



Anti-Discrimination Guidelines *for Local Councils*



How anti-discrimination law affects the delivery of services by local councils in NSW

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Anti-Discrimination Guidelines *for Local Councils*

**How anti-discrimination law affects the delivery of
services by local councils in NSW**

These guidelines have been developed to assist local government managers and councillors understand their responsibilities under anti-discrimination law. They have been developed by the Anti-Discrimination Board of NSW in conjunction with the Division of Local Government, Department of Premier and Cabinet.



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Introduction

Anti-discrimination law is there for a very good reason — to help give everyone a 'fair go'. Local government services should be provided and managed fairly and equitably on behalf of all members of the community.

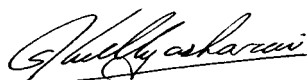
Anti-discrimination law provides councils with a good guide to creating equitable and consistent policies and procedures.

If there are fair, non-discriminatory policies and practices in place, Council is less likely to have problems. Members of the community are more likely to be satisfied with the services they get from their council. As local councils become more and more accountable to the community, it is becoming increasingly important for every local council to be able to show that everyone is treated fairly and properly.

By following the principles outlined in these Guidelines, Council's service delivery practices are enhanced. There are tangible and measurable benefits in service delivery. This can only be good for everyone.

Local councils which have eliminated discrimination and harassment provide better services for their community, and a fair workplace for their employees and elected councillors.

The Anti-Discrimination Board and the Division of Local Government, Department of Premier and Cabinet share a commitment to ensuring that everyone in local government understands these principles and is in a position to put them into effect. We are confident that these Guidelines will assist in that process.



Stépan Kerkyasharian AO

President

Anti-Discrimination Board of NSW



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What is in these Guidelines?

These Guidelines have been produced by the Anti-Discrimination Board of NSW and the Division of Local Government, Department of Premier and Cabinet, to help councillors and managers and staff of local councils understand their anti-discrimination responsibilities in relation to service delivery. We want to prevent discrimination and reduce the number of complaints of discrimination that are lodged against local councils.

Nothing in these guidelines conflicts with providing the best possible service to every community member. In fact, abiding by these guidelines can only enhance Council's delivery of services.

The guidelines explain:

- how anti-discrimination law affects the delivery of services by local councils in NSW;
- whose responsibility it is to make sure the law is followed;
- what to do to make sure Council keeps to the law;
- where to get more information or advice.

If you have questions about the information in these guidelines, please contact the Anti-Discrimination Board. The Board's addresses and phone numbers are on the back cover. Any questions about the Model Code of Conduct or community strategic plans should be directed to the Division of Local Government.

Other guidelines

We also have guidelines which explain how to ensure that Council's employment (as opposed to service delivery) practices are discrimination and harassment free. For more information on these publications and how to order them, see back cover or go to the Anti-Discrimination Board's website at www.lawlink.nsw.gov.au/adb.

How does anti-discrimination law affect local councils in NSW?

What does the law say?

Under the *NSW Anti-Discrimination Act 1977* it is unlawful to discriminate against someone (treat them less favourably than others) or harass them, because of their own or their friends', relatives' or associates':

- sex (including pregnancy and breastfeeding);
- race (including colour, descent, nationality, ethnic and ethno-religious background or national origin);
- age (including compulsory retirement);
- marital or domestic status;
- homosexuality (actual or presumed, male or female);
- disability (physical, intellectual, mental or psychiatric, whether past, present, future or presumed. This includes disease causing organisms such as HIV/AIDS. The law also says that employers and service providers *must* provide people with disabilities with facilities or services they need to either enable them to do a particular job for which they are the best person or to which they have been elected, or to access any service that is available to people who do not have a disability. This must be done unless it would cause Council 'unjustifiable hardship' to provide the required service or facility;
- transgender status;
- responsibilities as a carer.

Discrimination against a person because of their responsibilities as a carer is only unlawful in the area of employment. Otherwise it is against the law to discriminate against or harass anyone for any of these reasons in:

- the types of services (including use of facilities) Council provides and the way in which those services are provided;
- how Council runs its council meetings and makes decisions, including the way local government councillors treat each other;
- Council's employment practices. NSW industrial relations law also makes termination of employment on discriminatory grounds unlawful, so individuals with claims of unfair dismissal relating to discrimination may be able to pursue them through the Industrial Relations Commission as well as through the Anti-Discrimination Board.

The *Local Government Act 1993* also has EEO provisions (sections 344–347) which do not cover all grounds for discrimination but complement the Anti-Discrimination Act by giving local councils specific responsibilities to plan for and achieve a diverse workplace. Councils are required to comply with the Anti-Discrimination Act regardless of the content of their EEO Management Plan.

The rest of these Guidelines deal with Council's responsibilities in relation to service delivery only. For more information about Council's employment responsibilities consult the Anti-Discrimination Board's employment guidelines (see back cover or visit the the Anti-Discrimination Board's website at www.lawlink.nsw.gov.au/adb).

Proving discrimination

Mr Powell, an Aboriginal man, claimed that when he entered a particular shop, staff followed him as if they thought he was a shop-lifter. A friend gave evidence that she had seen a staff member 'zoom in' on Mr Powell, then send someone to speak to him. The staff member concerned told the NSW Administrative Decisions Tribunal (NSWADT) that she had sent the second staff member to help Mr Powell who, she said, 'looked a bit lost'.

In the NSWADT, the question was whether there was enough evidence to prove 'on the balance of probabilities' that Mr Powell had been discriminated against because of his race.

