of changing the culture but there has not been a direct strategy employed".

The Tribunal is satisfied from all of the material before it that retention of the female gender-linked positions exemption should not be continued beyond 31 December, 1997 but on balance and despite its very serious concerns about the apparent lack of progress in equal employment opportunity within the Department over the period of the exemption to date, it is of the view that subject to what follows the objects of the Act and the advancement of equal employment opportunity within the Department would best be served by continuing the exemption to that date in so far as it applies to female gender-linked positions.

#### Retention of Gender-linked Positions for Males

The evidence overall clearly leads to the conclusion that the retention of gender-linked positions for males serves only to exacerbate the unfair discrimination against women.

In cross-examination, Mr Home agreed that there is no need to advantage men in, as it were, quarantining 50 percent of the deputy principal positions for them. He agreed with the proposition that excluding gender-linked positions, males are over-represented at all promotional levels proportionate to the Departmental workforce as a whole. In re-examination however, he did say that he was speaking of there being no need to retain the male gender-linked positions only after 31 December, 1997. When asked what the reason for that was, he said:

"Just to apply consistency".

He pointed out that there were consequences and ramifications of the Tribunal not granting the further extension to the exemption. He said while there are clearly some administrative issues that would create problems, more importantly the Department has announced placements, transfers and promotions all through the course of this year on a certain understanding.

Asked then if that is the case and knowing the exemption was to expire, why that was done, Mr Home replied:

"...I think perhaps the planning was inadequate and I acknowledge that ideally all of these issues, debates and discussions would have been had and resolved and a position adopted well in advance of the 6th of July. There are a number of reasons for that and I don't know that there's much point in going through those. The point is valid".

He subsequently went on to say:

"...there are people who have made decisions and I don't have any evidence of the type of decisions but clearly people have made decisions based on notifications or advice they have from the Department as to where they will be located next year and in some cases that could extend to selling homes or buying homes or whatever. There are...the main concern really is those decisions that have been taken since the 6th of July on which people have relied".

The same consideration of course applies in relation to the issue of transfer and the Tribunal will deal with it when we come to discuss that issue. In the meantime suffice to say the reasoning we adopt there applies also in relation to the issue of male gender-linked positions.

The Tribunal accepts the submissions made on behalf of the Commissioner and the Director on this issue. There is little doubt that the male gender-linked positions operate in fact actually to increase the disproportion of women in promotional positions having regard to the fact that 70 percent of the workforce (80 percent in the primary sector) is female.

It is for that reason the Tribunal is not prepared to extend the exemption in respect of male gender-linked positions.

The so-called "consistency" argument advanced against this does not, in our view, weigh sufficiently against the continuing discriminatory effect of the policy to justify any different conclusion. Furthermore, when considering the merits of the application for extension of the exemption it is pertinent to take into account the period for which exemption has already applied, the equal employment opportunity concerns which have previously been identified by the Tribunal, the action (or lack of action) taken by the applicant and the Department over the period of exemption to address them and how it is that the situation of present difficulty has been allowed to develop notwithstanding it was known to the Department that the exemption was to expire on 6 July, 1997. Taking these considerations into account also, the Tribunal is reinforced in its view that the desirability of consistency in appointments for 1998 does not justify the continuation of the exemption in relation to male gender-linked positions.

#### Transfer System

Once again the discriminatory effect against women of the transfer system has been well known to and acknowledged by all concerned for a long time.

The problem is in making the transition.

The Department has had ten years to "bite the bullet". It has not done so. In failing to do so it has been acting contrary to the provisions of the *EO Act*. Beyond reliance of the exemption relating to male and gender-linked promotional positions the Department has done nothing or very little to rectify the situation in any real practical sense.

Both the Teachers' Union and the Federation submitted that abolition of the transfer system at this stage without considerably more consultation and a suitably long time for implementation of a wholly merit-based system would create industrial and other problems. Apart from practical difficulties likely to be experienced by individual teachers and their families, reference was made to industrial agreements entered into between the Department and the relevant unions. The Federation drew the Tribunal's attention to the "Collective Workplace Agreement for School Administrators", ("the Workplace Agreement"), being attachment "T" to the Affidavit of Mr Tonci Misich.

