SUPREME COURT OF QUEENSLAND

CITATION:	*Malaxetxebarria v. State of Queensland* [2006] QSC 286
PARTIES:	**GRACIA MALAXETXEBARRIA (BY HER NEXT FRIEND ROBYN MALAXETXEBARRIA)** (appellant) **v.** **STATE OF QUEENSLAND** (respondent)
FILE NO:	S3529 of 2006
DIVISION:	Trial
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 October 2006
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2006
JUDGE:	Helman J.
ORDERS:	**Appeal allowed.** **The orders made on 18 April 2006 by the Anti-Discrimination Tribunal are quashed.** **The appellant's complaint is remitted to the Tribunal for further hearing and consideration of that part of the complaint that concerned events in and after June 2004.**
CATCHWORDS:	DISCRIMINATION LAW – STATE PROVISIONS – QUEENSLAND – *Anti-Discrimination Act* 1991 (Q.) – Alleged discrimination on the basis of age in the provision of education – appeal against decision of Anti-Discrimination Tribunal under s. 217 of the *Anti-Discrimination Act*.

The following cases were cited in the judgment:

Steed v. Minister for Immigration and Ethnic Affairs (1981) 37 A.L.R. 620
East Finchley Pty Ltd v. Federal Commissioner of Taxation (1989) 90 A.L.R. 457
Hospital Benefit Fund of Western Australia Inc. v. Minister for Health, Housing and Community Services (1992) 111 A.L.R. 1
Australian Trade Commission v. Underwood Exports Pty Ltd (1997) 49 A.L.D. 411

Anti-Discrimination Act 1991 ss 7(1)(f), 106(1)(a), 217, 218
Education (General Provisions) Act 1989 ss 13, 14, 16, 17, 18

COUNSEL: Mr A.A.J. Horneman-Wren for the respondent
The appellant was represented by her next friend, her mother

SOLICITORS: Mr C.W. Lohe, Crown Solicitor, for the respondent

[1] This is an appeal under s. 217 of the *Anti-Discrimination Act* 1991 against the decision of a member of the Anti-Discrimination Tribunal handed down on 18 April 2006. The Tribunal dismissed the appellant's complaint of discrimination, which was received by the Anti-Discrimination Commission on 13 September 2004. The parties were ordered to bear their own costs. An appeal to this court against a Tribunal decision is permitted only on a question of law: s. 217(1).

[2] The appellant, whose case was conducted throughout by her mother, was born on 13 May 1994. She claims that, contrary to s. 7(f) of the Act, the respondent discriminated against her directly and indirectly on the basis of her age. The alleged discrimination was in the State education system by officers of the Department now called the Department of Education and the Arts. Chapter 2 (ss. 6-116) of the Act concerns discrimination prohibited by the Act. In that chapter Division 3 (ss. 37-44) of Part 4 (areas of activity in which discrimination is prohibited) deals with the education area. Subdivision 1 of Division 3 (ss. 37-39) deals with prohibitions in the education area, and subdivision 2 (ss. 40-44) with exemptions for discrimination in the education area. Subdivision 1 of Division 3 is as follows:

Subdivision 1 – prohibitions in education area

37 Explanatory provision (prohibitions)

An educational authority must not discriminate in the education area if a prohibition in section 38 or 39 applies.

38 Discrimination by educational authority in prospective student area

An educational authority must not discriminate –

(a) in failing to accept a person's application for admission as a student; or

(b) in the way in which a person's application is processed; or

(c) in the arrangements made for, or the criteria used in, deciding who should be offered admission as a student; or

(d) in the terms on which a person is admitted as a student.

39 Discrimination by educational authority in student area

> An educational authority must not discriminate –
>
> (a) in any variation of the terms of a student's enrolment; or
>
> (b) by denying or limiting access to any benefit arising form the enrolment that is supplied by the authority; or
>
> (c) by excluding a student; or
>
> (d) by treating a student unfavourably in any way in connection with the student's training or instruction.

