DOING IT IN THE COURTS: OPENING RESEARCH TO PUBLIC SCRUTINY

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Introduction

This paper analyses the positioning of researchers and their research by the courts in legal complaints brought against education authorities. It is a continuation of a theme begun at the previous AARE conference in Melbourne (Komesaroff, 1999) in which I discussed the methodological issues in research that is politically charged. I was reporting on my doctoral research in which I investigated issues of language and power, the positioning of a linguistic and cultural minority and the context within which educational policy and practice exists (Komesaroff, 1998). Viewing deaf education from the perspective of language and power explained the struggle over language practices and resistance to a change in educational policy among educators of the deaf, and the way in which the dominant language, English, is legitimised and perpetuated in deaf education. I discussed the legitimacy of politically charged enquiry and the challenges facing a researcher who frames politically charged questions.

Over the past decade at least eleven formal complaints related to deaf children’s access to native sign language in education have been lodged with the Human Rights and Equal Opportunity Commission. This ongoing legal action has brought pedagogical debate over educational policy and language practices into the courts. Court transcripts from the two recent cases heard by the Federal Court of Australia provide the data for an analysis of the ways in which legal counsel position researchers and interpret their research to support the legal arguments being made.

The first case, Clarke v Catholic Education Office and Another (Federal Court of Australia, 2002) was taken by the parents of a profoundly deaf boy against an independent school and education authority in the ACT. The case was determined in favour of the applicants (Federal Court of Australia, 2003), and an appeal by the education authority was dismissed the following year (Federal Court of Australia, 2004a). The second case, Hurst and Devlin v Education Queensland (Federal Court of Australia, 2004b, 2004c), was heard 29-31 March 2004, and 7-11 June & 15-18 June 2004; a determination has yet to be made in this case. The complaint was lodged by the families of two deaf children against a state education authority, allegedly for failing to provide the children with an adequate education. The complainants called for teachers fluent in Australian Sign Language (Auslan) or interpreters to be employed alongside mainstream teachers. I appeared as an expert witness in both these cases, and have provided written evidence in a further seven
cases over the past decade. In *Hurst and Devlin v Education Queensland* (Federal Court of Australia, 2004b, 2004c) my doctoral thesis (Komesaroff, 1998) was submitted as evidence and I also made a response affidavit in relation to evidence submitted by an expert witnesses for the defence (a fellow academic and educational researcher). I was cross-examined on my thesis and a recent publication in which I reported on the cases of alleged unlawful discrimination in education related to deafness and language use (Komesaroff, 2004). Part One of this paper provides an overview of these cases and a description of the two cases that have reached the Federal Court of Australia. Part Two presents the analysis of court transcripts, and Part Three a discussion of the researcher as expert witness.

**Part One**

**Allegations of discrimination over language practices in deaf education**

In Australia, the Human Rights and Equal Opportunity Commission (HREOC) is responsible for the investigation and conciliation of complaints made under anti-discrimination legislation. Complaints relating to deaf education can be made to HREOC under the Disability Discrimination Act 1992 (Commonwealth of Australia, 1992), a federal law that makes it unlawful to discriminate, directly or indirectly, against people with a disability. In the area of education, according to the DDA, it is unlawful for an education authority to discriminate by (1) refusing or failing to accept an application for admission from a person with a disability or accepting that person on less favourable terms or conditions; (2) denying or limiting access to any benefit provided by the educational authority, expelling a person because of a disability or subjecting the person to any other detriment; or (3) the presence of humiliating comments or actions that create a hostile environment. ‘Indirect discrimination’ is defined as discrimination that is the result of a condition or requirement that is not reasonable, disproportionately affects people with a disability or with which a person with a disability cannot comply (Toohey & Hurwitz, 2002). Each year HREOC receives over a thousand complaints; since 2000, on average 8-10% of all cases related to education and just over 3% of all complaints in this period related to deafness (see HREOC reports http://www.hreoc.gov.au/annrep_99_00/index.html; http://www.hreoc.gov.au/annrep01_02/index.html; and http://www.hreoc.gov.au/annrep00_01/index.html accessed 11 August 2003). Most complaints in education are in the university and government primary school sectors (Toohey & Hurwitz, 2002).

The DDA does not require education authorities to make changes if those adjustments will impose an ‘unjustifiable hardship’ on them. HREOC is obliged to try to resolve all matters through conciliation; and on average, about half the cases in education are resolved this way. Toohey and Hurwitz (2002) report that education complaints are generally resolved quickly and have a common characteristic that ‘both parties have a genuine interest in the best interest of the child or young person or student and so have a desire to resolve the issues that led to the complaint’. Elizabeth Hastings, a former Disability Discrimination Commissioner, however, questions the motives of departments of school education given the frequency of confidential settlements made immediately before or during a hearing:
This pattern of late settlement is noteworthy and indicates that some education authorities are keen to avoid setting precedents in this area. In my opinion this ad hoc solution of individual cases is not the best way to make decisions: the important issues are not aired, discussed or determined, and our case law remains impoverished and unhelpful as to how to eliminate discrimination and thereby avoid complaints (Elizabeth Hastings cited on http://www.hreoc.gov.au/disability_rights/speeches/1997/edspeech.html accessed 11 August 2003).