Taking into account all of the circumstances, the Tribunal decided that there was a more innocent explanation as to why Mr Powell had been singled out by Dollar Smart staff and that it was not satisfied, on the balance of probabilities, that it was because of his race.

Leelan Powell v Smart Dollar Pty Ltd [2009] NSWADT 234, 14 September 2009

The four types of discrimination

1. Direct discrimination — treating someone less favourably than others

Direct discrimination is when a councillor or council employee treats someone less favourably than others in the same or similar circumstances because of their sex (including pregnancy and breastfeeding), marital or domestic status, race, age, homosexuality, transgender status or disability.

Direct discrimination happens when decisions are based on stereotyped views about people of different genders, races, ages and so on. In other words, direct discrimination is when assumptions are made about a person just because they happen to belong to a particular group of people. They are put into a box labelled 'women,' 'men,' 'Lebanese' and so on, rather than being treated as an individual.

Direct discrimination often results in an inaccurate judgment. People from any particular group are *not* all the same.

Direct and Indirect discrimination

Examples of direct discrimination

If Council refused to rent a hall to a gay group because of concerns about the members' homosexuality, this could be direct homosexual discrimination.

If a staff member refused to deal with a customer because they can't speak English, this would be direct race discrimination.

Examples of indirect discrimination

If Council had a rule that their oval can only be available for games of rugby. This could be indirect sex discrimination against women wishing to play other sports (such as hockey or soccer) on the oval, unless the council can show that their decision is reasonable in all the circumstances. It might be reasonable and therefore within the law if Council could show that there were other council spaces where women could play sports. It might be unreasonable and therefore against the law if the oval was the only space Council provided for outdoor sports, and it was within their financial resources to offer it for women's sports as well as men's sports.

If the only public access to a council building was up several stairs, it could be indirect discrimination against people who have mobility disabilities, unless the Council can show that it would be unreasonable in all the circumstances to provide appropriate access.

Indirect discrimination

Case heard by the NSW Administrative Decisions Tribunal (NSWADT)

Ms Robinson alleged discrimination on the ground of disability in the provision of services by a methadone clinic.

A new policy required her to attend the clinic daily, early in the morning. She had previously attended several days a week and was given take-home doses.

Ms Robinson had Hepatitis C and chronic back pain, which made public transport difficult. It was also hard to get up and dressed early enough.

The Tribunal agreed that she could not practically comply with the new rules and that a significantly higher proportion of methadone users who did not have Ms Robinson's other disabilities would be able to comply with the requirement.

The Tribunal found that requiring Ms Robinson to attend daily was unreasonable in the circumstances.

Ms Robinson did not ask for financial compensation but the clinic was ordered to find a way of accommodating Ms Robinson's needs.

Robinson v Sydney West Area Health Service [2007] NSWADT 77

2. Indirect discrimination — a rule or requirement applies to everyone but unreasonably disadvantages a particular group.

Sometimes treating everyone the same way actually disadvantages groups of people when there is no need for this to happen. This is called indirect discrimination.

If you have:

- a rule, requirement or policy that is the same for everyone; *but*
- it results in the members of one group, say an age group or racial group, being disadvantaged compared with people in other groups; *and*
- if this rule, requirement or policy is not reasonable in all the circumstances;

it will be indirect discrimination and against the law.

This applies to unwritten rules, requirements and policies as well as written ones. In other words, whether or not something is *unlawful* indirect discrimination will depend on all the circumstances of the particular case.

3. Harassment

Anti-discrimination law defines harassment as any form of behaviour that is:

- not wanted, not asked for and not returned; *and*
- likely to cause a hostile or uncomfortable workplace, or service delivery environment, by:
 - humiliating someone (putting them down);
 - seriously embarrassing them;
 - offending them;
 - intimidating them; *and*
- happens because of their (or any of their relatives', friends' or colleagues') sex, pregnancy, marital or domestic status, race, disability, homosexuality, transgender status or age.

Sexual harassment is unwelcome:

- advances, or requests for sexual favours; or
- conduct of a sexual nature that a reasonable person would expect a person to find offensive, humiliating or intimidating.

Many different types of behaviour can amount to harassment, depending on their effect on the person being harassed. Examples include:

- racist, sexual, sexist, anti-gay (homophobic) material distributed or displayed in Council workplaces or by Council, in any form — pictures, written, email, internet, faxed;
- racist, ageist (and so on) verbal abuse or comments;
- sexual behaviour of any sort;
- stereotyping jokes;
- 'over the top' initiation rites.

Sexual harassment case

Mr Sammut claimed to have been sexually harassed by a co-worker who kept hugging him after he asked her to stop. He also objected to 'risque' stories she told in his presence. A witness described the hugs as the sort 'a woman gives a man'.

The employer argued that employees hugged each other for mutual support. She saw the complaint as 'trivial' and the worker concerned couldn't see what was wrong.

The Tribunal found that Mr Sammut was not sexually harassed by the stories because he was not offended, humiliated or intimidated. They simply lowered his opinion of the woman.

It did find, however, that the hugs were sexual harassment and that the employer was vicariously liable for failing to take reasonable steps to prevent it. Neither the manager, nor the co-worker, understood sexual harassment and the complaints were handled in an 'amateurish' manner, not in accordance with policies.

The Tribunal stated that even in small organisations, it was reasonable to expect the manager to understand and follow policies, to take complaints seriously and to ensure that employees understood how policies applied to their own behaviour.

Sammut v Distinctive Options Limited (Anti-discrimination) [2010] VCAT 1735 (14 September, 2010)

Disability discrimination and safety

Mr Bellamy, who had a bi-polar mood disorder, was a woodworker with Council. During an episode of hypomania, he threatened to burn down his workshop. He then realised he was ill and left.