[3] It was not in dispute that subdivision 2 of Division 3 of Part 4 had no application to this case, but on behalf of the respondent it was submitted that s. 106, which is in Part 5 (ss. 103-113, general exemptions for discrimination) of Chapter 2 did apply. I shall return to that contention later.

[4] The appellant's case is that she is a gifted child who has been discriminated against by the respondent in not allowing her unconditional acceleration within the school system. A claim for compensation of $500,000 was made as part of the complaint. The respondent denies the claim, asserting that it has dealt with the respondent without discrimination either direct or indirect.

[5] The events that gave rise to the complaint concern the appellant's passage from primary to secondary education. At the request of her mother she was permitted to begin school in Year 1 at the Mutdapilly State School in 1999, when she was still four years old. Although she began Year 2 in 2000 at the Warrill View State School, her mother removed her early in that year and she continued her education under the supervision of the School of Distance Education and tutored by her mother for the rest of 2000 (during which she was accelerated to Year 3) and in 2001, 2002, and 2003 until 19 August 2003, when she was re-enrolled at the Mutdapilly State School. For the remainder of the school year in 2003 she was in the Year 6-7 composite class which was taught by a senior teacher, Mr Clive Griffin. She was then nine years old, and the other children of her age at the school were in Year 4. Mr Griffin had had considerable experience in teaching, having been employed by the Department from 1980. His evidence before the Tribunal in his witness statement dated 18 March 2005 – he was not required for cross-examination - was that the appellant had completed the Year 6 work in 2003 and was one of the best two or three Year 6 students. In December 2003 Mr Griffin gave this general comment concerning the appellant's progress in the second semester of 2003 in a student progress report:

> Gracia does well across all subjects and is coping quite well with Year Six. I am particularly impressed with her level of understanding in Maths. She is very quick to grasp new concepts. I am also impressed with her reading ability and her ability to research. Academically, Gracia will succeed whatever the educational setting, but it is vital that she be allowed to 'consolidate' in social terms. Socially, next year should be better for her, with some students closer to her age in the class.

[6] Mr Griffin said that at the end of the school year in 2003 the appellant had completed the Year 6 'learning outcomes' sufficiently to progress to Year 7. For the three months that he taught her she did 'the mainstream Year 6 work performed at an above average to good level in all Key Learning Areas at Year 6 level'. He did not carry out any assessment of the appellant 'against the Key Learning Areas that would be applicable to a Year 7 student'. Mr Griffin did not agree that the appellant had achieved 'all the learning outcomes applicable to a Year 7 student' or that she had completed primary school. The appellant's mother, however, asserted that in 2003 the appellant 'had learnt all of the Key Learning Areas of primary school' and had been doing Year 8 work at home. Mr Griffin said he was extremely concerned at the prospects of the appellant's being put into a Year 8 class at the age of nine and a half because he did not see any evidence of the social precociousness that would be required for a child of her age to be able to function socially among adolescents. Socially, and, as far as he could observe, emotionally, her development was 'age-appropriate' and no more. He could, he said, envisage her having a 'very tough time of it socially' at a secondary school and was worried about her welfare in such a situation.

[7] In discussions in November 2003 between the appellant's mother and Ms Mary Allen, a senior guidance officer at the Ipswich District Office of the Department of Education and the Arts, the appellant's mother asked that the appellant be accelerated into Year 8 at the Rosewood State High School in 2004. In early December 2003, it was proposed on behalf of the Department that the appellant remain at the Mutdapilly State School or a State primary school of her mother's choice and that the Ipswich District Office prepare an individual education plan for her. (An individual education plan can be prepared to assist a gifted and talented student.) An alternative proposal was that the appellant return to the School of Distance Education and the Ipswich District Office negotiate with the School to provide a curriculum for her.

