

BREAKING DOWN BARRIERS

In the first of two articles, KERENA MARCHANT considers the needs of tribunal users who are disabled with language-based access needs, and the practicalities of providing support during a hearing.

Despite the efforts of tribunal chairs and members to ensure that tribunals are jargon-free and accessible to users from all backgrounds, there remains a group of people who, because of disability, cannot access English in spoken or written form, or sometimes in either. There are also those who have English as a second language and are not sufficiently fluent to access tribunal proceedings. This broad group includes the nine million with disabilities who have language-based access needs and the estimated three million people whose first language is not English. The first group includes those who have had these needs since birth or through acquired disability. They can include people with learning difficulties, mental health disabilities, speech and language difficulties, sensory disabilities, neurological disabilities or injuries. For these people, it will be impossible to have a fair hearing without some form of language facilitation, such as a foreign or sign language interpreter, communicator or facilitator.

In the summer 2007 issue of *Tribunals*, Kerena Marchant will look at how best to include those for whom English is a second language in the tribunal process.

Some common terms

An interpreter or translator is someone who changes what someone is saying into another language. The term 'translation' is often associated with those working mostly on written translations. There is another, important distinction between the words 'translate' and 'interpret', which is that a translator will simply translate literally, while an interpreter may have to interpret differences in culture as well as language.

British Sign Language

Interpreters are mostly associated with foreign language interpretation. Disabled people do not require interpreters

or translators for access needs, although they may need additional interpretation support if their first language is not English. However, there is one group of disabled people who use interpreters for reasons of language, culture and access – the deaf community. Deaf

people who use British Sign Language (BSL) regard themselves as a linguistic minority with their own culture and language. Many of this group see themselves as a linguistic minority first and disabled second. BSL has its own distinct grammar and vocabulary, which is quite distinct from English. In fact, the nearest language to BSL in terms of syntax and paralinguistics is Mandarin. BSL has no written form and if deaf BSL users want to record information, they usually record on to videotape. Deaf people have their own culture and way of living that is distinct from hearing people and BSL is the linguistic reflection of that culture.

Other signing systems

There are other signing systems used by deaf and disabled people, such as Sign Supported English (SSE), Signalong, Makaton and Paget Gorman. These signing systems are distinct from BSL in that they are signing systems that are English-based, as opposed to a distinct language. SSE, which is used by deaf people whose first language is English as opposed to BSL, is based on BSL signs, but these are put into English order. Makaton and Signalong, which are used by people with learning difficulties, also borrow some signs from BSL. Paget Gorman is a signing system that is used with children who have speech and language disorders and has no link with BSL signs. When communicators deliver signing systems, they are not interpreting, but translating, by matching a

sign to an English word. They may use a more simple form of English that meets the user's more limited language needs, but they are not playing an interpreting role. Some communicators will not use a signing system but use their skills to break down spoken language so that it is accessible to disabled people with a learning, speech or language difficulty. Some communicators may use symbol charts or be able to understand unclear speech. Some hard-of-hearing people may use a lip speaker who simply repeats what is said using clear lip patterns.

The whole judicial process is reliant upon effective oral communication. Any failure in oral communication will strike deeply at the delivery of justice and may arise from:

- Lack of fluency in the English/Welsh language.
- Illiteracy.
- Learning disabilities.
- Hearing difficulties.

Equal Treatment Bench Book, Judicial Studies Board

Article 6

The moral and legal right to a fair hearing for all tribunal users is contained in Article 6 of the European Convention on Human Rights. Under section 6 of the Human Rights Act, it is unlawful for a public authority to act in a way that is incompatible with the Convention. The right to a fair trial contained in Article 6 is compelling reason for tribunals to provide interpreters or communicators for those who need them. Failure to provide such facilitation puts tribunals in breach of Article 6. A tribunal could face a legal challenge for failing to provide language interpretation or facilitation under Article 6.

Disability Discrimination Act

Communication access is also an integral part of the Disability Discrimination Act 1995, which makes it unlawful to discriminate against disabled people in the provision of facilities and services. By failing to comply with section 21 of that Act, which deals with the duty of providers of services to make adjustments, including the

provision of 'auxiliary aids or services' to tribunal users, tribunals could face charges of disability discrimination. Section 21 specifically mentions sign language interpreters, but the section can be read as including other kinds of communicator for those with language difficulties.