Council banned him from the premises for two months and placed other restrictions on him for OH&S reasons. Mr Bellamy complained that he had been discriminated against because of his disability.

The tribunal agreed the threats made by Mr Bellamy called for an investigation into whether or not he posed an on-going safety risk. Council did not, however, carry out an investigation and the Tribunal found that, had it done so, it would have shown Mr Bellamy did not pose any risk.

Banning him from his workplace was unreasonable and discriminatory. He was awarded \$17,000 and an apology.

Bellamy v McTavish & Pine Rivers Shire Council [2003] QADT 15, 7 October 2003

Carer’s responsibilities and the ‘reasonableness’ test

The employer changed its 40 hour roster to a 44 hour, two week, cycle of four shifts. Mr MacPherson objected to the change because it interfered with his family life. He had to resign as the coach of his son’s soccer team, for example, and would miss family meals.

He claimed that the new roster unlawfully discriminated against him on the ground of his family (carer’s) responsibilities.

The magistrate found that the disruption to Mr MacPherson’s family life was not so severe that the new hours could be said to be unreasonable. He had not, therefore, been discriminated against.

MacPherson v Coal & Allied Mining Services Pty Limited [2009] FMCA 881, 9 September 2009

In a diverse community, it is possible to do or say something that upsets another person without knowing that you have done so. Harassment, therefore, can be intentional or unintentional and can be committed by people with or without decision-making or supervisory power.

4. Vilification

Vilification is behaviour that could incite (encourage) hatred, serious contempt or severe ridicule of a racial group, homosexual people, people who have HIV/AIDS or people who are transgender. To be against the law, the act must be in public. But, unlike unlawful harassment it can happen outside work or service delivery relationships.

Examples of vilification are:

- racist, anti-gay, anti-HIV/AIDS or anti-transgender posters, cartoons or verses on council noticeboards;
- racist, anti-gay, anti-HIV/AIDS or anti-transgender jokes sent via council email accounts;
- racist, anti-gay, anti-HIV/AIDS or anti-transgender abuse that happens publicly between people (members of the public, employees and/or councillors) in council meetings or on council premises.

What if someone makes a discrimination complaint to the Anti-Discrimination Board?

If a member of the public, a council employee or a councillor believes they have been unlawfully discriminated against or harassed by Council or one of its councillors or employees, they can complain to the Anti-Discrimination Board of NSW.

The Board deals with discrimination complaints from individuals or people acting on their behalf. The complaint must be in writing (including by email) but it can be in the person’s own language or a member of the Board’s staff can help the person to write down the complaint. Officers of the Board will talk with the person who has made the complaint then approach Council (usually in writing to either the General Manager or Mayor, depending on what is being complained about) and ask for Council’s comments about the matter. The Board does not take sides — it acts impartially at all times.

If there seems to be some evidence of unlawful discrimination, the Board may ‘conciliate’ the complaint. It will try to help the person who complained and the council they’re complaining about reach a *private* and *confidential* settlement. Depending on the circumstances, this could, for example, be one or any combination of the following:

- financial compensation;
- a change in the council’s policies or rules;
- an apology;

- that the person is considered for a job, or that an education program is run, to ensure that people aren't discriminated against in future.

It is also against the law to harass or victimise someone for making a complaint of discrimination in good faith to either Council or the Board — even if their complaint turns out to be unfounded.

Most complaints are conciliated. If a complaint can't be conciliated (or in some circumstances if the President of the Board declines a complaint), it is possible for the person who complained to go to the Equal Opportunity Division of the Administrative Decisions Tribunal (previously called the Equal Opportunity Tribunal). The Tribunal is similar to a court and provides a legal judgment that must be followed. If a complaint is heard at the Tribunal it will usually become a public matter. This means the media will be able to report it. Among other orders, the Tribunal can order that a council pay up to \$100,000 compensation, plus costs, for each complaint.

Can a complaint about discrimination be made under a council's code of conduct?

Yes. Under the *Local Government Act 1993*, all councils are required to adopt a code of conduct that incorporates the provisions of the *Model Code of Conduct for Local Councils in NSW*.

The Model Code sets the minimum requirements of conduct for council officials. The Model Code applies to all council officials. These include councillors, members of staff, administrators, members of council committees, conduct reviewers and delegates of council.

The Model Code imposes a number of general conduct obligations on council officials. In particular, council officials:

- must not act in a way that causes, comprises or involves intimidation, harassment or verbal abuse;
- must not act in a way that results in discrimination, disadvantage or adverse treatment in relation to employment, or involves prejudice in the provision of a service to the community;
- must treat others with respect at all times;
- must consider issues consistently, promptly and fairly and deal with matters in accordance with established procedures, in a non-discriminatory manner;
- must not harass, discriminate against, or support others who harass and discriminate against colleagues or members of the public. This includes harassment and discrimination on grounds of sex, pregnancy, age, race, responsibilities as a carer, marital or domestic status, disability, homosexuality, transgender grounds or if a person has an infectious disease.

The procedures for managing complaints about the conduct of council officials are set out in the Model Code and each council's code of conduct.

Carer's responsibilities

Ms King returned to work after maternity leave to find that her job had been divided into two positions. She was given the more junior role. The senior role included most of her previous responsibilities. She argued that she had been discriminated against because of her parental responsibilities.

The company argued that the senior role was given to the better candidate.

