CASE NOTE

THE INSTRUCTION OF STUDENTS WITH HEARING IMPAIRMENTS IN AUSLAN: *HURST AND DEVLIN v EDUCATION QUEENSLAND*

ELIZABETH DICKSON
QUEENSLAND UNIVERSITY OF TECHNOLOGY, BRISBANE, AUSTRALIA

I INTRODUCTION

A further case asserting discrimination in the failure to provide school lessons in Auslan, the natural language of the Australian Deaf Community,[1] has been heard in the Federal Court of Australia. *Hurst and Devlin v Education Queensland*[2] follows the earlier case of *Clarke v Catholic Education Office*[3] which successfully challenged the policies of the ACT Catholic Education Office in relation to the provision of Auslan interpreters to students with hearing impairments.[4] It was argued for Tiahna Hurst and Ben Devlin that the failure of Education Queensland to provide Auslan interpreters to assist them in their pre and primary school class rooms amounted to discrimination under the *Disability Discrimination Act 1992* (Cth) (DDA). Auslan is a language constructed from hand movements, body language and facial expression. Unlike other methods of communication used by people with hearing impairments, it does not simply 'translate' English – it is a discrete language with its own grammatical structures and rules. Further, it exists only in its 'signed' form and cannot be recorded in writing or 'spoken'. Education Queensland's approach to the education of students with hearing impairment, the 'total communication' policy, emphasises a variety of methods which may be used to facilitate communication - finger spelling, lip reading, speech and signing, or more particularly, Signed English.[5] While Ben Devlin succeeded in proving unlawful discrimination, Tiahna Hurst failed on the basis that, although Education Queensland's policy was unreasonable, Tiahna was able to comply with it. Despite its mixed outcome, however, the decision is likely to expedite a review by Education Queensland of its policies in relation to the provision of education services to students with hearing impairments. The case is also interesting in that Lander J, in his decision, has suggested that it is not appropriate to use legislative remedies to challenge education department policies.

II FACTS

Tiahna Hurst was 7 years old at the time of hearing. She was born profoundly deaf. Tiahna's grandparents are also profoundly deaf and communicate in Auslan. Although Tiahna's mother, Gail Smith, is not deaf her first language is Auslan, her second English. Tiahna's father's second language is Auslan. Between June 2001 and February 2002, Tiahna was a student at a pre school facility operated by the Respondent, the Noosaville Special Education Unit (SEU). She left the State system in February 2002, returning in August 2003, to attend the Coolum State Pre-School. From January 2004 she attended the Coolum State School. Tiahna's complaint to the Human Rights and Equal Opportunity Commission (HREOC) in 2003 related back to alleged deficiencies

in the education she was provided at Noosaville in 2001. The evidence of Tiahna's mother was that, as there was no one on staff at Noosaville who could communicate with Tiahna either by way of Signed English or Auslan, Ms Smith herself had to stay with Tiahna during the school day to facilitate her communication with others. Although not spelled out clearly in the judgment, Ms Smith's claim on behalf of her daughter appears to be that because the State did not provide an appropriate education for Tiahna, her family was forced to provide for her needs, through private schooling and therapy, at their own expense. The Respondent's case was that Tiahna, a bright student with good oral communication ability, was not at any disadvantage compared with her hearing peers. Tiahna's academic progress was good and there was evidence that she could communicate effectively with others. The Respondent argued, further, that any detriment that could be proved could be traced to factors apart from Tiahna's treatment in the State education system, including the fact that she had attended Noosaville SEU only intermittently, and subsequently, had attended a 'regularly changing array'[6] of schools, some without special facilities for students with hearing impairment. Education Queensland also contended that aggressive and uncooperative behaviour by Tiahna's mother had impeded its ability to deliver education services to Tiahna.