Over the past decade I have observed a pattern of late settlement in many of the cases lodged against education authorities over deaf education. Such settlements are made without admission of liability, avoid legal precedent and impose a requirement of confidentiality. In doing so, they do little to reduce widespread discrimination beyond providing solutions to individual cases. Unlike cases that reach confidential settlement, the determinations reached by the Federal Court contribute to Australian case law.

Between 1993 and 2003, at least 11 formal complaints related to education (pre-school to secondary level), deafness and native sign language were lodged with HREOC (see Komesaroff, 2004). Six of these cases reached conciliation, one was dismissed and two were withdrawn. The remaining two cases were heard by the Federal Court and the transcripts of these proceedings provide the data used to analyse the positioning of academic research and researchers in legal cases reported in this paper.

**Cases heard by the Federal Court of Australia**

In *Clarke v Catholic Education Office and Another* (Federal Court of Australia, 2002), the parents of a profoundly deaf boy, aged 12 at the commencement of the 2000 school year, claimed that the Catholic Education Office (CEO) and Mackillop Catholic College (ACT) discriminated against their son because his enrolment at the catholic secondary college was offered on the basis of inadequate support. After attending a Catholic primary school operated by the CEO with the assistance of a teacher’s aide fluent in Auslan and volunteer interpreters, the secondary college only offered the *possibility* of access to sign language. The model provided:

- ‘Teacher assistants trained in *notetaking* for students who will assist the student in the classroom to access the class information *where possible*’;
- ‘Use of signing support – if a staff member (teaching/other support staff) *were to have these skills and be in a position to input into the learning support program*’; and
- ‘if possible, [to] have … [his] peers from … Year 7 classes to support him with interpreting and relaying verbal messages’


The parents offered to arrange volunteer support or provide a grant of $15,000 for a teacher’s aide fluent in Auslan, if funds could not be obtained from other sources.
However, the school’s principal ‘expressed concern that a student-specific grant might set an unacceptable precedent’ (Federal Court of Australia, 2004a, p. 16). The respondents to the complaint argued that Jacob was capable of communicating through a variety of communication methods and would not be best served by ‘relying’ on a sign language interpreter in secondary school (the incongruity of this argument is evident in the need for a court interpreter agreed to by all parties, discussed later in this paper).

Federal Court Judge Madgwick found in favour of the applicant, determining that the CEO and Mackillop Catholic College unlawfully discriminated against Jacob Clarke by the failure to offer Auslan support (Federal Court of Australia, 2003). A press release later issued by Mr Clarke stated:

We never really wanted to pursue this matter in the Courts ... we gave the CEO and Mackillop ample opportunity to negotiate an outcome but all our attempts met with resistance. Jacob is profoundly deaf and uses AUSLAN as his first language. Mackillop was only prepared to offer a note-taker to support Jacob in the classroom. It should have been abundantly clear that Jacob would not have been able to cope in this circumstance (press release, Mr Clarke, 9 October 2003).

The case went to appeal on 6 August 2004. Judges Tamberlin, Sackville and Stone dismissed the appeal and ordered that the appellants pay the respondent’s costs (Federal Court of Australia, 2004a, p. 4). They noted that the model of support offered by the school did not require provision of signing or Auslan support: ‘This is not a commitment but rather a possibility, and is restricted to possible notetaking assistance’.

Hurst and Devlin v Education Queensland (Federal Court of Australia, 2004b, 2004c) challenged the policy of a state education authority to educate deaf students through Signed English. Two families with deaf children lodged the complaint against Education Queensland because of lack of access to full-time Auslan interpreters in schools and an absence of deaf bilingual education programs in the state government sector (http://www.auslancase. kpslawyers.com, accessed 9 October 2003). The first child was 11 years old, profoundly deaf and attended the local primary school. He was assessed as being severely language delayed. He spent most mornings in a special education class with other children with various disabilities (intellectual, behavioural and physical disabilities). The afternoons were spent in the mainstream classroom on a modified program. The claim of discrimination was made under the DDA, section 22 (a) and (c) that it was ‘unlawful to discriminate by limiting the student’s access to any benefit provided by the educational authority or by subjecting the student to any other detriment’ (Federal Court of Australia 2004c, p. 20). Counsel for the applicants submitted to the court that it was a ‘very clear case of the denial of access to the benefit of a full education’ (p. 20) teaching staff failing to communicate the same educational content as provided to hearing peers. This centred on their ‘failure to teach by Auslan and with alleged consequences in terms of development’ (p. 21). The second child in the case was six years old and born with severe to profound deafness. She was assessed as being in the normal range of language development due to
early acquisition of Auslan (her mother is fluent in Auslan, having deaf parents) and requiring full-time access to Auslan to enable full access to educational content.

The case was first heard by Judge Spender in the Federal Court of Australia, 29–31 March 2004 (Federal Court of Australia, 2004b). After several days’ proceedings, including examination of some of the witnesses (only those for the applicant had been heard), the judge was recused and the trial rescheduled for hearing later in the year. The case was heard by Judge Lander 7–11 June & 15–18 June 2004 (Federal Court of Australia, 2004c). Witnesses, including those who had already appeared before the court, were recalled. Previous evidence stood and the defence cross-examined witnesses on the evidence they provided in witness statements as well as cross-examination in the earlier hearing.

