

INQUIRY INTO PUBLIC TOILETS

Organisation: Anti-Discrimination New South Wales

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Anti-Discrimination NSW

Submission to the Inquiry into Public Toilets

1 November 2024



Anti-Discrimination
New South Wales

Acknowledgement of Country

Anti-Discrimination NSW acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this document.

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Introduction

Anti-Discrimination NSW (**ADNSW**) thanks the NSW Legislative Council's Portfolio Committee No. 8 – Customer Service (the **Committee**) for inviting submissions to the inquiry into public toilets.

The terms of reference include that the Committee should have regard to:

- the provision, design, accessibility and inclusivity of public toilets across NSW, including toilets provided in public spaces and toilets provided for the use of members of the public in private premises accessed by the public,
- state, national and international best practice for the provision and maintenance of public toilets,
- the regulation of, and funding for, public toilets in NSW and whether new standards, guidelines, funding models, legislation or other forms of regulation are warranted, and
- any other related matters.

About ADNSW

ADNSW administers the *Anti-Discrimination Act 1977* (**ADA**) which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities. Sexual harassment, as well as vilification on the grounds of race, transgender status, homosexuality, HIV/AIDS and religion, is also unlawful.

ADNSW works to eliminate discrimination in NSW by:

- answering enquiries,
- resolving complaints,
- raising awareness about discrimination and its impacts,
- managing applications for exemptions under the ADA, and
- advising the government about discrimination issues.

The ADA is currently under review by the NSW Law Reform Commission¹ and ADNSW has made a submission advocating for the expansion of various protected attributes.

Scope of Inquiry

While the majority of the inquiry's Terms of Reference are not within ADNSW's areas of expertise, the following terms appear to coincide with ADNSW's legislated areas of responsibility:

¹ Anti-Discrimination Act Review, Preliminary Submissions, Law Reform Commission,
<https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review/preliminary-submissions.html>.

‘(a) the provision, design, accessibility and inclusivity of public toilets across NSW, including toilets provided in public places and toilets provided for the use of members of the public in private premises accessed by the public’.

The accessibility and inclusivity of public toilets in NSW has the potential to create discriminatory impacts particularly for groups with characteristics protected under the ADA. These groups include but are not limited to:

- People with disability
- Carers with young children and prams
- Older persons
- People who identify as transgender or non-binary

Our submission will primarily focus on attributes protected under anti-discrimination laws to assist the Committee’s enquiries related to accessibility and inclusivity.

The Anti-Discrimination Act 1977 (NSW)

The ADA was enacted to eliminate discrimination and promote equality of opportunity between all persons. In NSW, this legal framework aims to ensure all individuals can fully participate in society, regardless of diverse backgrounds or circumstances.

Provision of Goods and Services

As a crucial piece of legislation intended to protect individuals from discrimination, the ADA prohibits discrimination in several areas of public life, including in the provision of goods and services. Under the ADA, the definition of services relevantly includes:

- services provided by a council or public authority, and
- services include services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use.²

This broad definition implicitly covers accessible and inclusive provision of public toilets for people with attributes protected under the ADA.

The ADA makes it unlawful for a person who provides goods and services to discriminate against another person on grounds which relevantly include sex, age, transgender status and disability by refusing to provide the person with those goods and services or in the terms on which they provide the person with those goods and services.³

It is important to note that the ADA does not contain a specific provision to protect persons with carer’s responsibilities from discrimination in goods and services, as the ADA only provides

² *Anti-Discrimination Act 1977 (NSW) (ADA)* s 4.

³ ADA s 33, 38M and 49M.

protection on the ground of carer's responsibilities in the area of work.⁴ In its submission to the NSW Law Reform Commission's review of the ADA, ADNSW has recommended a broad review of the areas of public life covered by the legislation, including in relation to carer's responsibilities.

Unjustifiable Hardship

The ADA contains an exception that states it is not unlawful to discriminate against a person on the ground of the person's disability, if the provision of the goods or services would impose 'unjustifiable hardship' on the person providing the goods and services. This means that providing accessible services for people with disability may not be unlawful if the provider can demonstrate that such adjustments would be excessively costly, time-consuming or would create other major difficulties. They must prove that it is more than an inconvenience or minor expense.⁵ Section 49C of the ADA states:

"In determining what constitutes unjustifiable hardship [...] all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, and
- (b) the effect of the disability of a person concerned, and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship".