The Tribunal did not believe this because:

- *Ms King had held the position and performed satisfactorily – it didn't make sense to give it to someone else;*
- *the sales manager had expressed concern about how women with children managed their time;*
- *he had told Ms King she should be spending as much time as possible with the baby;*
- *he had sent an email to other employees after Ms King's return, saying 'Please welcome Sally back to the office and if she s-p-e-l-l-s--e-v-e-r-y-t-h-i-n-g out when talking to you, please be patient';*

The Tribunal was satisfied that Ms King was not appointed because of the sales manager's beliefs about the effect her childcare responsibilities might have on her performance.

She was awarded \$19,685.

King v Nike Australia P/L (Anti-discrimination) [2007] VCAT 70, 24 January, 2007

Whose responsibility is it to make sure the law is followed?

Council liability

Legal responsibility for unlawful discrimination committed by, or on behalf of, the Council usually rests with Council itself.

Council may be legally liable for unlawful harassment, discrimination, vilification and/or victimisation that occurs between:

- councillors;
- employees;
- a councillor or councillors and an employee or employees;
- Council itself, a councillor, or a council employee and a member of the public;
- members of the public on Council premises or at Council organised occasions.

Council will be legally liable— *unless* it can show that it took ‘all reasonable steps’ to prevent the discrimination, harassment or vilification.

‘All reasonable steps’ include clear, written policies on all forms of discrimination and harassment relating to Council’s service delivery, including Council decision-making. Council must have adopted and implemented a code of conduct that is consistent with the *Model Code of Conduct for Local Councils in NSW*, issued by the Division of Local Government, Department of Premier and Cabinet.

Council should also have:

- a **discrimination and harassment prevention policy**;
- a policy on **acceptable standards of behaviour** displayed in a prominent place so that people know as soon as they enter council premises that they will be refused service if they breach the standard;
- a **community strategic plan** (required under the Local Government Act) that includes consultation with and addresses the needs of various groups in the community that it serves; and
- a **complaints procedure** so that members of the public can complain about discrimination or harassment by Council.

These policies should be distributed to all councillors, employees and, where relevant, community members.

Managers need to ensure:

- that councillors, employees and, where relevant, community members, understand their rights and responsibilities under these policies;
- that these policies and procedures are implemented; and
- that employees receive ongoing training in non-discriminatory practices and service provision.

Individual liability

If Council can show that it took all reasonable steps to prevent the discrimination or harassment a councillor and/or council employee

Responsibility of Managers and Directors

KW had told a senior manager that her supervisor, DF, was harassing her. She said that DF had asked her for dates, for kisses and cuddles and whether she was wearing underwear. He touched her on her bare leg while she was driving a forklift.

The Company’s sexual harassment policy stated that managers and supervisors should provide a harassment free workplace.

The complaint was investigated by a senior manager who had worked with DF for many years. It was found to be unsubstantiated, so DF refused to re-read the company’s sexual harassment policy or to attend refresher training as requested by his manager.

The Tribunal found the company liable. It had failed to maintain a harassment free workplace and to ensure that its supervisors and managers fully appreciated that this was their primary responsibility.

The company was ordered to provide all of its directors with a copy of the decision.

KW v BG Limited [2009] QADT 6, 21 April 2009

may be **personally** liable for unlawful discrimination. Councillors are also legally liable for their own discriminatory behaviour towards other councillors.

A manager, councillor or council employee may also be personally legally liable if:

- they act in a discriminatory, harassing or vilifying way when carrying out Council duties, for example, when performing formally delegated tasks, such as approving or not approving a development application;
- they encourage, aid or allow Council to do something which is discriminatory, harassing or vilifying, for example, by making a discriminatory recommendation to Council about a particular development application or neglecting to tell Council that, if they take a decision based on discriminatory assumptions, they could be breaking anti-discrimination law.

Who is responsible for making sure the law is followed?

The major responsibility for ensuring that anti-discrimination law is not broken by anyone acting on the Council's behalf, rests with Council and with the General Manager. Obviously, if responsibility for some service provision matters is delegated to other managers or supervisors, these managers/ supervisors may also share some of the responsibility for making sure that the law is followed.

Managers' role

Council and individual councillors will rely upon managers as their source of expert advice on a number of matters. They will look to managers for expertise and leadership. This means that as well as being familiar with the Local Government Act, managers should also be able to answer their questions about discrimination law. Managers should be in a position to guide and help councillors so that individually and as a Council they do not inadvertently or deliberately break anti-discrimination law.

How to make sure that Council follows anti-discrimination law

Be careful about your own behaviour

Managers and councillors must ensure that Council business does not discriminate, harass or vilify anyone in contravention of the law. Councillors and managers need to be careful how they speak to and behave towards council employees, councillors and community members.

For example:

- don't do anything that could be interpreted as unwanted behaviour that is sexual, sexist, racist, ageist, homophobic etc;
- remember that everyone has different values and opinions and what upsets one person might be acceptable to another — every community member has the right to fair and non-discriminatory services delivered in a way that neither vilifies nor harasses them;
- be careful of the words you use, how they are said, how you look at people, throw away comments, sexual or stereotyping pictures, cartoons, stories, jokes and so on — either don't indulge in such behaviour or check first to see if it's likely to offend.

Back off immediately and apologise sincerely if a council employee, councillor or a community member says, or indicates in any other way, that they don't like the behaviour.

Check Council services

In general, all the services Council provides for the community must be fairly available to all members of the community — irrespective of their age, sex (including pregnancy and breastfeeding), race/ethnic group, marital or domestic status, disability, homosexuality or transgender status or that of their relatives, friends or associates.