[8] Those proposals did not satisfy the appellant's mother or the appellant who was adamant that she should be permitted to attend the Rosewood State High School in 2004. Following further discussions there was a meeting at the Department's Ipswich District Office on 21 January 2004. At the meeting were the appellant, the appellant's mother, Ms Judith Hewton who was then president of the Queensland Association for Gifted and Talented Children Inc., Mr Mark Campling, then acting Executive Director (Schools) West Moreton District, and Mr Jeffrey White, then the Manager (Education Services) Ipswich and West Moreton Districts. Ms Hewton, advocate and educator, acted as the advocate for the appellant and her mother at the meeting, as she recorded at para. 6 of her statement dated 31 March 2005. Mr Campling put a proposal to the appellant's mother that the appellant take part in a program called the 'Personalised Knowledge Pursuit' program at the Rosewood State High School for six periods a week and for the remainder of the week attend the Rosewood State School where a program appropriate to her needs and abilities would be developed. Mr Campling told the appellant's mother that if the appellant were able to handle the program 'academically and socially' after a trial period her attendance at the high school would be extended. He said that if the trial were not successful the appellant could continue with the program arranged for her at the Rosewood State School that would be appropriate to meet her needs and abilities. Mr Campling had formulated the proposal following discussions with Mr White and the principals of the Mutdapilly State School, the Rosewood State High School, and the Rosewood State School.

[9] The appellant's mother rejected the Department's proposal. The appellant was by then enrolled in Year 8 at the Brisbane Adventist College at Wishart.

[10] In a letter dated 10 March 2004 from Mr Ken Rogers, Assistant Director General (School Performance) of the Office of State Schooling, to the appellant's mother, it was conceded that Mr Campling had information concerning the appellant's capabilities that gave 'a comprehensive and well-founded overview' of her abilities verifying that her reasoning abilities were in 'the superior to very superior' range. 'The main concern in considering Gracia's future schooling related to her social- emotional maturity as a nine year old and her relationships with her peers,' Mr Rogers explained. 'Given these concerns, there was a need to make sure that Gracia would be supported in ways to ensure her success in a high school setting,' he continued.

[11] After the appellant's first semester of seventeen weeks at the Brisbane Adventist College, the College provided an academic report dated June 2004 showing that the appellant had been assessed as attaining the following grades: A in computer skills; A- in religious studies, mathematics, and science; B+ in studies of society and the environment and music; B in English, industrial techniques, and health and physical education; and B- in art. The report records that the appellant had been absent for only one day, and had not missed any teaching periods. Her participation and co-operation in class sport were very good and her skill was satisfactory, it recorded. The Department's response to the request for unconditional acceleration remained, however, unaltered.

[12] The appellant's mother received a letter dated 9 July 2004 from Mr Murray Watt, Senior Policy Adviser to the Minister for Education and Minister for the Arts. Formal parts omitted, the letter was as follows:

> The Honourable Rod Welford MP, Attorney-General and Minister for Justice, forwarded your email regarding the education of your daughter, Gracia, to the Minister for Education and Minister for the Arts, Anna Bligh MP. The Minister has asked me to respond to you on her behalf. I sincerely apologise for the delay in replying to you.
>
> The Department's release of the *Framework for Gifted Education* in March 2004 was a result of a review of the previous *Policy on the Education of Gifted Students in Queensland Schools*. The review entitled, *Expanding Possible Futures: A Review of Education Queensland's Policy on the Education of Gifted Students in Queensland Schools*, is available on Education Queensland's website at www.education.qld.edu.au.
>
> Queensland schools have had provisions to ensure the needs of students who are gifted were met well before the release of the *Framework for Gifted Education*. The Framework presents guidelines for acceleration, however, the practice of accelerating a gifted student, after comprehensive assessment of the student's readiness, has occurred in Queensland schools for some time.
>
> To this end, I reaffirm the offer made to you by Mr Mark Campling, Acting Executive Director (Schools), West Moreton District that

> Gracia attend part-time at Rosewood State High School for six periods per week to participate in the school's extension program. This would act as a trial that could lead to further opportunities to extend her participation in other secondary programs. Gracia's primary school program would also be modified to provide for her extension needs. It was considered that this proposal offered greater chance of success than the immediate full time enrolment in Year 8 that you requested. This proposal addresses the main concern relating to Gracia's social-emotional maturity as a 9 year old in a secondary setting and her relationships with her peers.
>
> I invite you to contact Mr Jeff White, Acting Manager Education Services, West Moreton and Ipswich Districts on telephone (07) 3280 1987, should you require further assistance with this matter.
>
> Thank you for bringing your concerns to the Minister's attention.

