



AUSTRALIAN FEDERATION OF DEAF SOCIETIES

Secretariat address:

37 Pearl Street

Newtown NSW 2042

Phone: 02 9550 2029

Mob: 0439 376 475

Email: executiveofficerafds@bigpond.com

Productivity Commission
LB2 Collins St East
Melbourne VIC 8003

Dear Sir / Madam,

The Australian Federation of Deaf Societies ("AFDS") wishes to thank you for the opportunity in being able to respond to the Disability Discrimination Act 1992 (Cth) inquiry.

AFDS is a peak body made up of the Deaf Societies across Australia representing the interests of organisations providing services to the Deaf community. The Federation was formed in 1966 with the principal objective of improving awareness of issues relating to the sector by Commonwealth and State governments. AFDS believes that people who are Deaf and use Auslan should enjoy the same rights and responsibilities as other Australians. AFDS is, therefore, working with the Deaf community in order to achieve equality of access, equal rights and greater visibility.

The Disability Discrimination Act has had a significant impact on the lives of people with disabilities. This is especially so within the Deaf community, which has seen a number of changes within the telecommunications area as a result of the *Scott v Telstra* case and the introduction of captioned movies.

Further, the prohibition of discrimination has generated a process of positive change for many people that have a disability and, it is hoped, for other Australians.

AFDS recognises the importance of this inquiry. There are two facts, however, that need to be highlighted:

1. first, that it is impossible to measure the success of the DDA solely by reference to the number of DDA matters that are determined by Courts. Many complaints are successfully resolved by conciliation and never come to the attention of the Courts or the public; and
2. secondly, people with disabilities are less likely than others to seek remedies for what has happened to them because, more than others, they are either unfamiliar with or intimidated by judicial and administrative processes. The result is that wrongs are not righted.

Our submission is mainly about discrimination in the provision of goods and services. In particular, our submission reflects the experiences of Deaf Societies, across Australia, of the discriminatory consequences for the Deaf of lack of access to sign language interpreters for service provision. The concept of reasonable adjustment, in line with the unjustifiable hardship provision, is looked at in the context of sign language interpreting and the experience of Deaf people seeking access to such services.

Yours sincerely

Kevin Jolly
President
Australian Federation of Deaf Societies
9 September 2003

SUBMISSION

Definitions

The position of AFDS is that the current, broad definition of disability under the Act is appropriate when defining disability for discrimination purposes. Such a definition of disability that shapes our society ensures a shift from the traditional characterisation that narrowly applied “disability” to someone who may use a wheelchair or who has an intellectual disability. The current definition affords needed protection to a larger number of Australians. The current definition, for example, copes with the fact that Deaf people are different- one Deaf person will use sign language whereas another will rely on oral cues. Under the current definition, it is not necessary for a complainant to demonstrate a particular “Deaf” behaviour in order to validly bring a complaint. Instead, the definition recognises the characteristic of deafness, that being the inability to hear, as the defining characteristic.

As has been pointed out, the definition used in the DDA applies only for the purpose of the DDA. The current definition is practical in its application than the various degrees of defining disability that are used to measure eligibility criteria for social security benefits for example, and it is our belief it should remain separate for this purpose.

Temporary Exemptions

It would seem from the outset that the power of the Commission to issue temporary exemptions, in one sense, contradicts the objectives of the DDA. If the objective is to eliminate discrimination as far as possible, then the exemption provision defeats the purpose of the objectives. Having had the opportunity to read a number of other submissions to the inquiry, AFDS concurs with the view presented by Ms Anita Smith, which addresses this issue by suggesting that organisations would be better advised to adopt their own measures to redress discrimination and develop comprehensive action plans.

In doing so, these organisations are taking a pro-active approach to identifying and addressing potential discriminatory practices and thinking about ways in which these practices could be eliminated without resorting to the exemptions provisions. At the same time it shows a commitment from these organisations that complements the objectives of the Act.

Reasonable adjustments = Unjustifiable Hardship

The issue of reasonable adjustments to ensure that services are equitable for Deaf people can become a contentious one. For Deaf people, the concept of reasonableness extends to the provision of a sign language interpreter in order to access a service for the duration of the appointment at that service. The adjustment provision therefore extends to that of making a service accessible through the provision of an interpreter.

A request to have an interpreter present at an appointment with a service provider has, on many occasions, led to the denial to that service. Service providers have not been willing to meet the costs associated with engaging an interpreter when requested. This results in Deaf people missing out on services, or has caused state Deaf Societies to meet the cost (often from capital) of employing an interpreter for such appointments.

It is the experience of AFDS that many services refuse to provide an interpreter for a Deaf client. Documented evidence is available that many services, especially within the

area of private medical and legal services, have refused to engage a professional interpreter. The most common theme with this refusal stems from the fact that to engage an interpreter in these instances results in a cost to the service provider. This, in turn, has placed on state Deaf Societies the burden of provision of interpreters for the Deaf person. Since Deaf Societies are committed to ensuring that deaf people receive equitable access to medical and legal service (because such services impact on the life decisions of Deaf people), the Societies have borne this burden for some years. Unfortunately, this has resulted in substantial financial deficits for Deaf Societies. Societies do not have the financial means to cope with the cost of interpreting, and some of them have been running down capital for some years in order to meet the need. Clearly, the irrecoverable loss of capital can continue for long.