While the 1995 Act does not expect public service providers to anticipate the specific needs of every user, tribunals should make their willingness to facilitate any reasonable request for language facilitation plain to their users, and ask them to alert the tribunal to any access needs they may have, in order to ensure a fair hearing.

Regulations

Tribunals take mixed approaches to the provision of interpreters or language facilitators. The regulations for some tribunals contain no statutory obligation to provide interpreters, let alone communicators. Others, such as SENDIST and SENTW, have regulations that allow for the provision of interpreters, although they do not specify whether this includes all the kinds of language facilitator that users might need. However, whether or not a tribunal's regulations permit the use of interpreters, the Disability Discrimination Act applies, as does Article 6, where a tribunal is determining a party's civil right or obligation.

Letting the user know

Tribunals need to let their users know of their right to use an interpreter or to request communication support to meet their access needs or any equipment that is required to do this. Many tribunals already include guidance in their 'how to appeal' literature or in their correspondence with the appellant before the hearing. It should be made clear to appellants, however, that this right is not confined to foreign or sign language interpreters, but includes other kinds of language facilitator, and that they should let the tribunal know of their access needs.

Avoiding an adjournment

Once the appellant's need for communication access has been identified, the tribunal will need to consider where to go to find an appropriate person. A tribunal should

steer away from asking a tribunal user to provide their own interpreter or facilitator, which may lead to an untrained family member or friend coming along to help the appellant, or the appellant paying for their communication support. Sign language interpreters and lip speakers working with deaf people usually have years of training in how to interpret, and this includes interpreting boundaries that apply in legal situations. Communicators do not belong to a professional body with standards and lack this training. A friend or family member without this training could become a liability to the tribunal user and to the tribunal process. It is imperative that tribunals ensure that an impartial communicator, preferably who is experienced in working in legal situations, is booked for the hearing. There are many agencies for interpreters and facilitators that tribunals can approach. The tribunal should also ensure that that person knows the signing or correct communication system used by the appellant. Tribunal members themselves can aid this process by reading the papers before the day of the hearing and alerting the tribunal administration where they suspect an access need may have been overlooked or it is not clear what the appellant's communication needs are. This good practice can avoid unnecessary adjournments.

The right to a fair trial goes much deeper than the simple provision of an interpreter or communicator, which will not on its own guarantee a fair hearing. The tribunal also needs to know how to identify an appellant's need for language facilitation, and panels need to know how to work with a wide range of interpreters, equipment and with disabled people's advocates during the hearing.

Specific needs

Disabled people cannot be categorised into groups with the same access and communication needs. Each is different and has individual communication needs. Some people may have more than one disability – for

example, a person who is deaf and blind may need hands-on or visual frame signing. Flexibility and lateral thinking is the key to working with disabled people. The table on page 6 attempts to summarise the types of support that might be required by people with different disabilities.

Children

Often children are involved in tribunal proceedings, either as live witnesses, on videotape or through a written interview with an independent interviewer. It is important that children's language needs are met to ensure accurate and equal access for them in the tribunal process. Some tribunals include the use of interpreters

or communication facilitation in their guidelines on working with children.

A child's testimony may need to be facilitated by an independent communicator or sign language interpreter. Some public bodies use specialist services to facilitate this, such as the National Children's Homes who provide skilled interviewers who will work to an appropriate communicator or interpreter to secure the view of the child for legal proceedings. This ensures the integrity of the child's interview, which should not be conducted or facilitated by a parent or anybody who is party to

the appeal, although the parent may sit in on it. The communicator should be comfortable working with a child, who may have a different use of language to adults.