Their membership of one of these groups must not, generally, influence such things as:

- whether the service is provided;
- the type of service provided;
- the manner in which the service is provided.

The following pages deal with various aspects of council services which councillors and managers may need to pay particular attention to, starting with the need to develop an all embracing non-discriminatory community strategic plan on behalf of the community, and then moving on to ensuring that specific services are free of discrimination, harassment and vilification.

Council's community strategic plan

The Local Government Act states that all councils must develop a community strategic plan in accordance with Division of Local

Government guidelines. The community strategic plan must be based on the social justice principles of fairness, rights, access and participation.

Councils are required to prepare a community engagement strategy, and engage with the community in the preparation of the community strategic plan. The community engagement strategy must also be based on social justice principles, and set out who will be engaged and how they will be engaged. This should include Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, women, older people, young people and people with a disability. More information about the community strategic plan is available from the Division of Local Government's website at www.dlg.nsw.gov.au under Integrated Planning and Reporting.

Some councils have established specific community liaison positions to help facilitate the delivery of appropriate and effective services. They have usually employed people in those positions who are of the same background as the community group they wish to liaise with. This can be a very effective way of establishing open communication. It is usually possible to target such positions without breaking anti-discrimination law because a particular background may amount to a genuine job requirement. In some cases, however, a specific exemption from anti-discrimination law to do this may be needed.

For more information about exemptions ask the Anti-Discrimination Board for a more detailed set of employment guidelines and/or for the *Exemption Guidelines* (see back cover for more information).

Customer services

Council may have several service points where members of the community can phone or visit for advice, to pay rates, lodge documents and so on. It is important that all employees who staff these service points give non-discriminatory service to every member of the community who contacts them. It is also important that the reasons for adverse decisions are explained so that people understand (and therefore do not complain) that they have not been discriminated against.

These service points must be accessible to as many members of the community as possible. If they aren't accessible, Council may be breaking the law. Two of the groups most likely to be discriminated against are people with disabilities and people from different ethnic backgrounds. Some important points to consider about these two groups are listed below. (Note, however, that it is important to ensure that no-one is discriminated against.)

People with disabilities

Councils must provide facilities or services that are necessary for people with disabilities to access council services, *unless* doing so would cause 'unjustifiable hardship'. Making some existing buildings or services more accessible may cost a lot of money but Council's ability to pay, as well as the possibility of alternative, less costly changes, must be fully investigated. At the very least, councils need to have plans to upgrade services so that they are accessible in the future. Examples of things

Counter Services

Complaint brought to the attention of the Anti-Discrimination Board

A woman wearing a Muslim hijab (headscarf) complained that she had been treated as though she was a five year old at a council's public information desk.

First, she had been ignored, then she had been shouted at as though she didn't understand English. (The woman spoke English extremely well.) She said that many of her friends complained of similar treatment. They believed it was because they were Muslim and dressed 'differently'.

Board staff advised her to take the matter up with council management and to come back to the Board if she did not feel her complaint was taken seriously. She did not, so it is assumed that council management dealt with the matter to her satisfaction.

Disability access case

Mr Sutherland was found to have been indirectly discriminated against on the ground of his disability because he was not allowed to park his car in a vacant area next to a communal swimming pool. He was required to use the main car park, 75 metres from the entrance.

He was unable to walk this distance and could not comply with that requirement.

Management argued that it had fulfilled its obligations. It had installed a sealed path to the pool and he could use a wheel chair (he didn't have a wheel chair). It claimed that the cost of providing road access to the pool was prohibitive and did not consider less discriminatory options such as allowing Mr Sutherland to use an unsealed maintenance road to get closer to the pool.

The Tribunal decided that the cost of providing disabled access was reasonable and that others would also benefit. Pool management was given 42 days to introduce measures to eliminate discrimination against Mr Sutherland.

**Sutherland v Tallong Park Assoc Inc,
NSWADT 287, 3 October 2006**

Council should consider and build into its plans (including the delivery program and operational plan) are:

- can people with disabilities get into and move around the public parts of Council's offices easily — are there ramps, lifts, etc?
- have the needs of people with visual impairments been taken into account in the design/layout of the public parts of the building?
- have public contact staff received disability awareness training?
- can people with various types of disability make contact easily?
- does Council have a telephone typewriter (TTY) for people who have a hearing impairment? Does Council have audio hearing loops in its meeting rooms?
- has all this been checked with people with disabilities themselves? Many councils do this by setting up a disability access committee with community representatives who themselves have various types of disabilities, or who provide services to people who have various types of disabilities.

The Local Government and Shires Associations of NSW have some resources available to support councils to improve their access for people with a disability. More information can be found at: www.lgsa.org.au.

People from culturally and linguistically diverse backgrounds

Questions Council may need to consider and, if resource intensive, build into its plans (including the delivery program and operational plan) include:

- can people who need an interpreter get one relatively easily? Does Council employ bilingual staff in key positions?
- are all Council's standard letters, forms and leaflets in 'plain' everyday English, and is there a translated message about accessing interpreter services on the reverse side of letterheads?
- is important information available in community languages appropriate to the culturally and linguistically diverse groups in the area — for example, does Council have multilingual signs outlining services and facilities?
- have public contact staff received cross-cultural awareness training?
- do public contact staff have an understanding of the needs of specific ethnic or religious groups — for example, Muslim people, Jewish people, Sudanese refugees and survivors of torture and trauma — and of the problems and issues caused by immigration and resettlement?
- does Council have a knowledge of population make up, local services and community networks in the area?
- have people from culturally and linguistically diverse backgrounds been consulted about how to make Council more accessible to them, through surveys, questionnaires, feedback, submissions, public meetings and so on?