Deaf Societies have done this because both State and Federal Governments have not seen the discriminatory effect of not providing interpreters for deaf people when they need to access services. Government funding for such interpreting services is non-existent in most states, or, where funding is provided by state governments, it is generally inadequate to meet even basic levels of demand.

Covering such costs has many long-term effects for Deaf Societies. The Deaf Societies of Victoria and South Australia have been forced to withdraw unfunded interpreting services for which a fee is not able to be recovered. This is a purely financial decision and is paramount to the survival of those individual Deaf Societies. All Deaf Societies are have, or are in the process of, making further financial decisions which, in some instances, means selling and/or relocating to other premises, or undertaking other revenue initiatives, such as employment and aged care services. This has resulted in a shift of service provision from mainstream activities to segregation, once again. As a result, the notions of independence and freedom to make choices for Deaf people are lost as they either miss out on services, or rely on people who do not use their language- or use it well- to get them through.

The establishment of a deaf -specific service does reduce the need to engage an interpreter, and it ensures that the service has Deaf- friendly practices. Generic organisations that are not willing to look at pro-active ways of making their service accessible for Deaf people greatly reduce choices available to Deaf people (that are available to others). Reducing rights of Deaf people also reduces participation of Deaf people in mainstream society. It is clear here that the objectives of the DDA are not being met where access to goods and services for Deaf people cannot be guaranteed.

Complaints

If a Deaf person were to lodge a complaint of discrimination against a particular service provider, the service provider will probably raise a defence of unjustifiable hardship. Doctors and solicitors charge clients for both their time and for disbursements. If a Deaf person wants to access these services, they are either denied access. Sometimes, this is because the Deaf person cannot afford an interpreter and the service provider knows that, for that reason, the service provision will be much longer than usual and largely un-billable. More often, this is because the service provider knows that a meeting with a Deaf client who does not have an interpreter is fraught with the risk of communication failure about crucial matters and the service provider does not accept that he or she should have to bear the cost of ensuring that an interpreter is present.

As the exact nature of what constitutes an unjustifiable hardship is not defined in the DDA this has become problematic. Basically, the unjustifiable hardship clause can provide a defence for the act of discrimination. That is to say that where the adjustment needed to prevent discrimination imposes a hardship on the respondent, this section may be used as a defence. As section 11(a) of the DDA provides for, the concept of

unjustifiable hardship is not solely an economic factor and the courts may consider the benefits as well as the detriment as the issue in question.

There is, however, a further consideration here in balancing the unjustifiable hardship section between small and large businesses. A much larger organisation may have the resources to eliminate discrimination while a smaller organisation may not.

Deaf people need to use various services. Sometimes, the services they need are provided by both smaller (affordable) and by larger (sometimes expensive) businesses. Although it appears economic considerations are at play, the choices for deaf people again become limited. Accessing an interpreter differs from the traditional means of structural changes needed for people with disabilities to access services, and therefore interpreting becomes an ongoing cost. This is a cost for which many organisations rarely budget.

It is still open to debate as to whether sign language interpreting for medical appointments, for example, is mandated by law. Following the recent Canadian decision in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, Canada now mandates the provision of an interpreter in all public and private medical appointments as a right for Deaf people. However, there are still many difficulties in putting this practice in place. These difficulties stem from it being a resource issue in terms of affordability of the interpreter and lack of mechanisms in place for enforcement of this practice. These difficulties, from the perspective of AFDS, can be resolved in a number of ways, including budgeting provision for interpreters by the major players in health services.

The excuse that services 'can't' afford to engage an interpreter should now be seen as a bygone issue.

Perhaps the most positive aspect of the decision is the recognition and validation of sign language interpreting in Canada and that access to health care services in Canada is a right for all Canadians. In Australia, the Deaf community, along with their hearing peers, also recognise that access to medical treatment and health care is a basic human right. This right is short lived, however, when interpreters are not accessible for all.

An alternative approach to looking at the issue might be to place more emphasis on the service provider as the party requiring the interpreter in order to ensure their service is accessible to all sections of the community. Too often it is the deaf person who is stigmatised with the need for an interpreter, and this need is then negatively perceived as an additional cost to the service provider.

Closing remarks

As the DDA is individual complaint based, the instigation of litigation can be a time-consuming process. Most Deaf people who do initiate a discrimination complaint based on a failure to provide interpreting often only seek redress for an interpreter to be present at a chosen appointment. Other damages, such as compensation are rarely sought. Without an interpreter, participation as well as access is not afforded.

The recent administrative function of HREOC as a result of the *Brandy v HREOC* decision and the subsequent changes to the *Human Rights Act* ensures that disability complaints are now a cost jurisdiction. This in turn may have a detrimental effect on whether a Deaf person will lodge a complaint knowing that there is a possibility that costs will be awarded against them in the result that the complaint is not upheld by the court.

Then again, whether a case involving discrimination is successful or not should not be a measure of success of the DDA. Rather the prevention of discrimination and the attitudinal changes of society as a whole can be a foundation in terms of measuring the success of the DDA. It is acknowledged however that conciliation, action plans and educational forums have also been an effective tool in allowing the DDA to have success.

For Deaf people, the use of an interpreter is a necessity of life. Sadly, due to the inability or unwillingness of service providers to make their services accessible to Deaf people, we are now seeing a move towards the old practice of segregated service provision as opposed to generic mainstreamed service provision.