[13] The appellant's mother received a letter dated 1 September 2004 from the Minister for Education and Minister for the Arts. Formal parts omitted, the letter was as follows:

> Thank you for you recent emails received on 13 July and 30 July 2004 concerning the education of your daughter, Gracia. I have also recently received a number of emails forwarded by Members of Parliament on your behalf. I sincerely apologise for the delay in replying to you.
>
> I am aware of the extensive correspondence and telephone conversations between you and officers within the Department.
>
> I reiterate that the practice of accelerating a gifted student, after comprehensive assessment of the student's readiness, has occurred in Queensland schools for some time.
>
> In June 2004, you were invited again to consider enrolling Gracia at Rosewood State School, and attend Rosewood State High School for six periods per week to participate in the school's extension program.
>
> Consideration of Gracia's social-emotional maturity as a 9 year old in a secondary setting and her relationships with her peers is of great importance. It is one of many factors that should be considered when analysing the appropriateness of acceleration. We know that gifted students sometimes have difficulty being accepted by their classmates and the absence of close peer relationships should not be confused with social immaturity.
>
> You are invited to contact Mr Mike Ludwig, Executive Director (Schools), Ipswich District on telephone (07) 3280 1773, to discuss the above proposal and other forms of acceleration.

> I am satisfied that the Department has made its responsibilities and policy position quite clear to you. I wish Gracia every success in her future education.

[14] The appellant's mother received a letter dated 22 September 2004 from Mr Terry Kearney, Acting Director-General of Education Queensland, in which the meeting of 21 January 2004 was referred to. Mr Kearney said he was satisfied the Department had made its responsibilities and policy position quite clear to her, adding that should she wish to reconsider the options the Department had made available to the appellant she should not hesitate to contact Mr White.

[15] The appellant's mother received a letter dated 19 April 2005 from Mr Pat Farmer, M.P., Parliamentary Secretary to the Commonwealth Minister for Education, Science and Training concerning refusal of her application for an allowance under the Assistance for Isolated Children Scheme the purpose of which is to provide 'financial assistance in recognition of the additional expenditure incurred by mainly geographically isolated families for the education of their children'. That letter, unlike the others to which I have referred, was not before the member, but was put before me at the hearing of the appeal.

[16] Expert evidence was given before the member by Ms Hewton, whose opinion supported the appellant's case for unconditional acceleration, and by Dr James Watters, Associate Professor of Education at the Queensland University of Technology, whose opinion was that the proposals made on behalf of the Department in December 2003 and January 2004 were 'appropriate and cautious educational strategies' in the light of concerns raised by Mr Griffin as to the appellant's social and emotional maturity. In particular, the partial acceleration proposal of January 2004 would be superior to a 'routine' Year 8 class.

[17] The complaint before the Tribunal was of direct and indirect discrimination. The appellant relied on Part 3 of Chapter 2 of the Act in which both types of discrimination are defined:

> **Part 3 Prohibited types of discrimination**
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> **9 Discrimination of certain types prohibited**
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> The Act prohibits the following types of discrimination –
>
> (a) direct discrimination;
> (b) indirect discrimination.
>
> **10 Meaning of direct discrimination**
>
> (1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.
>
> *Example*

R refuses to rent a flat to C because –

- C is English and R doesn't like English people
- C's friend, B, is English and R doesn't like English people
- R believes that English people are unreliable tenants.

In each case, R discriminates against C, whether or not R's belief about C's or B's nationality, or the characteristics of people of that nationality, is correct.