There are two points which may be made about those concerns.

The first point is that the Workplace Agreement is not particularly specific about this.

At clause 10.10 transfer rights and limited merit selection are issues which are noted as being the subject of an agreement by school administrators and the Department to participate in the development of career structures.

In clause 10.14 school administrators agree to undertake and be subject to the selection of school-based staff in schools which choose to change subject to (inter alia) vacancies occurring through transfer, promotion, retirement or any other reason that constitutes a permanent move from the position and the school utilising a consistent and equitable merit-based process to accommodate participation in local merit-selection and transfer.

Significantly, in clause 11 which deals with "policy and partnership" it is agreed that to ensure the implementation of the agreement the parties will establish joint task forces comprising a range of interest groups on a number of specific issues including a career structure for school administrators incorporating issues such as transfer and a systemic introduction of merit transfer.

It was Mr Misich's evidence before the Tribunal that lack of consultation has been fairly commonplace in terms of feedback. Indeed he said that principals had referred the Federation to clause 11 of the Workplace Agreement in the context of the Department's current proposals of the phasing out of the transfer system because the first the Federation knew about that proposal was an announcement in the media regarding it and a subsequent letter from Mr Home (which he noted was in fact sent out after the date of the Affidavit filed by Mr Home in the present proceedings).

Overall the evidence is that despite the fact that the transfer system has been recognised from the outset as a major discriminatory factor against females and notwithstanding the exemption having operated for the last ten years, there has even now been little or no consultation by the Department with the relevant representative bodies about its removal and the introduction of a merit-based system.

What the Workplace Agreement effectively requires in our view is proper consultation. It does not necessarily purport to enshrine the promotion on transfer system as an industrial right.

The second point to be made is that even were that not so and the Workplace Agreement and other industrial agreements did purport to establish promotion on transfer as an industrial right, such agreements could not make lawful discriminatory practices or policies which would otherwise be unlawful under the *EO Act*—as we are satisfied the transfer system is.

When the *EO Act* came into operation in July 1985 it contained a number of general exemptions. Section 69(1) generally exempted from the provisions of the *EO Act* (so as to make not unlawful) Acts done under statutory or other specified legal authority. So far as is relevant here that section provided that—

"69(1) Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with the requirement of—

(a) any other Act which is in force when this section comes into operation

(b) —

(c) —

(d) —

(e) an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment (including the payment by an employer of a salary, wage or other remuneration in excess of the amount fixed by such a court or tribunal and whether or not the payment of such salary, wage or other remuneration but for this provision would constitute unlawful discrimination".

Thus an industrial award or agreement could have made lawful discriminatory conduct which otherwise would have been unlawful under the *EO Act*.

However, section 69(2) expressly stipulated that paragraphs (a), (b), and (e) of section 69(1) ceased to be in force at the expiration of two years after the coming into operation of the section unless regulations made under that sub-section provided otherwise. There are no such regulations. The exemption applicable to industrial orders or awards accordingly ceased in July, 1987 and so even if the transfer system were embodied in an industrial order or award that would not make lawful what would otherwise be (as we find) unlawful discrimination under the *EO Act*.

We have already made some reference to the evidence and submissions in relation to the disadvantage which it is suggested would likely be suffered by teachers who have presently or recently taken country promotional positions in the expectation that they would have, if not an entitlement, at least an expectation under the transfer system of being able to return to the city or metropolitan area in due course.