Facilitating

The interpreter or communicator is there to facilitate the appellant and ensure that they can access the hearing and have a fair hearing. Tribunal panels need to have full understanding of the role of interpreters and communicators as facilitators, to ensure that a fair hearing is achieved. Interpreters and communicators are not there as helpers, friends or supporters. They are there to translate or break down language and to provide

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Disability	Access need	Communication support required
<i>Hearing-impaired.</i> Deaf and hard of hearing.	Cannot hear speech, no speech or unclear speech. Some deaf people cannot read or write English.	<ul style="list-style-type: none"> ● BSL interpreter. ● SSE communication support. ● Lip speaker. ● Radio aid. ● Loop system. ● Speed text. ● Palentype.
<i>Learning disability.</i> People with a variety of diagnosed and undiagnosed difficulties, such as Down's syndrome, autism, dyspraxia, fragile X syndrome, acquired brain damage.	Developmental delay, short- and/or long-term memory difficulties, processing difficulties.	<ul style="list-style-type: none"> ● Makaton signing system communicator. ● Advocate to break down language and facilitate the person to express their own view. ● Use of symbols to understand meaning.
<i>Visually impaired.</i> Blind and partially sighted.	Unable to see, or varying degrees of useful sight.	Tribunal paperwork in large print, Braille or tape. If deaf and blind, the person may need a visual frame or hands-on signing.
<i>Speech and language difficulty.</i> Dyspraxia, Down's syndrome, autism, cerebral palsy, acquired brain injury, stroke, people with throat cancer.	Varies – can have expressive and/or receptive difficulties accessing language or be unable to speak. Alternatively, may have processing difficulties with spoken language.	<ul style="list-style-type: none"> ● Paget Gorman signing. ● Signalong. ● Makaton signing. ● Argumentative communication equipment (voice boxes). ● Communication charts. ● Symbol books. ● Communicator who can understand their speech.
<i>Mental health disability.</i> Schizophrenia, depression, anxiety.	Anxiety, paranoia, impaired grasp of reality, short- and long-term memory loss.	Often need a trusted person to help get across their point of view and to cope with anxiety. Many people with mental health needs can have other disabilities, such as learning difficulties, deafness and speech and language needs, and their communicator needs to have experience in mental health needs to fully facilitate them.

access. Panels need to work within a tribunal framework that enables this. Hearings that involve communication support will take longer, and double time should be allowed. While a BSL or SSE sign language interpreter will sign at the same time that panel members and parties are talking, they may need slightly longer to keep up or break down and expand on some aspects of language.

Communicators or facilitators with learning disabled persons may need extra time to break down and explain the meaning of what has been said. While it is possible to use Makaton signing or Signalong at the same time that the panel members are talking, it is important to remember that these are very simple signing systems with a limited vocabulary, which does not encompass legal

jargon. The communicator may need the panel to use a more simple register of language and need extra time to explain legal concepts or the meaning behind questions. If it is a long hearing, two interpreters may be needed, or ample breaks provided if there is a single interpreter. The Council for the Advancement of Communication with Deaf People (CACDP), the professional body for British Sign Language interpreters, requests that their interpreters have a break every 20 minutes to ensure that they are fully able to process and translate to a high standard. If equipment is to be used, such as a loop system, radio aid or Palentype machine, time needs to be set aside to set it up in the tribunal room, ensure that it is working and that all involved in the hearing can use it and are comfortable with it.

Before the hearing

The panel needs to find out how the communicator plans to work, and where they need to sit or stand. For example, a sign language interpreter or lipspeaker will be unable to stand directly in front of a window, as the deaf user will be unable to focus on them against the light. It is not unreasonable for a panel to move to the other side of the table in such a case. The signing interpreter will also need to sit or stand on the same side of the panel. An advocate or communicator for a person with learning difficulties may need to sit beside to the appellant, and may need room on the table for a symbol chart.

Consideration needs to be given to where the interpreter or communicator waits for the hearing. There is no right or wrong approach – access and impartiality are the important issues. For example, the appellant may need help in communicating with the clerk or the other party before the hearing and the interpreter should, in these instances, be with them. It is not appropriate for the interpreter to be with the appellant to help them prepare their case while waiting for the appeal! However, it is important to give the interpreter and the appellant

a short opportunity to ensure that they can understand each other prior to the hearing, and for panels to check that this is the case at the start of the hearing.