(2) It is not necessary that the person who discriminates considers the treatment is less favourable.

(3) The person's motive for discriminating is irrelevant.

Example

R refuses to employ C, who is Chinese, not because R dislikes Chinese people, but because R knows that C would be treated badly by other staff, some of whom are prejudiced against Asian people. R's conduct amounts to discrimination against C.

(4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.

(5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.

11 Meaning of indirect discrimination

(1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term –

(a) with which a person with an attribute does not or is not able to comply; and

(b) with which a higher proportion of people without the attribute comply or are able to comply; and

(c) that is not reasonable.

> (2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example –
>
> (a) the consequences of failure to comply with the term; and
>
> (b) the cost of alternative terms; and
>
> (c) the financial circumstances of the person who imposes, or proposes to impose, the term.
>
> (3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.
>
> (4) In this section –
>
> ***term*** includes condition, requirement or practice, whether or not written.
>
> *Example 1 –*
>
> An employer decides to employ people who are over 190cm tall, although height is not pertinent to effective performance of the work. This disadvantages women and people of Asian origin, as there are more men of non-Asian origin who can comply. The discrimination is unlawful because the height requirement is unreasonable, there being no genuine occupational reason to justify it.
>
> *Example 2 –*
>
> An employer requires employees to wear a uniform, including a cap, for appearance reasons, not for hygiene or safety reasons. The requirement is not directly discriminatory, but it has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular headdress.

[18] The appellant's case of direct discrimination was that the respondent treated her less favourably than it would have treated an older child with the same achievements. At paragraphs 56 to 61 of the member's reasons for his decision, he dealt with that contention as follows:

> 56. To be successful in proving direct discrimination in these circumstances, the complainant must demonstrate that she has been treated less favourably because of an attribute (in this case, the complainant's age) than another person (real or hypothetical) without that attribute in the same or similar circumstances.

> 57. Mr Horneman-Wren, on behalf of the respondents, submits that the appropriate consideration in this case would be the circumstances of a child seeking enrolment in a State high school having achieved all the Year 7 Key Learning Outcomes. It might be arguable that the complainant (as a nine year old) was treated differently to another 11 or 12 year old child who had achieved all of the Year 7 Key Learning Outcomes and was entitled to progress to Year 8 at a State high school.
>
> 58. But the factual foundation upon which this exists, namely that the complainant had completed the Year 7 Key Learning Outcomes for a State school in Queensland, was not proved. The complainant's mother indicated that the complainant had completed these outcomes in the course of work that she had achieved at home, particularly by completing work that had been set for her older sister at another school.
>
> 59. The evidence of Mr Griffin clearly demonstrates that this outcome had not been achieved during the course of the complainant's schooling at the Mutdapilly State School. He specifically disagreed with the assertion that the complainant had achieved these goals. In the circumstances, I am not prepared to find that the complainant had achieved all Key Learning Outcomes for a Year 7 student within the Queensland State school system.
>
> 60. In any case, given my findings on the major issues outlined above, I do not consider that the complainant was treated less favourably in these circumstances. The respondent gave consideration to the evidence available to it, made appropriate investigations and recommendations. It offered the complainant a reasonable program of acceleration that was consistent with the complainant's best interest and current academic research. The complainant and her mother chose not to accept the PKP program as it was not considered by them to be the best option.
>
> 61. In summary, I dismiss the complaint of direct discrimination.

[19] The indirect discrimination relied upon concerned the imposition of a term which required her, as a child who was a candidate for admission to Year 8, to have attained a level of social and emotional maturity which might be determined, in part, by her age. At paragraphs 62 to 67 the member dealt with that assertion:

> 62. In the complainant's outline of argument filed prior to the hearing, the complainant also asserts indirect discrimination. Indirect discrimination requires the imposition of a term which (a) a person with the attribute does not, or is not able to comply with, and (b) with which a higher proportion of people

without the attribute comply or are able to comply and (c) which is not reasonable.

