



29 January 2010

Manager
Broadcasting Content Policy Section
Department of Broadband, Communications and the Digital Economy
GPO Box 2154
Canberra ACT 2601

By e-mail: mediaaccessreview@dbcde.gov.au

Dear Sir/Madam

Re: Media Access Review

We write in relation to the Access to Electronic Media for the Hearing and Vision Impaired Discussion Report

The Disability Discrimination Legal Service Incorporated is an independent, community organisation that specialises in disability discrimination matters. It is a not for profit incorporated association that provides free legal service to people with disabilities. It also provides community legal education and undertakes law and policy reform projects in the areas of disability and discrimination.

A committee of volunteers manages the service. The DDLS Management Committee includes people with disabilities. Many people with disabilities, volunteers and students contribute their efforts to the work of the DDLS.

The DDLS works as an active member of the community legal sector and the disability advocacy sector.

We have read the submission by the Disability Discrimination Legal Centre, Sydney, and endorse its contents, with the following modifications. In relation to recommendations two, three and four, we believe that cinema releases, DVDs, and television programs should be captioned and have audio description regardless of whether they have been captioned and audio described overseas

In addition we make the following comments.

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Remedies Under the Disability Discrimination Act

Section 12 of the *Act* provides that the *Act* applies throughout Australia and that the *Act* has effect in relation to acts done within a Territory. There appears to be an uncertainty about whether a person who is discriminated against in the provision of goods under *Section 24*^[1] is able to take action against a foreign manufacturer or producer of a product manufactured or produced outside the territorial jurisdiction of Australia. For instance, a movie in DVD format produced abroad that has no subtitles or captions is not accessible to a person with a hearing impairment. The sale of the DVD without such a facility may constitute indirect discrimination under *Section 6*^[2]. In cases where the producer has a domestic agent, the complaint may be filed against the agent under *Section 9(12)*^[3] of the *Act*. In cases where the foreign producer does not have a domestic agent, but a local distributor under a distribution contract supplies the product (the DVD movie), to the Australian public, a complaint may be made against the distributor under *section 122* of the *Act*.

Section 122 of the *Act*^[4] provides that a person who is aiding or abetting a discriminatory conduct is as liable as the person who has committed the discriminatory conduct. A successful complaint under this provision is unlikely however to succeed because the distributor is usually able to rely on the defence of unjustifiable hardship^[5]. The distributor under its contract with the producer may not have the contractual prerogative to add additional feature such as captions^[6]. Adding captions may necessitate deletion of other features that may be of value to other consumers. If the producer provides a master copy of the movie in DVD format without captions, the distributor obligated to make the product accessible to deaf persons may be faced with the possible prohibitive costs of captioning and reproducing captioned copies.

Hence, there is a need to put in place standards or measures to ensure that goods manufactured abroad, particularly movies in DVD formats, are accessible for a person with a hearing loss. Currently the *Act* is not effective in resolving this type of discrimination.

We wish to make the following the comments in relation to the broader obligations of government and industry to the disability community.

There seems to be a considerable amount of money being expended by corporations on improving technology in a number of areas linked with cinema and television – for example high definition digital and 3D. The rapidly changing nature of technology sees continued expenditure aimed at improving the experience of media access for people without disabilities. In the meantime, expenditure on the technology required for people with hearing and vision impairment is deemed onerous by the corporations, as mentioned numerous times in the Discussion Report.

It is disingenuous for corporations to claim financial hardship when it comes to access through captioning for example, when it is clear they are spending substantial amounts of money on improving access for people without disabilities – where there is no real need. This occurs in the context of the current extremely poor access for people with vision and hearing impairment.

[1] Section 24

[2] Section 6-

[3] Section 12,ss 9

[4] Section 122

[5] Section 24,

[6] The Australian Caption Centre received an annual grant from the Department Of Family and Community Services to caption “general release” entertainment videos. This grant allows the captioning of many titles free of charge for Australian distributors however; not every film can be captioned under this grant because funds are limited. The costs to provide captions to a movie either in VHS or DVD is about t \$26.00 per minute.

The Commonwealth has obligations to ensure the aims and objectives of domestic and international discrimination and human rights legislation are met. The common response of industry to rely on Standards and action plans is not helpful for people with disabilities, and the DDLS is completely against further exemptions in the area of media access.

An example of these failures of government and industry is the Transport Standards, where dates for compliance have not been met in Victoria. No consequence has occurred for non compliance, and the inevitable result for people with disabilities is a continued inability to access the tram network – significantly affecting their quality of life. Exemptions and action plans are chipping away at the rights of people with disabilities and the very legislation that government claims is crucial for obtaining equality of human rights. It is the government who should be ensuring compliance with any voluntary or mandatory targets -- however it does not.

While there seem to be a plethora of reviews and committees considering a number of issues brought up in the Media Access Discussion Report, such reviews and committees delay concrete outcomes for people with disabilities. A good example is the issue of captioning, where there has been little real progress and numerous problems with quality continuing over a significant period of time.

We particularly disagree with the claim on page 30 under “The building and refurbishment of new or existing cinemas in Australia is a commercial decision for cinema operators.” in relation to the provision of captioning and audio access. The provision of such access is not in our view anything to do with “refurbishment”. It is access to a service, commensurate with section 24 of the *Disability Discrimination Act* - “Goods, Services and Facilities”.

The DDLS believe that the Commonwealth should be taking a “hands on” approach to the issue of media access for people with disabilities, amongst other things. Since signing the Optional Protocol of the *UN Convention on the Rights of People with Disabilities*, the Commonwealth has signalled its intention to ensure that the rights of people with disabilities under the Convention are upheld. It therefore has an obligation to ensure that it leads the way in this regard.

It is vital in the consideration of the discussion report that it is acknowledged that the current access to media for people with hearing and vision impairment is extremely poor. In that context, decision-making on improving access should be endorsing high expectations for corporations involved in these industries to improve access, and do so immediately.

It is not appropriate for people with disabilities to be expected individually to make complaints of discrimination at the relevant human rights commission in relation to these issues. In particular, the inability of those individuals to further their complaint to the Courts due to costs requires government to take a more proactive role. We would request that government stepped up to this responsibility, and rather than approach these matters as an impartial body, recognise that it has the capacity to be quite proactive in this area.

Ultimately, whatever is decided, we are against any further exemptions or protections for industry in the area of access. The Disability Discrimination Act already has an available defence for any discrimination complaints, of unjustifiable hardship. If industry at any time should seek to defend its obligations to create access to media for people with disabilities, such a defence is already available to them and does not need to be supported by any other agreements outside of the Act.

If we can provide further information that would assist please contact us.

Yours sincerely

Julie Phillips
Manager

Placido Belardo
Principal Solicitor