The order in which people are served

It is best to serve people on a 'first come, first served' basis. If Council has an obviously fair system such as this, people are less likely to assume that they are being treated differently, ignored or discriminated against, because of their race, sex, etc.

The way in which different types of people are treated

Everyone who staffs service points must treat all members of the community without discrimination. People must not be harassed, abused, ignored or humiliated because of their sex, pregnancy, race/ethnic group, disability, age, homosexuality, marital or domestic status, or transgender status or that of their relatives, friends or associates.

Possible acts of vilification that happen in Council offices

If a councillor or council employee spots racist, anti-gay, anti-HIV/AIDS or anti-transgender graffiti on Council property it should be removed immediately, to ensure that Council is not seen as agreeing with something that is possibly against the law.

If a councillor or council employee overhears racist, anti-gay, anti-HIV/AIDS or anti-transgender abuse happening by members of the public in Council offices, or between employees and members of the public, they should provide a warning that this sort of behaviour is unacceptable on Council premises or in any public place, and may well be against vilification law. If such behaviour continues, Council or Council's management may need to consider removing the people involved or (if they are employees) disciplining them in line with Council's disciplinary rules.

Public health services

Council health services should be available without discrimination. Councils may need to take particular care with the following issues.

Food and sanitary inspections

Many establishments that serve or prepare food are run by people from culturally and linguistically diverse backgrounds. Care must be taken to ensure that these people are not harassed or discriminated against because of their race.

For example, you can't decide to get tough on food/sanitary/health inspections in Asian restaurants, without doing the same for non-Asian restaurants as this would be race discrimination. Sometimes it may be appropriate to use an interpreter or to provide important information in translation. If council employees pass on information clearly and in a non-judgmental way, people are less likely to assume that their actions and decisions are racially motivated.

Garbage services

Garbage services must be provided fairly to all sections of the community. For example, a decision can't be made to provide no or fewer garbage services (or to charge more for them) to outlying Aboriginal communities, than are provided to or charged for outlying non-Aboriginal communities. It would be race discrimination to do this.

Burials and cremations

Does Council take account of the different cultural and ethno-religious needs of all the different culturally and linguistically diverse groups represented in the area in relation to burials and cremations on council operated land — at least as far as public health and other laws allow?

Council Swimming Pools

Complaints handled by the Anti-Discrimination Board

A gay group wanted to hire a council swimming pool to hold a gay swimming carnival. They were initially refused because council employees were worried that other members of the public would stop using the pool for fear of catching AIDS. The group was advised that Council's refusal could well be against the homosexual and HIV/AIDS (disability) discrimination part of the law. The Board advised Council to educate the public (if necessary) rather than appear to endorse the public's (presumed) mistaken and prejudiced views about both homosexuals and how HIV/AIDS can be transmitted.

A woman with a disability that causes her to be incontinent was denied access to a council swimming pool unless she wore a special 'nappy' under her swim wear, which would have been visible and cause her extreme embarrassment. She consulted her specialist who recommended the use of an anal plug, which would prevent any possible contamination of the pool. The council officers weren't happy with this solution and insisted she use a nappy. The woman put a complaint in with the Board, who contacted the council. Within a few hours, the council contacted the woman to inform her that the alternative suggested by the doctor was better than the council's original proposal and she was invited back to the pool.

If not, this could be race discrimination. For example, insisting that a minister of religion must conduct burial ceremonies could be indirect race discrimination because an Aboriginal person who requires a traditional customary burial may need to be buried by an elder. It could also be indirect homosexual discrimination because a gay man or lesbian may not be able to become a member of a traditional church and could not therefore be able to be buried by a minister of religion.

Recreation services

Recreation services should be provided without breaching anti-discrimination laws. It is worth checking the following points.

Sporting facilities

Make sure that these are provided fairly for both sexes, across both traditional male and female sports.

All facilities must also be available fairly to people of all ages.

It is also important to ensure that people with disabilities have full access to sporting facilities and associated amenities — unless it would cause Council unjustifiable hardship to provide this.

It is also important to consider the needs of particular ethno-religious or other groups — for example, Muslim women may request women-only sessions at the council swimming pool for ethno-religious reasons. To deny their request could be indirect race discrimination. Council may need to request an exemption to allow a women-only service or provide equivalent men-only sessions.

Camping grounds and caravan parks

Generally, council employees/Council should use the same non-discriminatory rules for everyone in deciding who is and isn't admitted to camping areas and caravan parks. The marital or domestic status, sex, race, carer responsibilities, age, etc of any person or their relative, friend or associate must not make any difference (unless there is another law that says this should happen).

For example, it is age discrimination to refuse to give someone accommodation because they have children or because of the age(s) of their children. It could be marital or domestic status discrimination to refuse accommodation because someone is a single parent.

It is also important to make sure that the rules don't end up discriminating against groups of people *indirectly*. For example, if there is a 'no pets' rule this must *not* include guide dogs for people with vision, hearing or mobility impairments. Guide dogs are not pets and must be allowed to accompany their owners.

Rental of council facilities

Council halls and other such facilities must generally be available to all groups in the community — whatever their sexual preference, race, age and so on. Bookings mustn't be refused just because of the race, sex, age, etc of the applicant(s). It is probably unwise for councils to give long-term exclusive-use bookings to groups of a particular race, sex, age, etc, unless

groups from other races, the other gender, other age groups and so on, can be similarly accommodated.

Parks

Parks must be accessible to as many members of the community as is reasonable.