As to this, Mr Misich explained the Federation's position in the following way—

"In terms of dismantling the transfer system our position is that under the proposals the sudden dismantling would have quite a negative impact upon administrators who have already made commitments and have already uprooted families and taken up positions in country locations under the existing process with the knowledge that there was opportunity for them to apply for transfer to...to either a more favourable location or return to the metropolitan area. In many of these instances partners have ceased jobs and seek whatever employment could be there at the current location. In some instances partners have separated to enter into a life of commuting. The rapid introduction of a merit-based system would be inequitable to many country administrators where...who don't have equitable access for professional development and the system does not have a methodical or consistent system of training for merit promotion. It's felt that...the Federation feels that it's this particular group that are the meat in the sandwich. They are caught between directions and standards through the Commission for Equal Opportunity (sic) and through the lack of, I guess, activity by the Education Department and as such a rapid introduction of a full-merit system would affect these administrators and their families to the point where their own morale would be very low as indicated by some of the feedback that we've received".

The Tribunal has given very anxious consideration to these matters. In the end we have come to the view that whilst the course proposed by the Department would have some ameliorating effect in respect of those teachers and their families (to the extent of 50 percent in the first year and 25 percent in the second) there would at the same time necessarily be a counter-balancing continuing disadvantage to women who would be deprived of promotional opportunities during that phase in process.

Furthermore it is not the case that the transfer system bestowed a right to promotion. There was a right to apply—although we recognise that given the priority of filling city positions by country transfers first the expectation that one's promotion or transfer prospects were thereby enhanced was reasonably realistic at least over time. Nonetheless, teachers who have accepted country postings with expectations based on the existing transfer system would of course still have the right to apply for city or other promotions under a wholly merit-based system.

So too as the Director observed when the question was put to her:

"Once again the women are being asked to wait while the majority of the men who have a certain expectation have that expectation met. It seems to me that once again you're asking the women to wait to have a full-merit system and I think it overlooks the fact that all those men are able to apply for a merit-based promotion. You're not leaving them out of the system. It's just that they...if they had some expectation...the only thing they seem to have had is that they could apply for a transfer. They weren't guaranteed a transfer. They could apply for a transfer. They can now...if you implement a full merit-based system they can apply for a merit-based promotion".

Mr Home recognised that whenever and however it was done, the transition would cause disadvantage or difficulty to some teachers and their families. That is however the unfortunate product of the lack of planning and inaction by the Department on this issue over the last ten years during which it has the benefit of the exemption.

The proposal to "phase in" the move from the transfer to a merit-based system in the manner described by Mr Home would continue the discriminatory effect against women over that period and quite probably beyond.

The Tribunal has no doubt that the filling of positions on merit would be the fairer system. On the evidence it would also be likely to be simpler and ultimately more cost effective.

We accept the submissions of Mr Matthews and Ms Foley that it would be inappropriate for the Tribunal to become involved in the running of the Department or policy making for it and we do not intend to create that situation.

We do not see a condition directed towards the abolition of the transfer system as involving that.

The policy is discriminatory. The Tribunal is required to advance the objects of the *EO Act*. They include the elimination so far as is possible of discrimination against persons on the ground of sex in the areas of work and education and to promote recognition and acceptance within the community of the equality of men and women.

The Tribunal has concluded that abolition of the transfer policy is critical to the advancement of the objects of the *EO Act* within the Department and to that end determines that the extension of the exemption in respect of female gender-linked positions to 31 December, 1997 be conditional upon abolition of that policy and the adoption of a wholly merit-based system by not later than that date.

#### Removal Of Four-Year Training Requirement

The Tribunal accepts that whilst the decision to remove that requirement in respect of level 3 positions is commendable, the effect of it has been merely to raise the "glass ceiling" to level 4. Beyond that the requirement still operates to perpetuate promotional discrimination against women within the Department.

The Tribunal is not persuaded by the submissions made on behalf of the Federation that removal of that requirement would be inequitable.

It is important to bear in mind that what is involved here is a requirement for promotion—that is to say the present policy is that a teacher is simply not even eligible for promotion to level 4, 5 or 6 unless he or she has a four-year qualification. To remove that as a requirement for eligibility would not be inequitable to those who have a four-year qualification: they may still apply for any such position. Nor would it mean that the time and expense devoted by them in gaining a four-year qualification would not be recognised or of less value—a teacher with a four-year qualification would obviously be expected to be recognised as more highly qualified (at least with respect to formal qualifications) than a teacher with a three-year qualification.