Ben Devlin was 12 years old at the time of hearing. Between 1995 and 1997 Ben attended childcare centres and a kindergarten which were not administered by the Respondent. From 1998 to 2002 Ben was enrolled at Noosaville preschool and at Noosaville primary school which were administered by the Respondent. He was diagnosed as hearing impaired when he was 16 months old. His parents and his four siblings are not hearing impaired and only his mother is fluent in Auslan. After early, failed, attempts to enhance Ben's hearing with hearing aids sufficient to allow him to become 'oral', Ben was introduced to signing at the age of 4, in 1997, but commenced formal schooling with little ability to communicate. In 1998 Ben was assessed as having 'average to above average cognitive ability'.[7] At preschool, and later school, Ben attended a combination of special education classes and mainstream classes. When he was in mainstream classes, however, he would have support from a special education teacher or aide. His teachers, and particularly those in charge of the mainstream classes, were not always competent in either signed English or Auslan. When teachers could sign, however, the preference was for Signed English. Mrs Devlin began to express her concerns about Ben's educational progress to school staff as early as 1998. Her complaints escalated, however, in 2002 when special education support for Ben on Fridays was withdrawn on the basis that there were not 'sufficient numbers' of children with hearing impairments enrolled at Noosaville to warrant employing a special education teacher for that day of the week. When her concerns were not addressed by Education Queensland, she contacted her state Member of Parliament and, ultimately, HREOC, triggering the present proceedings. At the time the complaint to HREOC was made, it should be noted, the Devlin family, including Ben, had no familiarity with Auslan and the Devlins had not complained to Education Queensland that Ben should be and was not educated in Auslan.[8] Ben was not introduced to Auslan until May 2003, well after the period relevant to the complaint to HREOC.[9] Also in 1993, the Devlin family organised a private speech therapist to teach Ben language and to provide auditory training sessions 'in an attempt to make up for the loss that they perceived he had suffered over the years'.[10] At trial it was accepted that, unlike Tiahna Hurst, Ben had 'fallen significantly behind his learning peers'.[11] As with Tiahna, however, the Respondent argued that it was not any failing of the State education system but other factors, including late diagnosis and lack of family communication, which caused Ben's detriment.

III Allegations of Discrimination

Both applicants originally claimed that they were disadvantaged, in comparison with their hearing peers, in that they were not taught in Auslan, which, in their circumstances was the only adequate method of communication with them. Lander J summarised the case as follows:

> Ben's principal case and Tiahna's case, put shortly, is that because they are profoundly deaf the only way in which they can be taught, which would not amount to discrimination under the Act, is in Auslan. They cannot be taught by the spoken word because they cannot hear it. They should not be taught in Signed English because that is an inferior method of communication than Auslan.[12]

The applicants claimed that the respondent's failure to provide teachers fluent in Auslan had retarded their education and would continue to retard it in the future. During the course of the trial both applicants sought to broaden the scope of the discrimination claimed. The applicants had been taught through a combination of the spoken word and Signed English. They sought to claim that the quality and fluency of Signed English used by teaching staff was so poor as to amount to discrimination. Lander J held that the pleadings did not support this second basis of alleged discrimination. Although much of the evidence at trial related to this second basis for discrimination, ultimately it was not pursued in relation to Tiahna. In Ben's case, however, Lander J allowed an application, after the conclusion of the respondent's case, to amend the statement of claim to include an allegation of discriminatory conduct in that '[t]he quality and fluency of the Signed English used by the respondent in the teaching of the Applicant has been, and is, poor'.[13] Lander J was satisfied that 'the respondent could not claim that it was taken by surprise by this amendment' taking into account the fact that similar allegations had been made as early as the original complaint to HREOC and aired comprehensively during the course of the trial.[14]

IV The Law

The DDA prohibits discrimination on the ground of a disability. Disability, as defined in DDA s 4, means:

(a) total or partial loss of the person's bodily or mental functions; or
(b) total or partial loss of a part of the body; or
(c) the presence in the body of organisms causing disease or illness; or
(d) the presence in the body of organisms capable of causing disease or illness; or
(e) the malfunction, malformation or disfigurement of a part of the person's body; or
(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

Section 22 prohibits discrimination in education as follows:

It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:

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

Discrimination can either be direct or indirect. Direct discrimination, as defined in DDA s 5, arises when 'because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability'. A comparison of the treatment of the treatment of the applicant and the treatment of a 'comparator' without the applicant's disability is required as part of the process of proof of 'less favorable treatment'.