63. The essence of the case based upon indirect discrimination appears to be the imposition of a term which required candidates for Year 8 to have attained a requisite level of social and emotional maturity which might be determined, in part, by the age of the child.

64. I agree with the submissions for the respondent that the complainant was not, necessarily, unable to comply with the term at the relevant time. To the contrary, the case for the complainant was that the Department was simply wrong in their assessment of her social and emotional maturity and that the complainant did possess the requisite social and emotional maturity. In other words, the complainant's case is that she could comply with the term. This in itself disposes of any case of indirect discrimination.

65. I also accept the respondent's submission that, the imposition of any such term was entirely reasonable in the circumstances. The respondent must prove on the balance of probabilities that the term is reasonable. Determining whether a term is reasonable will involve consideration of circumstances from the point of view of the respondent and the complainant. In striking the balance between the various interests to be considered when imposing a requirement or condition in an activity or transaction, the interests of all persons concerned must be considered.

66. I have had regard to all the relevant circumstances of this complaint, including the factors specified in s. 11(2)(a)-(c) of the Act. The possible complications for the school, the student and other students in accelerating a child beyond their level of social and emotional maturity are relevant aspects for consideration in the overall circumstances.

67. In summary, the complaint of indirect discrimination is dismissed.

[20] The hearing of the appellant's complaint took place over three days: 27, 28, and 29 July 2005. At the beginning of the first day the member, in an understandable attempt to clarify the issues before him, sought to have them defined by the parties. The appellant's mother contended that the discrimination complained of was not confined to that alleged to have taken place at the beginning of 2004 but included that shown in the letter of 1 September 2004 from the Minister for Education and Minister for the Arts and later in the letter from Mr Farmer: transcript p. 9. There followed discussion in which Mr Horneman-Wren for the respondent submitted that the matter at issue was refusal to enrol the appellant at the Rosewood State High School in 2004: transcript p. 10. The discrimination complained of was both direct and indirect: transcript pp. 18-19. Evidence of events prior to late 2003 was to be

treated as evidence of the appellant's scholastic history, but the continued refusal of the Department to enrol the appellant in the State high school after January 2004 until the Minister's letter was to be treated as part of the complaint to be considered by the member. As recorded at p. 19 of the transcript, Mr Horneman-Wren put it this way:

> As far as the events subsequent to January 2004 and what's said to be perhaps the continued refusal to enrol, if I can put it in that way, up until about the Minister's letter of June 2004, I'm happy to deal with that as part of the overall period that goes to that contravention.

(The Minister's letter was written in September 2004 and not June 2004, but it is clear that Mr Horneman-Wren's reference was to the letter I have quoted.)

[21] As I read the member's reasons, in dealing with the complaint he focussed on the decision of January 2004. He considered that it was reasonable for the respondent to have taken a cautious approach to the acceleration of the appellant, adding that she had attended a State school for only three months leading up to the decision: para. 49. He did refer briefly – but only briefly - to the appellant's enrolment at the Brisbane Adventist College, when he recorded that the principal of that school interviewed the appellant and her family and gave approval for her to attend Year 8, and that she had attended the school and had 'performed well': para. 37.

[22] On this appeal the appellant's mother made a number of submissions the effect of which was to seek a review on the merits of the member's decision concerning the events of January 2004. Since an appeal to this court is permitted on a question of law only and since the appellant's mother sought to rely on alleged errors of fact rather than of law by the member on his decision on that part of the appellant's complaint that concerned the events of January 2004 the appellant must fail on that part of the argument advanced on her behalf : it was clearly open on the evidence before the member to reach the conclusions he did. But, as I have explained, there was another aspect of the appellant's complaint before the member. It concerned the response of the Department to the appellant's request for unconditional acceleration after she had completed the first half of 2004 in Year 8 at the Brisbane Adventist College. The appellant's case was that the report of the college showed that she should have been accelerated directly into the State high school then.