If there is a 'no dogs' rule there must be an exception for guide dogs for people with hearing, vision and/or mobility impairments — it is disability discrimination to refuse access to people accompanied by guide dogs.

Council must also consider whether people with disabilities or those of different ages have special needs that could reasonably be met in all the circumstances (in terms of Council's resources and so on). For example, are some parts of the park wheelchair accessible?

Council should also consider the needs of other groups — although clearly this will depend on the particular demographics of the community. For example, can parks be made safer for women joggers, homosexuals (given the prevalence of assaults against gays and lesbians in some areas) and the elderly by adding more lights? Could scented gardens be planted for people with visual impairments to enjoy? Are all ages catered for?

Public toilets

All of Council's public toilets *and* baby change facilities — in parks, recreation areas, reserves, halls, and so on — need to be provided equally for both sexes and for people with disabilities (and for anyone who needs to accompany them). Not to do so could be either sex or disability discrimination. In addition, people who are transgender should be allowed to use the toilets of their identified gender.

Libraries and museums

Libraries and museums should cater for all sections of the community. Do they contain material/displays that cater for the needs and values of people from culturally and linguistically diverse backgrounds and/or Aboriginal groups in the community? Do they foster respect and tolerance for people of different ages or culturally and linguistically diverse backgrounds? Are these groups consulted about what they think is appropriate reading material or about providing historically accurate and culturally sensitive displays/exhibitions?

Many councils have taken positive initiatives such as running multicultural displays, homosexual history displays and so on. Many have involved community members in the design and servicing of such exhibitions.

Racist, anti-gay, anti-HIV/AIDS or anti-transgender graffiti or posters

Anything like this that appears on Council property and that could be against the vilification laws (see page 8) must be removed if Council is to ensure that it is not seen as endorsing acts of vilification.

Homosexual 'beats' (meeting places for male-to-male sex)

How does Council react to police or community objections about beats on Council property? In any Council discussion about what to do about beats, councillors and council employees must be careful not to discriminate

Marital Status Discrimination

Complaint handled by the Anti-Discrimination Board

A single mother booked a site at a caravan park but the manager refused to allow her to have the site as he alleged that single mothers behaved immorally and caused too much trouble. When approached by the Board, the manager stated that the Local Government Act allowed him to exercise absolute discretion over the allocation of sites. The Board pointed out that this discretion should still be exercised in a non-discriminatory way. The complaint was conciliated when he allowed the woman to move her caravan onto the site.

Council Facilities – Public Toilets

Complaint handled by the Anti-Discrimination Board

A man complained that a council discriminated against him because of his sex as it only provided women's toilets in a particular public park. During conciliation, the council first threatened to remove the women's toilets as well, but eventually agreed to consider cheap partitioning or a 'porta-loo' as a temporary solution until a planned new toilet block for both sexes was completed.

against, or encourage others to discriminate against, people on the grounds of their actual or perceived homosexuality and/or actual or perceived HIV/AIDS status.

Decisions made about beats are often based on unfounded fears about gay men rather than on a realistic assessment of whether there is actually a problem or not. Council's discussions should be based on fact not assumptions. It is appropriate to involve the local gay community in these discussions.

Community services

All groups need appropriate and fair access

All community services — whether targeted at children, the aged, sick people, etc need to be fairly and/or equally available without discrimination on the grounds of people's race, sex, disability, age, etc.

This may mean providing separate services for some groups. These services may also need to be provided in different ways to accommodate the different cultures represented in the local area if Council wants to avoid possible claims of either direct or indirect discrimination.

Meals in Council community centres and Meals on Wheels

Are the meals provided by Meals on Wheels or in Council community centres appropriate for all the different groups in the community. For example, are Jews offered kosher meals? Are halal meals provided for Muslims?

Meals on Wheels must not be refused a person who is (or is thought to be) carrying a disease causing organism such as HIV. To refuse the service would be disability discrimination. If staff or volunteers are concerned, they must be provided with adequate HIV and AIDS education and accurate information about other infections, such as 'swine flu'.

Interpreters

Are interpreters or bilingual/multilingual staff provided where appropriate?

Needs analysis and community engagement

Are different groups consulted about their needs before services are set up and then regularly consulted to check that their needs are still met?
Does Council take account of user/population profile changes?

Services targeting specific groups

There is generally no problem under anti-discrimination law with Council providing welfare services targeted at specific age groups or culturally and linguistically diverse groups. However, Council may need to apply for and get an exemption from anti-discrimination law to target services towards only one sex, people with a particular disability as opposed to other disabilities, gay men as opposed to lesbians, or lesbians as opposed to gay men. Council should check with the Anti-Discrimination Board before taking any decision to target a council service towards a particular group only.

Roads, public utilities, etc

Allocate priorities fairly

The needs of all groups within a community should be considered. Perhaps the most important consideration is what Council's priorities are for development or upgrading. Council priorities may be determined according to such things as what Council can afford at what stage, the commercial benefit of the particular upgrading/improvement project and the size of the community affected by the particular project.

However, care also needs to be taken to avoid potential discrimination when assigning priorities. For example, it might be race discrimination to either overlook the needs of an outlying Aboriginal community to have accessible, all-weather roads and/or adequate drainage or sewerage systems, or give them lower priority than projects nearer to the town centre.

Accessibility for people with mobility disabilities

Consult with the community rather than making assumptions. Make sure that Council has a plan to gradually upgrade all old footpaths and other public utilities to meet disability access standards. Remember that the legal standard is that it will be disability discrimination to deny full access unless it can be shown that it would cause Council unjustifiable hardship to provide full access.