The state’s argument made a connection between the quality of and access to sign language in the home and the children’s language proficiency. Its counsel also presented the common-sense view that ‘if English is spoken in the home by hearing parents and English is spoken by the child’s non-hearing-impaired peers, the child ideally would have a facility in English in order to be able to communicate best at home and in society at large’ (Federal Court of Australia, 2004c, p. 245). The way in which researchers were positioned in these cases is analysed in the next section.

Part Two

Analysis of court transcripts

The data analysed for this article are drawn from more than 1,200 pages of transcript of Federal Court proceedings in two cases in which I appeared as an expert witness. All data were made available in the public domain, published on government websites or transcripts of proceedings undertaken in open court. I have analysed the cross-examination of my own evidence given in Clarke v Catholic Education Office and Another (Federal Court of Australia, 2002), the determination of the case by the primary judge (Federal Court of Australia, 2003) as well as the decision reached when the case was heard on appeal (Catholic Education Office and Anor v Clarke, Federal Court of Australia, 2004a). Data analysed from the second case, Hurst and Devlin v Education Queensland, include opening remarks from legal counsel, cross-examination of my own evidence in both hearings (Federal Court of Australia, 2004b and 2004c) and evidence presented by four other expert witnesses who are researchers, in the second hearing (Federal Court of Australia, 2004c). In a process of grounded theory, data have been analysed and are discussed under the following headings: (1) Intensions of the researcher, (2) Are you an advocate? (3) Political association, and (4) Academic debate as non-consensus.

(1) Intensions of the researcher

In the case, Hurst and Devlin v Education Queensland, I provided evidence in both the first and subsequent court hearing (Federal Court of Australia, 2004b and 2004c). On 7 June 2004, I was called as the first witness for the applicants. My evidence was tendered and I
was cross-examined by Defence Counsel, Mr Bain QC (referred to below as DC; his
dialogue shown in italics)\(^1\). Mr Bain drew on my earlier evidence and subsequent cross-
examining by him on 30 March 2004. He opened the cross-examination questioning me
on the transcript of evidence from the previous proceedings:

\[ \text{DC:} \quad \text{Have you had access to a transcription of that evidence [from the first
hearing] since then?} \]

\[ \text{L:} \quad \text{Yes, I have.} \]

\[ \text{DC:} \quad \text{And you’ve studied that?} \]

\[ \text{L:} \quad \text{Yes, I’ve read that through.} \]

\[ \text{DC:} \quad \text{And have you consulted with others about that?} \]

\[ \text{L:} \quad \text{No, not particularly, I talked to – certainly to Mr James Gray [counsel for the
applicants].} \]

\[ \text{DC:} \quad \text{Who suggested that you study your previous evidence?} \]

\[ \text{L:} \quad \text{I said I’d read it. You asked me if I’d studied it, and I said I’ve read it. I’ve
read it through and I thought that was probably a wise thing to remind
myself of the case.} \]

\[ \text{DC:} \quad \text{Well, we don’t want to delay on minor things… but I did ask you whether
you’d studied it, and I thought you said yes?} \]

\[ \text{L:} \quad \text{No, I said I’d read it.} \]

\[ \text{DC:} \quad \text{I see. Well, whose idea was it? … Are you saying it was yours?} \]

\[ \text{L:} \quad \text{Yes, I received a copy of the transcript and therefore read it.} \]

\[ \text{(Federal Court of Australia, 2004c, p. 44, emphasis added).} \]

What followed was an hour’s cross-examination of a published article (Komesaroff, 2004)
and, after a lunch adjournment, a further two hour’s cross-examination of my evidence
which centred on my thesis tendered as evidence for this case (Komesaroff, 1998). Close
questioning of the article I had published related to the timing of substantive writing and
editorial revisions. The charge being advanced by the defence was that I had revised the
article and engaged in public academic discussion after being retained as a witness to the
case in progress (Federal Court of Australia, 2004c):

\(^1\) Note: Expert witnesses are indicated by the initials D, H, J or L. L refers to my own evidence.
DC: You are really advancing an argument, an argument for the view that you are also presenting as an expert witness in this case, aren’t you? (p. 46)

DC: Although you were writing in 2003 on the same topic of a case in which you were a witness advancing criticism of the state’s administration? (p. 51).

The defence questioned the absence of discussion in my article (Komesaroff, 2004) about any positive actions taken by Education Queensland in response to the current legal case, considering it a requirement for currency and ‘balance’ (Federal Court of Australia, 2004c, p. 54). The Defence Counsel commented:

‘I put it to you quite simply this was your entering the lists to attempt to get leverage for Auslan. You were trying to make a point to the embarrassment of State Education Departments that ordinary folk had to go to Court to get Auslan’ (p. 55).

He characterizes the case in progress as ‘one of your flagships’ (p. 53). He refers to my evidence variously as my ‘view’ (p. 47), an ‘extreme view’ (p. 94) and ‘bias’ (p. 97). He commented:

‘[You have a] philosophical detestation that anyone should try to teach hearing impaired children in English as a first language rather than Auslan as a first language’ (p. 49).