A similar defence is also present in the federal *Disability Discrimination Act 1992* (Cth).⁶

For example, it may not be unlawful to provide entry to a building to access toilets by a set of stairs if the building owner can prove that modifying the building to allow wheelchair access would cause unjustifiable hardship.

Complaints and Reports

Between 2019-2024, ADNSW received nine complaints related to the accessible use of public toilets on the grounds of disability and transgender discrimination. These complaints were primarily made against entities whose buildings contained toilets that were difficult to use or access, such as councils, government departments, hotels and workplaces.

Because the ADA does not cover carer's responsibilities discrimination in the provision of goods and services, no data was recorded in relation to the accessible use of public toilets by people with carer's responsibilities.

⁴ ADA Pt 4B, Div 2.

⁵ Guidelines on 'reasonable adjustments', Job Access, <https://www.jobaccess.gov.au/employers/guidelines-reasonable-adjustments>.

⁶ *Disability Discrimination Act 1992* (Cth) (DDA) s 11.

Table 1: Number of complaints relating to use of public toilets received by ADNSW by ground of discrimination from 2019-2024.

| Ground of discrimination | Number of complaints |
|----------------------------|----------------------|
| Disability discrimination | 4 |
| Transgender discrimination | 5 |

ADNSW also has an online community reporting tool for people to report on any incidents of discrimination happening in the community. It encourages people to make informal reports whilst remaining anonymous and without having to go through the process of lodging a formal complaint. In 2022, ADNSW received one complaint about the lack of disability access to public toilets at a renowned botanic garden in Sydney's CBD.

However, it is unlikely that ADNSW's complaint statistics reflect the actual level of lived experiences in our communities as generally only a small proportion of people who encounter discrimination will make a formal complaint.⁷

Currently, the onus is on the individual affected by discrimination to make a formal complaint under the ADA. ADNSW's role involves bringing the parties together in a confidential conciliation process to try to resolve the issue in an informal and mediated way. There have been some satisfactory outcomes for the complainant involving accessibility issues, as demonstrated in Case Study 1 and Case Study 2 below.

Case Study 1 – Disability Discrimination

Zoe* and Lily* have problems with mobility. They applied to lease the ground floor of a warehouse, but their application was refused. Zoe and Lily were told that there was only a toilet for men on the ground floor, and that the toilet for women was upstairs and could not be accessed because of their mobility issues.

Zoe and Lily lodged a complaint of disability discrimination with ADNSW.

At the conciliation conference, it became clear that the women could use the ground floor toilet as it had one entrance with a lock. After discussions, the real estate agent offered Zoe and Lily the lease.

Case Study 2 – Transgender Discrimination

Frieda* is a transgender woman and a member of a golf club.

Frieda had been using the female toilets for several years until she was directed by management to use the men's toilets.

She tried to resolve the problem with the club's management team without success.

⁷ Tackling the "Known Unknown": How Equality Bodies Can Address Under-Reporting of Discrimination Through Communications, 2012 Equinet, the European Network of Equality Bodies, <https://equineteurope.org/wp-content/uploads/2013/05/Tackling-the-Known-Unknown-FINAL-MERGED.pdf>.

Frieda made a complaint of transgender discrimination to ADNSW.

At conciliation, the club director agreed to allow Frieda to use the female toilets without restriction and organised training for the staff on anti-discrimination legislation.

**Names have been changed to protect the privacy of the individuals.*

Protections in other jurisdictions

Disability Discrimination Act 1992 (Cth)

There are complex and overlapping legal protections across Commonwealth, State and Territory jurisdictions that can be challenging to navigate for people who experience issues relating to accessibility or inclusive use of facilities such as public toilets. The objectives are to eliminate discrimination against persons on the ground of disability in various areas, including the provision of facilities and access to premises.⁸

In NSW, a complainant can choose to pursue a disability discrimination complaint under the DDA with the Australian Human Rights Commission (AHRC),⁹ or with ADNSW.¹⁰

The DDA and ADA are similar in that both pieces of legislation contain disability discrimination protections under the provision of goods and services. It is notable to highlight, though, the DDA provides further protections for:

- Access and use of public premises, and
- Available facilities.