Having regard to these considerations and all of the evidence before it, the Tribunal determines that extension of the exemption in respect of female gender-linked positions to 31 December, 1997 should be conditioned also on removal of the four-year training requirement in respect of all promotional positions within the Department by that date.

#### Monitoring And Review

The long history of the exemption and the lacklustre response of the Department to it certainly lends force to the submissions of all parties other than the applicant and the Federation that there is no good reason to believe the Department would achieve greater equal employment opportunity in the future unless encouraged and assisted to do so by a formalised system of joint internal and external monitoring and review.

The Tribunal sees some force in the Director's submission that the monitoring and reporting conditions sought by her are required for an extended period because extension of the exemption (albeit limited to female gender-linked positions) will have effect until the beginning of 1999. That is in turn because it will be applied to the filling of promotional positions for 1997/98.

However it is the Tribunal's view that section 135 of the *EO Act* does not empower it to impose conditions on an exemption which would apply beyond the period of the exemption itself.

Monitoring and reporting requirements can be imposed as a condition upon an exemption. That was done, for example, by the South Australian Equal Opportunity Tribunal in *Pasminco Metals—BHAS Limited* (1991) EOC 92-384.

In that case exemptions were granted subject to a number of conditions including that the applicant attend before the Tribunal no later than certain specified dates to report what action had been taken and progress achieved in relation to a number of specific equal employment opportunity issues within the working environment.

We accept the submission of the Teachers' Union that the DOEPE Review suggests that the exemption merely maintains the status quo and masks the discriminatory behaviour of the Department and that whilst removal of the exemption may expose the discriminatory behaviour of itself it would not necessarily provide any assistance to the women affected nor to the Department in addressing the problem. To provide a feedback mechanism as was sought would allow strategies to be developed, implemented, reviewed and changed if necessary to ensure the best possible outcome for both the Department and for women seeking promotion in the Department. We further accept that an effective mechanism for achieving that would be the establishment of an Equal Employment Opportunity taskforce comprising departmental representatives and at least one representative of each party to the present proceedings. The establishment of such a taskforce would also be consistent with the requirement for consultation on equal employment opportunity and related issues to be found in industrial agreements such as the Workplace Agreement and to which reference was made by the Federation and the WA Secondary Deputy Principals' Association.

In respect of the question of the imposition of monitoring and review therefore the Tribunal determines that the extension of the exemption be further conditional upon the Department establishing by not later than Friday 24 October, 1997 an equal employment opportunity taskforce as specified above. We do not consider it necessary to impose any further condition nor authority for the Director to refer the matter back to the Tribunal since we consider any deficiency or concern which might arise in relation to the role or work of the taskforce could properly and more appropriately, in the circumstances, be the subject of a reference by the Director to the Tribunal under section 147 of the *EO Act*.

Nor do we consider it appropriate to impose the other two conditions sought by the Director. They were directed to a review of departmental EEO policies and procedures and the Performance Management System. In our view they would either have to be so broadly stated as to lack utility or would have to be so specific (and ongoing) as to amount to an inappropriate involvement by the Tribunal in the detailed development of departmental policy and planning.

#### CONCLUSION

It is the determination of the Tribunal for the reasons expressed above that the application should be granted and the exemption be extended from 6 July, 1997 to, and including, 31 December, 1997 but only in relation to female gender-linked positions and subject to the following conditions. Namely that:

- (1) The transfer system be abolished and replaced by a merit-based system by not later than 31 December, 1997.
- (2) The mandatory requirement of four-year training for appointment to promotional positions be abolished in respect of all promotional levels by not later than 31 December, 1997.
- (3) By not later than Friday, 24 October, 1997 the applicant establish a departmental Equal Employment Opportunity Taskforce comprising departmental representatives and at least one representative of each of the first to the fifth respondents inclusive. Such Taskforce to examine, monitor and review the equal employment opportunity initiatives being implemented and planned by the Department, the Department's progress in compliance with conditions (1) and (2) above and to advise and assist the Department in the development and implementation of equal employment opportunity policy.