I was called a ‘committed crusader’ (p. 73); albeit with the rider ‘I put it to you very politely but not disrespectfully’ (p. 73).

(2) Are you an ‘advocate’?

Expert witnesses, who are researchers and academics, who appeared in these cases were repeatedly referred to as ‘advocates’ of or ‘advocating’ a particular view. In Clarke v Catholic Education Office and Another (Federal Court of Australia, 2002, p. 61). I was held to be an advocate of Auslan: ‘Now, you are committed to the use of Auslan and bilingual education, aren’t you?’ I resisted this positioning by both the Judge and Defence Counsel:

Judge: But are you committed to that?

DC: to achieving better access to Auslan for the deaf in conformity with those beliefs – in education …?

Judge: I can’t imagine that you wouldn’t be. I understand that you say, “Yes, but I’m not an Auslan nut per se, as it were, that I have deep reasons for advocating the use of Auslan”? … That’s your position isn’t it – that you believe there are – there are equity issues, there are scientific bases, there
are experiential imperatives that indicate that at the present time Auslan is the best way to go? (p. 62).

In his determination of the case, Judge Madgwick stated that he was ‘impressed’ with my evidence despite seeing me as an advocate:

... while she is an advocate of the use of Auslan over other methods of communication for the deaf, a comparative field with which this case is not concerned, I thought her relevant opinions sound and reliable and I accept them (Federal Court of Australia, 2003, p. 23).

In the review of this case, when it returned to the Federal Court on appeal by the CEO, Judge Madgwick is cited as considering my views ‘sound and reliable’ and accepting my evidence as ‘impressive’ (Federal Court of Australia, 2004a, p. 40). Despite this judgment, lawyers for the appellant again submitted that I was an ‘advocate for Auslan’ (p. 40). In the second case, Hurst and Devlin v Education Queensland, the same approach of naming expert witnesses as ‘advocates’ was used by the defence in cross-examination. These examples occurred in the cross-examination of my evidence by Defence Counsel in both hearings:

‘You advocate a bilingual, bicultural approach?’ (p. 17);

‘you are passionate about endeavouring to obtain employment along those lines for hearing impaired people, aren’t you?’ (p. 25);

‘you are an advocate for increasing employment for deaf people, aren’t you?’ (p. 25); and

‘you are passionate to advocate ... that hearing impaired children should be taught Auslan?’ (p. 41).

(Federal Court of Australia, 2004b, emphasis added)

‘You are a peer advocate for the use of Auslan’ (p. 45);

‘you are urging an opportunity for employment and educational opportunity for other sign language users that is directed at those who would not have as much in the way of educational or employment opportunity, namely, those who have, in your view, suffered from hearing impairment?’ (p. 72).

‘the thesis for which you advocate here’ (p. 79); and

‘this is the reality of what you are advocating’ (p. 87).

(Federal Court of Australia, 2004c, emphasis added)
Another witness (Expert Witness J) was characterized similarly (Federal Court of Australia, 2004c, emphasis added):

‘you have been someone who has been strongly advocating the use of Auslan through the 1990s; would you agree?’ (p. 239);

‘what is it that you are advocating’ (p. 240);

‘are you advocating for the separate education of deaf children’ (p. 240);

‘what you are advocating … you don’t actually specify what you see to be the way in which the classroom would proceed to achieve the ends your (sic) advocating’ (p. 241); and

‘When you advocate that there be the use of Auslan as the instructional mode …’ (p. 257).

The evidence of this witness (Expert Witness J) was also repeatedly referred to as ‘opinion’. The following exchange occurred between Expert Witness J and the Defence Counsel (Federal Court of Australia, 2004c, pp. 249-250, emphasis added):

**DC:** your opinion is that deaf children should be educated in Auslan as a first language for the purpose of them learning a second language in Australia, being English?

**J:** Yes. It’s not just my personal opinion, it’s based on the research findings …

**DC:** Yes, I appreciate that. How long has that been your opinion – the opinion that I just put to you?… when you first reached the opinion that you now express, was that the opinion generally in academic circles, or was it then a minority opinion?

Defence Counsel also referred to the growing recognition of the legitimacy of native sign languages and bilingual programs as ‘development … trend … debate’ (Federal Court of Australia, 2004c, p. 137) and ‘trial work’ (p. 138).
(3) Political association

In Hurst and Devlin v Education Queensland (Federal Court of Australia, 2004b, 2004c), four expert witnesses were also questioned about their association with the organisation funding the case on behalf of the parents, Deaf Children Australia. They were asked if they had had any association with the organisation and who had contacted them in order to give evidence (Expert Witnesses H, J & L); if they had given evidence in any other Discrimination Act based proceedings (Expert Witnesses J & V); whether and by whom they would be remunerated (Expert Witness L); and if they expected to be paid by Deaf Children Australia (Expert Witness H). In the cross-examination of my evidence in the first hearing, much was made of who had approached me to be involved in the case. The defence asked if it was the Victorian College for the Deaf (a segregated school for the deaf that endorses bilingual education) or Expert Witness V who also appeared for the applicants and is employed by Deaf Children Australia. At the first hearing (Federal Court of Australia, 2004b), Expert Witness V was also questioned about who had made the initial contacted with her about the case, and who had arranged for her to meet the parents and children at the centre of the complaint. She was asked about Deaf Children Australia and questioned by the defence about the organisation having ‘within its ranks a number of people who are very strongly of the view that Auslan must be taught as a language for deaf children in school. That’s so isn’t it?’ (Federal Court of Australia, 2004b, p. 44). The Defence Counsel went on to say:

DC: You see, can I suggest to you that there is something of a campaign, to put it bluntly, by some at the VSDC (sic, reference to Deaf Children Australia previously known as VSDC Inc), to try to push Auslan to the fore in the education system? (p. 44).