Access and use of public premises

Disability discrimination for access and use of public premises is prohibited under section 23 of the DDA:

Under section 4 of the DDA, premises include ‘a place (whether enclosed or built on or not)’. The AHRC states that a person with a disability has a right to access places used by the public, further affirming that the DDA provides protections to people with disability for inaccessible places.¹¹ The AHRC provides that places used by the public include ‘parks, public swimming pools, public toilets and pedestrian malls’.¹²

Available Facilities

Section 24 of the DDA makes it unlawful for a person who makes facilities available to discriminate against another person on the ground of the other person’s disability:

- (a) by refusing to make those facilities available to the other person; or

⁸ DDA s 3.

⁹ Australian Human Rights Commission Act 1986 (Cth) (‘AHRC Act’) s 46P.

¹⁰ Anti-Discrimination Act 1977 (‘ADA’) Pt 9, Div 1, Sub Div 1.

¹¹ D.D.A guide: The ins and outs of access, Australian Human Rights Commission, <https://humanrights.gov.au/our-work/disability-rights/dda-guide-ins-and-outs-access>.

¹² Ibid.

- (b) in the terms and conditions on which the first-mentioned person makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person makes those facilities available to the other person¹³.

Commonwealth legislative instruments known as disability standards require new buildings that are to be used by the public, together with existing public transport buildings, to provide sufficient accessibility for all people, including people with a disability.¹⁴

Sex Discrimination Act 1984 (Cth)

The objectives of the federal *Sex Discrimination Act 1984* (Cth) (SDA) are to eliminate, as far as possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy and breastfeeding. It covers protections in the areas of work, accommodation, education, the provision of goods, facilities, and services, and more. It also provides further protections for discrimination on the ground of family responsibilities, hostile environments, and sexual harassment for specific areas, such as work and educational institutions.

The SDA contains more provisions that are relevant to the accessibility and inclusivity of public toilets for people with more protected attributes than the ADA, including people who are non-binary and intersex.

Gender Identity

Gender identity refers to the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth.¹⁵ Discrimination on the ground of gender identity is prohibited under section 5B of the SDA.¹⁶

Intersex status

Intersex status refers to the status of having physical, hormonal, or genetic features that are neither wholly female or male, a combination of female and male, or neither male nor female.¹⁷ Discrimination on the ground of intersex status is prohibited under section 5C of the SDA.¹⁸

Available facilities

Under the SDA, it is unlawful for a person who 'makes facilities available' to discriminate against another person on the ground of the other person's gender identity or intersex status:

- (a) by refusing to make those facilities available to the other person;

¹³ DDA s 24

¹⁴ *Disability (Access to Premises – Buildings) Standards 2010* (Cth) s 2.1 and 4.1.

¹⁵ *Sex Discrimination Act 1984* (Cth) ('SDA') s 4.

¹⁶ SDA s 5B.

¹⁷ SDA s 4.

¹⁸ SDA s 5C

- (b) in the terms or conditions on which the first-mentioned person makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person makes those facilities available to the other person.¹⁹

Other Standards or Guidelines

National Construction Code (NCC)

The NCC sets the minimum required level for the safety, health, amenity, accessibility and sustainability of buildings in Australia and is maintained by the Australian Building Codes Board. It provides that sanitary facilities for personal hygiene must be provided in a convenient location within or associated with a building, to the degree necessary, appropriate to the function or use of the building, the number and gender of the occupants, and the disability or other particular needs of the occupants.²⁰ These requirements have been used as a standard for tribunals to evaluate if facilities meet accessibility requirements.

Changing Places Facilities

In Victoria, Changing Places enables people with high support needs to participate in their local community and access recreational and tourist attractions, parks, community spaces and entertainment and sporting venues. These facilities contain toilets larger than standard accessible toilets and provide extra space and facilities to meet the needs of people with disability, including height adjustable adult change tables and tracking hoist systems.

To be categorised as a Changing Places toilet, the facility must meet the specifications outlined in the *Changing Places Design Specifications 2020*²¹ and must be accredited and listed on its website and the National Public Toilet Map.²² This initiative, originating from the United Kingdom, is a key component of Victoria's Universal Design approach to create communities that are welcoming and inclusive and to ensure built environments are accessible for all Victorians. ADNSW supports this initiative being brought to NSW.

ADNSW thanks the Committee for the opportunity to provide a submission in response to its inquiry into public toilets.

Alex Benn
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¹⁹ SDA s 22.

²⁰ National Construction Code – Access Verification Methods Handbook 2022, 2.2 Access Performance Requirements, page 9.

²¹ *Changing Places Design Specifications 2020*.

²² The National Public Toilet Map, Department of Health and Aged Care, <https://toiletmap.gov.au/>.

We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

Enquiries and complaints

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