[23] In the appellant's notice of appeal the following orders are sought:

1. Appeal allowed.

2. Decision Member Mullins dated 18 April 2006 set aside.

3. Matter reheard with a clear ruling as to what is said to be the acts of Discrimination: The non-admittance to year 8, all acts including December 2003, January 2004, June 2004, September 2004 to even the Feb 2005 submission at disclosure Or just the December, January non-admittance to year 8.

The body of the notice is, not unlike the appellant's mother's submissions, discursive, but it is clear that the chief matter complained of is the member's

confining his decision to the complaint concerning the Department's decision of January 2004 'when in fact there were other acts of discrimination by non-admittance' (p. 2). Reference was then made to the letters from Mr Watts and the Minister. There is also a reference to Mr Farmer's letter.

[24] The response of the Department in January 2004 came before - on the member's, but not on the appellant's mother's assessment - the appellant had demonstrated her ability to undertake Year 8 school work. By the middle of 2004 there was further proof, according to the argument advanced on behalf of the appellant, that she could be accelerated successfully without conditions to Year 8 in 2004.

[25] The principles that apply to the question I have just mentioned were not in issue, and perhaps are too well established and well known to require the citation of authority, but it is appropriate, I think, to refer briefly to four cases, all appeals on questions of law from the Administrative Appeals Tribunal to the Federal Court of Australia, in which they have been applied. In *Steed v. Minister for Immigration and Ethnic Affairs* (1981) 37 A.L.R. 620 it was observed:

> It is a mistake to conclude simply from the fact that a judge or Tribunal does not refer, or does not refer in detail, to some particular aspect of the case that it has escaped his attention. It is not in anyone's interests that the judge or Tribunal be expected to set out every consideration which passes through his mind, although some, and usually the most significant, will be expressly dealt with. (p. 621)

An error of law may, however, be committed by a tribunal if a central issue before it is ignored or there is a failure to make findings on material questions of fact: *East Finchley Pty Ltd v. Federal Commissioner of Taxation* (1989) 90 A.L.R. 457 at p. 468, *Hospital Benefit Fund of Western Australia Inc. v. Minister for Health, Housing and Community Services* (1992) 111 A.L.R. 1 at p. 8, and *Australian Trade Commission v. Underwood Exports Pty Ltd* (1997) 49 A.L.D. 411 at p. 420.

[26] The effect, if any, the appellant's apparently successful completion of the first semester of Year 8 at the Brisbane Adventist College should have had on the Department's response to her request for unconditional acceleration called for careful consideration and analysis. Although the member accepted that the Department's decision in January 2004 was not discriminatory it does not follow that its response in the middle of the year was not discriminatory, if one takes into account the assessment of the appellant in the Brisbane Adventist College report.

[27] It follows from what I have explained so far that the appellant would be entitled to have her complaint remitted to the Tribunal for further consideration of the response of the Department after her successful completion of the first semester of 2004 at the Brisbane Adventist College to her request for unconditional acceleration to the Rosewood State High School. Under s. 218(c) of the *Anti-Discrimination Act*, the Supreme Court, on the hearing of an appeal, may remit the matter to the Tribunal for further hearing or consideration or for rehearing. There was, however, another issue before the member, and also raised on this appeal, that could affect the outcome of this appeal.

[28] On behalf of the respondent it was argued that an exemption provided for in s. 106(1)(a) of the *Anti-Discrimination Act* applied to the appellant's complaint because the respondent was acting in accordance with s. 14(1) of the *Education (General Provisions) Act* 1989. The member considered that because he had found that there had been no direct or indirect discrimination in contravention of the *Anti- Discrimination Act* it was unnecessary to decide whether the exemption applied: para. 69.

[29] Section 106 of the *Anti-Discrimination Act* concerns acts done in compliance with legislation etc. So far as it is relevant it is as follows:

> **106 Acts done in compliance with legislation etc.**
>
> (1) A person may do an act that is necessary to comply with, or is specifically authorised by –
>
> (a) an existing provision of another Act;
>
> …
>
> (2) In this section –
>
> ***existing provision*** means a provision in existence at the commencement of this section.