The defence adopted the view that language practices in deaf education are on a continuum of communication strategies, despite my effort to dispel or disrupt this construct of language use in my thesis:

DC: the competing approaches from auditory verbal, with or without [hearing] aids through to Auslan as first language with TCP [Total Communication Practices] somewhere in the middle, as a combination of elements of things, and other approaches between those is, effectively, I suggest to you, the range of approaches (Federal Court of Australia, 2004c, p. 83).

The view that education authorities that provide access to instruction (for minority language students) through the majority language only are merely providing an approach that appears at one end of a continuum, disregards the issues inherent in language and schooling. It does, however, assist with an argument that only those who oppose the dominant approach are being political. This exchange occurred between me (L) and Defence Counsel in the first hearing (Federal Court of Australia, 2004b, p. 15, emphasis added):

DC: Can I put to you simply that the general adoption of Auslan as a medium
for instructing people with a hearing impairment is as much a political matter as it is a matter of linguistics?

L: I think that … all language and all education is a political manner (sic, matter), and therefore deaf education is not absolved from that …

DC: Well, is not the adoption of Auslan, the propagation of Auslan as a mode of teaching something which is bound up with cultural and political sensitivities of those who are deaf?.

L: Yes, in the same way the Cochlear Implant in ordeal education, I believe, is bound up with the same political power issues. The difference is that one is a minority view and one is a majority-dominant view.

Later in the same cross-examination, Defence Counsel made the following comment:

DC: in other words, those who themselves are converts to or who naturally prefer Auslan? You are speaking about the Auslan interest group in that, aren’t you? (p. 39).

In the second hearing, similar comments were made to me by Defence Counsel (Federal Court of Australia, 2004c, emphasis added):

‘I suggest to you … what you put forward as your academic opinion has as its predicate, the notion of political dominance of those who are hearing impaired?’ (p. 87).

‘that is a frank political statement, isn’t it’ (p. 88); ‘your political mantra’ (p. 89); and

‘you launch into a political diatribe in these paragraphs, do you not?’ (p. 89).

Consistent with the language used in politics, the Defence Counsel also referred to Victoria as my ‘heartland’ (p. 104). In response to the last question cited above, I stated that this ‘diatribe’ was in fact ‘calling on the international conventions, the international literature and view expressed at an international forum on the decade of disabled persons that deaf people should be recognised for their linguistic rights’ (Federal Court of Australia, 2004c, p. 89). I drew on the recommendations of the World Federation of the Deaf Scientific Commission on Sign Language (World Federation of the Deaf, 1993, p. 12) that ‘Teachers of the deaf must be expected to learn and use the accepted natural sign language as the primary language of instruction’. This position was reaffirmed in 2003 at the 14th World Congress of the World Federation of the Deaf (WFD) at which the federation resolved to continue its work: ‘Opposing the violation of the linguistic and human right of Deaf people still common worldwide and reaffirming that Deaf children have a right to bilingual education in their indigenous sign and written languages’ (conference recommendations
presented by Carol-lee Aquiline, General Secretary of WFD, 2003, no page number). Almost a decade earlier, the Salamanca Statement on Special Needs Education (UNESCO, 1994) had declared: ‘The importance of sign language as the medium of communication among the deaf, for example, should be recognised and provision made to ensure that all deaf persons have access to education in their national sign language’.

Defence Counsel also questioned international Expert Witness H in the following way (Federal Court of Australia, 2004c, emphasis added):

in the course of your preparing your affidavits, was your attention drawn to the need to be strictly objective and to be appropriately moderate in your view as an expert witness? (p. 136).

in essence you’re advancing a political argument, aren’t you? …. Can I suggest to you that that is not in truth a summary but rather a political statement or argument? (p. 136).

Now, everything you are saying is directed not at Auslan as a better mode of communication, but Auslan as being the way in which there can be the assertion of a minority cultural influence by the deaf community (p. 102).

(4) Academic debate as ‘non-consensus’

The following dialogue between Defence Counsel and Expert Witness (J) is an interesting exchange on the view of academic debate as ‘non-consensus’ (Federal Court of Australia, 2004c, p. 252):

DC: And the argument which you advance has not yet been emphatically accepted as the orthodoxy, has it?

J: By whose orthodoxy?

DC: Well, the orthodoxy of educational institutions, the orthodoxy of educators and, for that matter, the orthodoxy of all the academic community?

J: You mean ‘Does every academic agree on the same issue?’; the answer, of course, is ‘No’.