Indirect discrimination is more subtle, and, perhaps., more complex, requiring proof of the following elements:

(1) the discriminator has required the applicant to comply with a 'requirement' or 'condition';
(2) a substantially higher proportion of people without the applicant's disability can comply with the requirement or condition;
(3) the requirement or condition is not reasonable, having regard to the circumstances of the case; and
(4) the applicant cannot comply with the requirement or condition.[15]

V Application of the Law to the Facts

Lander J accepted that both Tiahna and Ben had a disability within the meaning of the DDA, linking hearing impairment to paragraphs (a), (e) and (f) of the definition of disability: 'Both of them have a disability as defined in s 4 of the Act, because both of them have a partial loss of bodily function; malfunction of part of the body; and a disorder or malfunction causing them to learn differently from a person without the disorder or malfunction'.[16]

The respondents argued that they had suffered discrimination in education, within the meaning of DDA s 22, in that their 'access' to educational materials was not at the same 'rate' nor of the same 'degree' as their hearing peers because of the respondent's educational policies and strategies in relation to students with hearing impairment.

After Lander J permitted amendment of the statement of Claim, Ben's alternative case, arising from the allegations of 'poor' teaching, was one of direct discrimination: he was treated 'less favourably' than the 'hearing' members of his class who were taught and could communicate in English. The applicants' main case, however, in relation to the failure to provide education in Auslan, was framed as one of indirect discrimination.

A *Ben's Direct Discrimination Claim*

Despite evidence that many of Ben's teachers and aides were not proficient in signed English, Lander J was satisfied that they were sufficiently well equipped to teach Ben:

> To avoid any doubt, I reject Ben's case that his instructors and teachers prior to 30 May 2002 were not qualified to teach him in Signed English. In particular, I reject Ben's claim that those persons were not sufficiently fluent in Signed English or could not deliver the Signed English with sufficient quality so as to amount to discrimination under s 5 of the Act.[17]

This explicit finding meant that it was difficult for Ben's claim of direct discrimination to succeed: Lander J did not accept that there had been 'less favourable' treatment of Ben in the manner in which his instruction was delivered at Noosaville school. Accordingly, Ben's claim

of direct discrimination failed. Further, Lander J was satisfied that there were other explanations for the fact that Ben had fallen behind his peers academically. He found that the delay in diagnosis of Ben's hearing impairment ,[18] the 'wrong' decision to attempt to make Ben an 'oral' communicator[19] and the fact that 'Ben's family cannot communicate with him'[20] had all caused educational disadvantage to Ben. Lander J also accepted that Ben's irregular attendance at school and his failure to complete homework assignments were further reasons he 'continued to under achieve' .[21]

B *The Indirect Discrimination Claims*

Case Law indicates that, for the purpose of proof of indirect discrimination, the discriminatory requirement or condition imposed by the respondent may be explicit but is often implicit.[22] In this case, Lander J lamented that '[u]nfortunately, both applicants have been unable to identify the requirement or condition with any precision at all'.[23] Lander J ultimately found that an implicit requirement could be inferred from Tiahna's pleadings 'that Tiahna accept an education and receive instruction in English without the assistance of an Auslan teacher or an Auslan interpreter'.[24]In relation to Ben, Lander J made a similar finding as to the nature of the requirement or condition imposed: 'His claim is, like Tiahna's claim, that he has been indirectly discriminated against by reason of a requirement or condition which required him to undergo his education in English and without the assistance of an Auslan teacher or an Auslan interpreter'.[25]

The comparator group, for the purpose of determining ability to comply with the requirement imposed, was readily determined in each case to be the 'applicant's respective hearing peers in the classroom situation'.[26] Despite the respondent's arguments to the contrary, Lander J held that 'there is no doubt that a substantially higher proposition of non-hearing impaired persons can comply with the requirement or condition because the instruction they receive is in English'.[27]

The main issues in relation to the indirect discrimination claim, according to Lander J, however, were whether Tiahna and Ben could comply with the requirement that they be educated in English and whether that requirement was reasonable. Lander J dealt first with the reasonableness of the requirement or condition. A large proportion of the lengthy judgment is devoted to a detailed overview of the expert evidence in relation to preferred method of educating children with hearing impairments. This reflects the ideological impasse between applicants and respondent: the applicants insisted that instruction in Auslan was essential to their educational development and the 'only way in which they can be taught';[28] and the respondent insisted that Auslan was 'but one' of a range of suitable options for instruction as recognised in their Total Communication Policy.[29] Lander J accepted that the Australian education community had evolved in its understanding of best practice in relation to the education of students with hearing impairments and that the Total Communication model advocated by Education Queensland was out-dated and that 'total communication, should give way to Auslan communication, at least with profoundly deaf children'.[30] He also declared 'Total Communication' to be a misnomer in that Auslan, although a recognised form of communication, was not part of the package offered to Tiahana and Ben by Education Queensland.[31] He declined to find, however, that Education Queensland had been 'not reasonable' in failing to implement a 'bi-cultural/bi-lingual' approach to education of students with hearing impairments, relying on Auslan as the primary form of communication, in its schools statewide at the time encompassing the applicants' claims. This did not prevent him from finding, however, that the requirement imposed on Tiahna and Ben that they 'undergo … education in English and without the assistance of an Auslan teacher or an Auslan interpreter' was 'not reasonable':