During the hearing

The chair and panel members need to pace their questions and legal explanations at an appropriate speed for the communicator or interpreter. The exact pace can vary! An educated deaf person and their interpreter or lip speaker will be happy with a normal pace, while a person with limited English may need a slower pace. In this case, the chair and panel should try to give simpler explanations and questions. Communicators have to

listen, and then process and break down the language for the appellant, and may need a slightly slower pace to facilitate this. It is good practice to check that the pace and the language level are acceptable to both the interpreter and the person who is being assisted by them. The law is complicated and the onus is on the chair, not the communicator, who lacks legal training, to make it understandable. It is also important that tribunal panels direct their questions to the appellant, and not to the interpreter or communicator.

Panel members are well aware that they should avoid asking leading questions.

Court interpreters should also be aware of this, but many are not, and many of the different communicators working with disabled people may never have worked in legal situations. It is worth reminding them throughout the hearing of the importance of translating literally what is said, and not doing more – for example, explaining it or giving the appellant the answer. If an interpreter working with a disabled person considers it is necessary to explain questions (as may be the case with a learning-disabled person), there needs to be some discussion with the panel chair as to how this is to be handled, to ensure they are not overstepping the boundary between facilitation and help. Equally, if the appellant's speech is unintelligible, the chair should monitor whether a

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communicator is actually listening to the appellant speak, or just answering for them. Putting this into practice is easier said than done, especially when dealing with learning-disabled people who may not understand what is asked of them.

Panel members need to control the situation using a variety of questioning strategies. I remember asking a young man with Down's syndrome if he could dress himself with a simple question: 'Are you able to dress yourself?' The advocate translated this as 'You can dress yourself, can't you?' Before the young man could reply, I told the advocate I would rephrase the question and asked: 'Can you put on your T-shirt yourself? How do you do this?' – and went on to ask questions about every item of clothing.

In a similar situation, I asked a gentleman with cerebral palsy about the help he needed during the night. He was understandably nervous, kept having muscular spasms and was unable to touch the words on his voice box and symbol chart, so his access worker started pressing them for him. I could see that he was not always pressing the keys or touching the word that the appellant was trying to point to, so I asked the appellant to confirm that the answers given were correct by nodding or shaking his head.

It is important to remember that an interpreter may not only have to translate language, but also culture. It is also worth remembering that deaf and disabled people have their own culture, which will influence their perception of the world, and that some legal and subject jargon that tribunals use don't translate into BSL. It is a sad fact that many deaf people with mental health disabilities are misdiagnosed or their psychiatric needs underestimated, because questions asked by mental health professionals – such as 'Do you hear voices?' – are signed without regard to culture.

Flexible

The final rule for tribunal panels working with interpreters and communicators is to be flexible and imaginative. I remember an appeal where the appellant was a deaf Somali refugee who had come to the UK

via Holland. He had no language at all, except a few Somali and Dutch signs. A previous hearing had been adjourned as the BSL sign language interpreter could not understand or be understood by him. It was decided to use two interpreters – a hearing BSL interpreter to translate the panel's questions to a deaf interpreter, who would use a combination of GESTUNO (an extremely visual form of signed communication used by deaf people internationally), mime and picture drawings to communicate with the appellant. The deaf interpreter would then sign back in BSL the appellant's answers to the BSL interpreter, who would voice them over to the non-deaf members of the panel. Triple time was allowed for this appeal – and it was needed!

The decision

The appellant's right to a fair trial does not end with the hearing, but with the decision. If it is the practice of your tribunal to give oral decisions after the hearing, make sure the clerk is aware that you need the communicator to stay for the decision. Some tribunals who issue written decisions ask appellants if they would like their decisions translated, and warn them that that process will take longer. In the case of a disabled appellant, tribunals need to clearly identify if this extends to actually paying an interpreter to record the decision on videotape in BSL, a Braille transcriber or for a communicator to translate into symbols.

Conclusion

There is no doubt that tribunals have an obligation under Article 6 and the Disability Discrimination Act to cater for the wide range of disabled people who require some form of language facilitation, either with human aid or by access to equipment, such as a loop system.

Finally, I feel I should apologise for skimming the surface of this deep and complex issue, and express the hope that the JSB will produce a comprehensive booklet at some time in the future.

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