DC: ‘Was there any particular work which demonstrated the correctness of your opinion?.

Defence Counsel also asked Expert Witness J:

‘Was it then the majority of academics?’
‘Are you able to identify a point of time where the majority of educators subscribe to your opinion?’ (p. 250, emphasis added).

And the following exchange occurred later in the cross-examination:

**DC:** ‘And the work that you’ve referred to … was part of the ongoing debate, was it not?’

**J:** ‘There is always ongoing debate in academia. That’s what we make our money from’.

**DC:** ‘…focusing just on the matter of consensus, can I suggest to you that the debate was going – substantive and ongoing into the late 1990s at least rather than that a consensus had been reached in the mid-1990s?’

**J:** I think debates are always ongoing in academia. That doesn’t mean that the consensus has not been reached.

In the second hearing of *Hurst and Devlin v Education Queensland* (Federal Court of Australia, 2004c), Defence Counsel drew a distinction between educators and academics, asking Expert Witness V:

**DC:** Well, were there any educators who supported the opinion you’ve expressed today, 15 years ago? I’m dealing now with educators, not academics? ’ (p. 251, emphasis added).

Later in the cross-examination, Defence Counsel suggested:

**DC:** can I suggest to you that there is not yet any majority view held by educators that Auslan is the appropriate medium and to be used bilingually biculturally – educators as distinct from academics, as his Honour distinguished those things? …. Teachers rather than, like yourself, persons who are academics in the theories of deaf education and alternative for deaf education; those who actually do the educating (p. 253, emphasis added).

**Part Three**

**Researcher as expert witness**

The courts rely on researchers and other professionals as expert witnesses. Their evidence can be cross-examined and in the case of researchers, this means opening their research to non-academic questioning. Legal counsel will try to establish or question the credibility of a witness. In *Hurst and Devlin v Education Queensland*, Judge Lander reminded the counsel for defence that an expert’s evidence is accepted as being ‘based upon sets of assumptions’ (Federal Court of Australia, 2004c, p. 259). He went on to say ‘You are
entitled to inquire what they [those assumptions] were and you’re entitled to put other sets of assumptions to her, but I can’t see any relevance in cross-examining experts as to what they might know and or what they don’t know’ (p. 259).

**Defending research**

When I was asked to provide an affidavit for *Hurst and Devlin v Education Queensland* (Federal Court of Australia, 2004b), I was overseas on six-months Outside Study Program. Given the difficulty of receiving and responding to papers related to the case, legal counsel for the applicants submitted my doctoral thesis as evidence. At the time, this seemed to me to be an efficient way of providing evidence as the preparation of a witness statement takes significant work. Tendered as evidence, my thesis was now the basis on which cross-examination could occur. Furthermore, my academic publications offered the legal defence team an opportunity to establish the time at which particular knowledge became known or, more accurately, was known by the author. This was used by defence lawyers in this case to suggest that the legitimacy of Auslan and bilingual practices was not widely known prior to the publication of my thesis (a flattering but untrue assumption as all researchers draw considerably from prior research or established academic knowledge).

**DC:** The debate concerning Auslan effectively has arisen only in the mid 1990s, hasn’t it?.... You introduce Section 2.8 [of your thesis] headed “The Current Debate”.... [read sections of my thesis]. And that was the state of the debate in 1998, October 1998? [publication date of my thesis].

**L:** Well, I don’t claim to be the first researcher to have researched this (Federal Court of Australia, 2004b, p. 20).

The Defence Counsel continued to read or direct me to sections of my thesis, raising questions about it for about five pages of court transcript. He drew the court’s attention to the section in my thesis ‘Limitations of the Study’ and asked questions in relation to this and the section ‘Future Research’ pointing to this as evidence of the need for ‘more study, more research’ (Federal Court of Australia, 2004b, p. 24). The Defence Counsel said ‘there was an argument to be had, but certainly no overwhelming case proven, that is so, isn’t it? (p. 24) and that ‘[this] has been the subject of some very limited use, some ongoing trialing, and a very hot academic debate from about the mid 1990s’ (p. 39).

Considerable time was spent in cross-examination on a refereed article published in an international journal in which I reported the legal cases related to deaf education (much as this paper may be used in the future by defence lawyers). I was questioned as to why I had not provided details of the efforts undertaken by Education Queensland in trialing a bilingual program (despite it being beyond the scope of the article) and whether I had written the article before or after being enlisted as a witness in the case. Here I was questioned closely about the date on which I provided final copy to the editor.
Researchers’ intentions being called into question

In providing evidence as an expert witness, the researcher’s intentions as well as the research itself is open to public scrutiny. The issue of conflict of interest may arise for researchers (and legal firms representing applicants\(^2\)). The question of payment for a researcher to appear as an expert witness was raised by the defence. In cases related to school education, a researcher whose work challenges current educational practice is likely to be sought by the applicant, parents who may have little or no financial resources and allege discrimination by a large education authority. In this situation, witnesses who appear for the respondent are unlikely to be questioned about the nature of payment for their services. An academic’s decision to provide a witness statement and appear before the court may be on a paid or \textit{pro bono} basis. If it is the former, the source and amount of payment may be questioned in an attempt to establish the motives of the witness or show an alliance with a particular individual or group. If it is the latter, an academic’s willingness to take on \textit{pro bono} work may be used to suggest she is an advocate or passionate supporter of a cause. Another option is to agree to payment on a ‘no-win, no-fee’ basis.