Section 106 commenced on 30 June 1992. Then s. 12 of the *Education (General Provisions) Act*, which later was renumbered as s. 14, provided as follows:

> **12. Provision of State education.** (1) For every student attending a State educational institution established pursuant to section 13, 14 or 17, there shall be provided a program of instruction in such subjects and of such duration as the Minister approves that –
>
> (a) has regard to the age, ability, aptitude and development of the student concerned;
> (b) is an integral element within the total range of educational services offered with the approval of the Minister first had and obtained;
> (c) takes account and promotes continuity of the student's learning experiences;
> (d) recognizes and takes account of the nature of knowledge;
> (e) has regard to whether enrolment is compulsory or non-compulsory.

That subsection remains in the *Education (General Provisions) Act* in that form except for some minor amendments of no consequence to the outcome of the appellant's complaint. The references to ss. 13, 14, and 17 have been replaced by references to ss. 16, 17, and 18(1)(c) respectively made necessary as a result of renumbering, relocation, and changes of expression but not of substance. Section 13 provided for the power to continue to establish State schools, s. 14 provided for the power to continue and establish other means of educational instruction, and s. 17 provided for the power to establish and maintain other State educational institutions.

The only other amendment was the omission of the words 'a program of instruction' and the insertion of the words 'an educational program', an amendment made by s. 67(1) of the *Youth Participation in Education and Training Act* 2003. The change of description from 'a program of instruction' to 'an educational program' is one merely of words in describing the same thing, and not of substance.

[30] Mr Horneman-Wren argued that what the officers of the Department did was merely in compliance with their obligations, acting as the delegates of the Minister, to comply with s. 14(1)(a) of the *Education (General Provisions) Act*, i.e. when approached by the appellant and her mother for enrolment at the Rosewood State High School, that high school being a State education institution established pursuant to the Act, consideration was given to the provision of an educational program having regard to the age, ability, aptitude, and development of the appellant. Mr Horneman-Wren argued that the identification and development for the ultimate provision of an education program which may discriminate on the basis of a student's age and development is specifically authorized by that Act. What was done was what was required by the Act to be done in order to comply with s. 14(1)(a). Had the Minister through her delegates not considered and devised, for ultimate provision, an educational program which had regard to the student's age and development there would have been a failure to comply with that provision. Mr Horneman-Wren argued that to have regard to the social and emotional maturity of the appellant was to have regard to her 'development' within the meaning of s. 14(1)(a).

[31] I am persuaded that on the evidence that argument is correct so far as it applies to the decision of January 2004. Although the appellant was not a student attending a State educational institution at any time in 2004, what the officers of the Department did was in anticipation of her being enrolled in State educational institutions, i.e., a State school and a State high school. They did no more than their duty under s. 14(1). Consequently, even if discrimination had been established, the respondent could have relied upon the exemption provided for in s. 106, because s. 103 of the *Anti-Discrimination Act* provides that it is not unlawful to discriminate with respect to a matter that is otherwise prohibited under Part 4 if an exemption in ss. 104 to 113 applies.

[32] Although on the evidence it is clear in my view that s. 106 of the *Anti-Discrimination Act* would apply to exempt the respondent from responsibility for discrimination because the program offered to the appellant in January 2004 was provided in compliance with s. 14(1) of the *Education (General Provisions) Act*, the question whether that program was still in compliance with the latter provision in and after June 2004 is a question of fact yet to be determined. By June 2004 the appellant had reached her tenth birthday and her aptitude and development had been demonstrated to be such as to result in her successfully completing the first semester of year 8 at the Brisbane Adventist College.

[33] I therefore conclude that the appeal should be allowed, the orders made by the Tribunal quashed, and the appellant's complaint remitted to the Tribunal for further hearing and consideration of that part of the complaint that concerned events in and after June 2004.

[34] I should add that the relevance, if any, of the letter from Mr Farmer is of course a matter for the determination of the Tribunal.