> In my opinion, it was not reasonable for Education Queensland to not provide Auslan teachers or interpreters to Tiahna and Ben if they were not able to comply with the condition that they receive their instruction in Signed English. In other words, whilst they have not succeeded in establishing that it was not reasonable of Education Queensland to not have introduced a bilingual-bicultural program by 30 May 2002, they have succeeded, in my opinion, in establishing that it would have been of benefit to both of them to have been instructed in Auslan rather than in English.[32]

Lander J was critical of the respondent's implementation of the Total Communication Policy and of the failure to assess the 'needs' of Tiahna and Ben to 'determine whether they should be instructed in English, including Signed English, or in Auslan'.[33] . He held that in Tiahna's case, particularly, it was 'obvious' that she would have 'been better taught in Auslan', as her first language is Auslan. Lander J held that it was not reasonable not to provide an Auslan teacher or interpreter to Tiahna 'throughout the whole of her education in Education Queensland's schools' ,[34] and to Ben 'for the two years prior to May 2002'.[35]

In Ben's case, Lander J was prepared to discount evidence that had proved fatal to his direct discrimination claim when considering the indirect discrimination claim. He held that those matters which had directly contributed to his diminished academic performance – late diagnosis, wrong treatment, family communication difficulties - did not mean he could, and indeed, suggested why he could not comply with a requirement that he undergo education in English.[36] He held that 'there can be no doubt that Ben has not been able to comply with the requirement or condition that he be educated in English and without the assistance of an Auslan teacher or interpreter'.[37] All four elements of indirect discrimination were thus proved and Ben was awarded $20,000 general damages as compensation 'in particular for the hurt, embarrassment and social dislocation which has been occasioned by his inability to communicate in any language'[38] and $40,000 for loss of earning capacity.[39]

Tiahna's case, however, stumbled on proof that she could not comply with the requirement or condition. Ironically, her family's efforts to redress, through private tuition and their own assistance, what they perceived as deficiencies in what was offered to Tiahna by the State system, may ultimately have cost them their case.[40] Lander J accepted expert evidence that Tiahna could receive her tuition in English and signed English.[41] This finding is controversial, however, in that it appears inconsistent with the approach of the Federal Court in *Clarke*. In *Clarke* it was also argued that the applicant, Jacob Clarke, as a 'total communicator' with experience of Signed English, could comply with the requirement imposed that he 'participate in and receive classroom instruction without the assistance of an [Auslan] interpreter'.[42] Madgwick J noted in that case that compliance could not be expected to come at the cost of 'substantial disadvantage' for the applicant as compared with the 'base group'[43], and found that, '[g]iven Jacob's needs the unwillingness to welcome Auslan interpretation for him was unreasonable'[44]. Upon appeal, The Full Federal Court did not interfere with the decision of Madgwick J that Jacob could not comply with the requirement. It could similarly, be asserted, perhaps, that although Tiahna Hurst theoretically could comply with the requirement that she be educated in English this was not without 'substantial disadvantage' to her in that her first language, as acknowledged by Lander J, is Auslan. It is interesting to note that in *Clarke* the reasoning of Madgwick J on the compliance point was clearly influenced by what he described as the 'impressive' evidence of Dr Komesaroff, 'a highly qualified educationalist and qualified Auslan interpreter'.[45] By contrast, Lander J, in *Hurst and Devlin* was not 'assisted' by the evidence of Dr Komesaroff, or that of another witness

for the applicants, Ms Pardo: 'They acted as advocates for Auslan and, in doing so, surrendered their academic detachment and objectivity'.[46]

VI Abuse of Process?