The foregrounding of the researcher’s perspective, ‘writing yourself into the thesis’ and other strategies considered good practice in feminist and social critical methodology were used by the defence to question impartiality. The following exchange occurred in the first hearing of \textit{Hurst and Devlin v Education Queensland} (Federal Court of Australia, 2004b, pp. 14-15, emphasis added) in the Defence Counsel’s opening cross-examination:

\begin{quote}
\textit{DC:} \textit{Dr Komesaroff, your doctoral thesis which you published in October 1998 recounts something of the history of the development of Auslan. It is
directed, I suggest, at making a case for bilingual education …. You have
explicitly detailed \textit{your own inclination}, that is distinct liking \textit{a preference}
of Auslan in the thesis? …. Well, we will not dwell on it, but you were very
open about what \textit{your own inclination} was in that respect, and we can read
that. \textit{You prefer} Auslan and \textit{you’re an adherent to} Auslan and \textit{supporter of}
Auslan, aren’t you?}
\end{quote}

In the second hearing of this case (Federal Court of Australia, 2004b), Defence Counsel described my thesis as:

\begin{quote}
‘intended … \textit{to be} provocative’ and ‘produced as an argument for change’ (p.
111, emphasis added);
\end{quote}

\(^2\) A case reported in my doctoral thesis lodged against a state education department was finally withdrawn after numerous delays and changes in legal counsel. The applicants, deaf parents, were reliant on free legal representation and as such were referred by the Public Law Clearing House to law firms willing to take on this work \textit{pro bono}. After several months representing the applicants, one law firm after another (three in total) withdrew its support for the case on the basis of a conflict of interest in representing the parents against the education authority (see Komesaroff, 1998).
‘to disempower the present teachers and to empower the deaf’, as ‘an argument for radical change’ (p. 112, emphasis added); and

‘presenting yourself as a catalyst for change, weren’t you?’ (p. 115, emphasis added).

It is true that my thesis challenged the dominant cultural values in (deaf) education. In positioning this research as political and the researcher as ‘openly political’ (Gitlin, Siegel & Boru, 1993, p. 204), ‘politically committed’ or ‘politically active’, I drew strength from feminist literature (see for example, Cherryholmes, 1988; Fine, 1994; Lather, 1994; Bacchi, 1996). In writing myself into my study, I saw myself as ‘rejecting the possibility of value-free research’ (Weiler cited in Gitlin et al, 1993, p. 199) and showing the reader how the researcher was positioned in relation to a political question (indeed, the word ‘political’ appears in the title of my thesis and much of my writing). When I was invited by teachers in the main case study to support their investigation, and later adoption, of bilingual deaf education I adopted an educative research paradigm (Gitlin et al, 1993; Gitlin & Russell, 1994). I entered into dialogue with teachers and parents, actively contributing to discussion about educational practice. Most teachers at the school acknowledged the influence of the research on the changes to their beliefs and knowledge about bilingual education. It was, however, clear to me from my first contact with the school that teachers were ready for change. My active involvement in the school community was a response to the decision already made by them to consider Auslan and bilingual pedagogy:

It is not the outsider that brings about improvement and change in teachers and schools – it is the school that improves itself. The staff of the school hold the key; if they decide to change themselves then things being to change’ (Murdoch & Johnson, 1994, p. 30).

The thesis provides a rich opportunity to develop coherent argument. The opportunity to contextualize research findings may or may not be present when a researcher is acting as an expert witness and asked to respond to pieces of information, summaries or concluding remarks selected by the defence in legal cross-examination.

**In the public good; potentially not in the researcher’s interest**

The explicit positioning of an academic acting as expert witness on one side of a legal argument may potentially disadvantage future access to research sites and participants. It may be difficult to attract support for future studies if a researcher’s work appears to have been used for political purposes. Secondly, researchers who adopt a social critical approach and question or challenge the status quo may be more likely to appear in opposition to an education authority that is defending its practices. The adversarial nature of legal cases means that expert witnesses may be called on to respond to the written evidence submitted to the court by another expert. In Clarke v Catholic Education Office and Another (Federal Court of Australia, 2002), I was asked by the applicant’s legal team to comment on the model of support offered by the school. In my judgment, the model was inadequate in the
given case. In evidence, I stated that it was highly inappropriate for a school and education authority to suggest a deaf child whose primary and preferred means of communication was through Auslan be placed in an educational environment that, in all likelihood, would provide no access to that language. Further to this, I considered it highly unreasonable to expect a deaf student to use note taking as his primary method of communication. Finally, I stated that it was a monumental failure of the school system not to provide adequate access for a student who was culturally and linguistically deaf. I pointed to the absence of any mention of Auslan (or even the more generic term ‘sign language’) in the CEO’s policy regarding the provision of services to students with hearing impairment. The approach endorsed by the CEO ignored or excluded the use of sign language despite the recommendations of a Victorian review of the provision of education to Catholic deaf children to introduce signing (see Sheehan, 1995), international conventions, and the policy of deafness organisations such as the WFD.

I had been placed in a further difficult situation when I was requested to interpret for the court as no interpreter had been booked despite the appearance of a deaf witness, the deaf student at the centre of the complaint. As the only expert witness fluent in Auslan or individual in court with the qualification and experience to interpret legal cases, I felt responsible for enabling the case to proceed if I agreed, or causing delay or rescheduling of the case if I had been unwilling to take this on. I agreed to do so, reluctantly, and only after ensuring that I would be free to discuss what had occurred in my evidence as an example of how a deaf person’s access to information is tenuous and may be the result of serendipity (as in my presence as an expert witness who was also qualified and sufficiently experienced to undertake court interpreting). I was sworn in as an interpreter and worked alone for 40 minutes (work at this level is usually done in tandem with another interpreter, each working for 15 to 20 minutes). After a lunch adjournment, I was called to the stand as an expert witness and remained there for more than two hours. I had significant interaction with the judge who addressed me from the bench. Despite the added work (and change in perspective) required by interpreting, I was able to use this event to support my evidence that Jacob did indeed require interpreters in school. Furthermore, the judge had had the opportunity to observe Jacob’s (and my own) proficiency in sign language and the incomprehensibility of his speech. Judge Madgwick in reaching his determination stated (Federal Court of Australia, 2003, p. 23): ‘If anything hangs on it I prefer her opinions to those of the respondent’s expert’.

Similarly, in Hurst and Devlin v Education Queensland (Federal Court of Australia, 2004b, 2004c), I was asked to comment on the quality of teachers’ signing in deaf education. In my doctoral research, I identified the general inability of most Australian teachers of the deaf to use Auslan as being central to their rejection of bilingual education and a major barrier to deaf children’s access to education. The lack of teachers who are themselves deaf (even in the specialist field of deaf education) further contributes to the general absence of cultural and linguistic role models for deaf students (Komesaroff, 1998). I provided evidence that Australian teachers of the deaf have little or no access to Auslan instruction in teacher education. I considered it both ‘reasonable’ and ‘fair’ to expect teachers of the deaf to adopt the language of the linguistic group they serve. I gave evidence that the only university in
Victoria providing teacher of the deaf training had increased Auslan instruction in its courses from four hours in the mid-1990s to 18 hours in the late 1990s. In my view, such an insignificant amount of instruction would do little more than make students aware of the existence of native sign language and the Deaf community. The most instruction in Auslan for pre-service teachers of the deaf was being provided in Western Australia (72 hours instruction and the requirement to achieve a satisfactory level of signing to complete the course). I compared this with countries that had endorsed bilingual deaf education, such as Sweden and Denmark, which provided 500-600 hours instruction in their native sign languages (Bergmann, 1994). Indeed, Swedish teachers are now required to be fluent in Swedish Sign Language as an entry requirement for teacher of the deaf training (personal communication, Kristina Svartholm, August 2003). I was also asked to submit an affidavit testifying that in my view an expert witness for the defence was not qualified to give evidence about the relative value of Signed English and Auslan. In this way, it can be seen that my evidence directly challenged state education authorities and the view of another expert witness, herself an educational researcher.

Conclusion

It is generally acknowledged that education is probably the most important issue for deaf people. In the view of Karen Lloyd (2001), current manager and past president of the Australian Association of the Deaf, it is also the most difficult issue on which to effect change. She is highly critical of the control traditionally taken by hearing people:

> Generations of Deaf children have been and continue to be ‘educated’ in a system controlled by people who are not deaf and who focus on deafness as a defect that needs to be ‘fixed’. The system attempts to educate them using a language (English) that they do not know fluently and cannot fully access; a system that excludes Auslan, and if it uses signing at all insists on using a form of sign contrived by hearing people. And these generations of Deaf children have emerged with poor English skills, poor education, poor general knowledge, poor self esteem and so on … it is particularly revealing that we meet so many ‘experienced teachers of the deaf’ who cannot communicate with us as deaf people (Lloyd, 2001, pp. 1-2).

In an article that examines US case law related to parental autonomy and the implications for decisions concerning pediatric cochlear implantation, Bender (2004, p. 106) states ‘Unlike the reversibility of educational decisions, some medical choices have life-or-death outcomes’. As an educator and educational researcher, however, I argue strongly that decisions over language practices in education have the potential to seriously impact a child’s life. Language delay and educational disadvantage as a result of failure to provide deaf children with access to linguistic and other information in the classroom is not easily reversed. Indeed, the evidence of this is the continuing low levels of literacy and general underachievement of deaf students widely reported in the literature.

The continuing legal action taken by parents of deaf children over the past decade suggests a failure of education authorities to adequately respond to the growing support for Auslan
and deaf bilingual programs in Australia. The limitations of individual complaints, however, are the delays, power imbalance between complainants and respondents, and ‘burn out’ of complainants (Agostino, 1999). A further deficiency of a focus on individual complaint is the failure to address systemic discrimination. When it comes to the need for educational change, researchers have a role to play in providing the courts with expert evidence and opening their research to the scrutiny of the legal system. If litigation convinces education authorities of the need for change, then it is worth the legal fight.

References