The criticism by Lander J of Dr Komesaroff as 'partisan' stems, perhaps, from a more deep-seated discomfort with the political agenda evident in the expert evidence in this case. The applicants' actions were supported by the lobby group Deaf Children Australia which has an unashamed objective of compelling the introduction of Auslan in the education of children with hearing impairments.[47] Lander J is stern in his criticism of the use of legal proceedings such as the present to promote a 'cause':

> In my opinion, it is a misconception to think that legal proceedings of this kind are the appropriate vehicle to introduce changes into the education system and, in particular, into that part of the education system which impacts upon persons with disabilities.[48]
>
> In my opinion, proceedings under the HREOC Act are not the appropriate medium for advancing educational theory in the hope and expectation that educational institutions will have to respond to a decision of this Court.[49]

Decisions about the education of children with disabilities, according to Lander J, are best made 'by educators in the best interests of the children'[50] and not by courts in the context of 'adversarial' proceedings.[51] This view, it could be argued, puts rather too much faith in the expertise and impartiality of educators, at the expense of the wishes and knowledge of parents and students themselves, and discounts the very real function of anti-discrimination legislation of providing a remedy when those providing services, intentionally or otherwise, impose a discriminatory regime. Indeed, it was only in the context of the present 'adversarial' proceedings that it was determined that Education Queensland 'educators' had not acted 'reasonably' in their treatment of the Ben Devlin and Tiahna Hurst.[52]

The respondent had also invited Lander J to hold that Ms Gail Smith, mother of Tiahna, and main proponent of Tiahna's case, had 'behaved grossly improperly leading up to and since the complaint to HREOC'.[53] The allegation was that Ms Smith had 'used these proceedings and the media as a two-pronged assault on Education Queensland to obtain what she believes Tiahna is entitled to, namely, an Auslan education'.[54] Lander J, while critical of Ms Smith's conduct during the proceedings,[55] 'declined' to make any adverse finding of abuse of process.[56] Allegations of this kind, again, reflect the ideological differences between the parties. The fact that similar allegations of 'pushy parenting', and cross- allegations of 'intransigent educators', have been made in many other Australian disability discrimination in education cases,[57] however, also suggests an unacceptable level of frustration generated by the parental 'interface' with education bureaucracy.

VII Conclusion

Although Lander J was generally not critical of Education Queensland's cautiously slow approach to the implementation of bilingual/bicultural education programs for students with hearing impairments it is likely that the finding of discrimination against Ben Devlin, following hard upon the earlier finding of the Federal Court of 'Auslan discrimination' by the ACT Catholic Education Office in *Clarke*, will hasten a review of services provided by Education Queensland. As Lander J conceded, 'Ben's claim has brought into the public the difficulties that hearing

parents have with deaf children. I can suppose, without knowing, that Ben's case is no different than a lot of other children with hearing parents'.[58] The 'flip side' of the decision in *Hurst and Devlin*, however, is that the dismissal of Tiahna Hurst's claim will cause pause to many disaffected parents contemplating legal action against education providers. Losing a case delivers not only heartache but, potentially, a huge financial burden to disappointed applicants. In a later hearing,[59] Lander J held that Tiahna's mother, Ms Smith, was liable to contribute to the considerable costs of Education Queensland. Although he apparently conceded that there was some 'public interest' in exposing Education Queensland's 'Total Communication' policy to public scrutiny and that this was a factor which theoretically could be taken into account in a decision whether to order costs against an applicant, Lander J declined to take it into account in Ms Smith's case, reprising his view expressed at trial that 'legal proceedings are not the appropriate medium for the purpose of examining the ambiguities in an education policy'.[60]

Endnotes

1. Auslan has been recognised by the Commonwealth as an indigenous Australian language and 'the principal means of communication within the Australian Deaf Community': Department of Employment, Education and Training, *Australia's Language: The Language and Literacy Policy* (1991) 20.
2. *Hurst and Devlin v Education Queensland* [2005] FCA 405 ((Unreported, Lander J, 15 April 2005) (*Hurst and Devlin*).
3. *Clarke v Catholic Education Office* (2003) 76 ALD 84; *Catholic Education Office v Clarke* (2004) 81 ALD 66.
4. Since *Hurst and Devlin* there has been another case alleging discrimination in the failure to provide tuition in Auslan. In *Ferguson v Department of Further Education* [2005] FMCA 954. Raphael FM dismissed the discrimination claim of a TAFE student on the basis that even if he had been provided with Auslan assistance there was no evidence to support his claim that he would have completed his course earlier. An interesting contrast with the present case is *Zygorodimos v State of Victoria* [2004] VSC 142. in that case the Victorian Supreme Court upheld the decision of the Victorian Civil Appeals Tribunal to dismiss an allegation of discrimination brought by a hearing impairment student who was taught primarily in Auslan but who was not proficient in Auslan: *Zygorodimos v Department of Education and Training* [2004] VCAT 128 (Unreported, McKenzie DP, 3 February 2004) Se also *Beasley v State of Victoria, Department of Education and Training* [2005] VCAT (Unreported, Coghlan DP, 5 April 2005) which concerned an application to strike out a claim of discrimination by a student alleging that his need for tuition by Auslan had not been met by the Respondent.
5. See Education Queensland, CS-11: Total Communication for Deaf/Hearing Impaired (version approved January 2005) Department of Education Manual http://education.qld.gov.au/corporate/doem/curristu/cs-11000/cs-11000.html at 15 December 2005.
6. *Hurst and Devlin* [407].
7. Ibid [202].
8. Ibid [301].
9. Ibid [302]. Lander J was caused to comment as follows: 'It seems to me that Mrs Devlin can hardly complain of Education Queensland's failure to offer Ben instruction in Auslan prior to 30 May 2002 when at no stage she or anyone else on her behalf, or on Ben's behalf, request instruction of that kind'.
10. Ibid [323].
11. Ibid [303].
12. Ibid [112].
13. Ibid [22].
14. Ibid [46].
15. DDA s 6.

16. *Hurst and Devlin* [5].
17. Ibid [310].
18. Ibid [334].
19. Ibid [336].
20. Ibid [337].
21. Ibid [461].
22. See, for example, *Australian Iron and Steel Proprietary Limited v Banovic and Others* (1989) 168 CLR 165, (McHugh J), *Waters and Others v Public Transport Corporation* (1991) 173 CLR 349, 360 (Mason CJ and Gaudron J).
23. Ibid [68].
24. Ibid [85].
25. Ibid [92].
26. Ibid [70].
27. Ibid [79].
28. Ibid [112].
29. Ibid [113]-[117].
30. Ibid [757].
31. Ibid [796]. See also [749]: 'In 1994 the Total Communication Policy was promulgated: CS-11. It did not include Auslan as a mode of communication. Notwithstanding that it is a philosophy of total communication, the philosophy as it has been applied as a policy has not contemplated the use of Auslan as a method of communication'.
32. Ibid [797].
33. Ibid [795].
34. Ibid [802].
35. Ibid [803].
36. Ibid [805].
37. Ibid [806].
38. Ibid [846]. Lander J was careful to note that not all 'the hurt, embarrassment and social dislocation …has been caused by Education Queensland. All of the other factors to which I have earlier referred have played a part'. Interest of $4000 was also awarded in respect of the general damages.
39. Ibid [865].
40. See Ibid [819]: 'It might be that she [Tiahna] has not fallen behind her hearing peers because of the attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan'.
41. Ibid [817].
42. *Clarke v Catholic Education Office* (2003) 76 ALD 84 [42].
43. Ibid [49].
44. Ibid [74].
45. Ibid [62]; *Catholic Education Office v Clarke* (2004) 81 ALD 66 [120].
46. *Hurst and Devlin* [148].
47. Ibid [421].
48. Ibid [424].
49. Ibid [431].
50. Ibid [429].
51. Ibid [425].
52. See above n 35 and n36.
53. *Hurst and Devlin* [389].
54. Ibid.
55. Ibid [388] and [390].
56. Ibid [391]-[392].
57. See, for example, *Demmery v Department of School Education* [1997] NSWEOT (Unreported, G

Ireland (judicial member) L Mooney and O MacDonald (members), 26 November 1997), *P v Director General, Department of Education* (1997)1 QADR 755, *Murphy and Grahl v State of New South Wales* [2000] HREOCA (Unreported, Carter P, 27 March 2000), *Travers v State of New South Wales* [2001] FMCA 18 (Unreported, Raphael FM, 21 March 2001).

58. *Hurst and Devlin* [349]-[350].
59. *Hurst and Devlin v Education Queensland (No2)* [2005] FCA 793 (Unreported, Lander J, 16 June 2005).
60. Ibid [33].