Planning and development

All development applications must be treated fairly

Applications should not be refused or delayed because of the applicant's race, sex, age, etc or that of their relatives, friends or associates.

Development applications from neighbours

Particular care needs to be taken to ensure that neighbours presenting similar development applications are dealt with equitably. The Anti-Discrimination Board sometimes gets complaints that 'my neighbour was allowed to do this and I wasn't, just because they are of such and such a race and I'm not.' Make sure that Council has clear procedures that are applied equitably to all members of the community, so that people are not unlawfully discriminated against, and decisions are seen to be based on clearly defined, non-discriminatory criteria.

Religious developments

Council must ensure that decisions about applications for religious developments are based on proper planning criteria rather than ethno-religious or racial prejudice. For example, Council can't refuse (or delay) a development application from a group wanting to build a mosque or a building associated with a mosque in circumstances when it wouldn't have done this for an application to build or develop a church or buildings associated with a church.

In the Board's experience, religious development applications have often led to difficult council meetings with community members taking very

Disability access case

Ms Taylor had spina bifida and used a wheelchair. She was unable to access most public places such as shops, Council Chambers and the local school because of problems with footpaths, gutters and roads. She had made suggestions, such as ramps, as to how the problems could be solved but Council argued that her ideas were either unsafe or too costly.

She claimed that she was being discriminated against on the ground of her disability.

The tribunal determined that Council had indirectly discriminated against Mrs Taylor because its failure to upgrade footpaths etc. amounted to the imposition of a condition that, to access public places, one had to be able to walk. A person with Mrs Taylor's disability could not comply with this condition and it was unreasonable.

Council knew about the problems but only started upgrading work after Mrs Taylor complained. The tribunal found that it could have afforded to do the work but had delayed doing so.

Mrs Taylor was awarded \$10,000.

**Taylor v Kentish Council [2009]
TESADT 5, 3 November 2009**

vocal and opposing sides. If this happens, remember that racial vilification is also against the law (see page 8).

Applications for special uses

(Such as gay guest houses, hostels or group homes for people with intellectual or psychiatric disabilities, women's refuges, drop-in centres for people with HIV, and needle exchange facilities)

First, Council needs to make sure that the decision does not discriminate against people because of who they are — for example because of the proposed residents' actual or presumed disabilities or homosexuality, and possible community intolerance of such people.

Secondly, Council needs to make sure that there is no vilification during council discussions (see page 8).

Thirdly, Council may need to find harmonious and productive ways of overcoming local hostility to, fear of or ignorance about certain types of people. For example, some councils have held productive meetings between hostile members of the community and those wishing to run the place that is provoking the hostility, which have led to the community changing its mind and accepting the development.

The needs of people with disabilities

The needs of people with disabilities must be taken into account in all planning and development decisions for buildings or sites that are meant to be accessible to members of the public including shops, professionals' offices, shopping centres, entertainment venues, parks and recreation facilities. Remember that the anti-discrimination legal standard is that access must be provided unless it would cause the owners/developers unjustifiable hardship to provide that access.

The tendency in recent legal decisions has been to require access through the front door of a building unless it can be shown that it would cause the owners/developers unjustifiable hardship to do so.

The 1999 Federal Court decision of *Cooper v HREOC* shows that Council may be legally liable (under the aiding and abetting provisions of anti-discrimination law) if it accepts the owner's/developer's word that it would cause them unjustifiable hardship to construct accessible buildings. Council needs to make a full examination of all the circumstances and then decide whether it really would cause the owner/developer unjustifiable hardship.

Of course, anti-discrimination law is not the only law in this area. Councils also need to take account of other laws regulating access and facilities for people with disabilities (for example, the Building Code of Australia, and planning provisions under the *Environmental Planning and Assessment Act 1979*). Many councils have established access committees with representatives from organisations representing people with disabilities to help them plan to better meet the needs of people with disabilities.

Alcohol-free zones

The Local Government Act allows councils to establish, continue or extend alcohol-free zones for specified public roads, footpaths and carparks.

However, if Council has an Aboriginal population of 1,000 or more, it must send a copy of any such proposal to the Anti-Discrimination Board before it proceeds with a decision. Council must send the Board:

- the proposal;
- a map of the proposed area highlighting the proposed alcohol-free zone and any liquor outlets adjacent to the proposed zone;
- the names of the recognised Aboriginal groups which have been consulted about the proposals;
- whether the people/organisations Council consulted with object to or agree with the proposal;
- a statement of reasons supporting the zone.

When the Board receives Council's proposal, it will check for any discriminatory impact on Aboriginal groups in the area. The Board must let Council know within 40 days whether the proposal is supported or not. Council must then take the Board's advice into account when it makes its final decision.

For further information about alcohol-free zones contact the Anti-Discrimination Board or the Division of Local Government (contact information is on the back page of these guidelines). Ministerial Guidelines are available on the Division's website — www.dlg.nsw.gov.au.

Check how Council runs its meetings and makes decisions

Senior managers and other council employees, as well as councillors, need to be aware of councils' obligations under anti-discrimination law. This is because Council itself must not endorse or make procedures, policies, rules or decisions that unlawfully discriminate against a particular group or groups.

Council decisions that are discriminatory can be overturned by the courts if challenged. Council may also have to pay compensation and legal costs to those discriminated against. Councillors and managers need to make sure that all service provision decisions are fair and non-discriminatory.

There must be no unlawful vilification, by anyone, during council meetings. If vilification or abuse occurs, councillors generally and/or individually, should publicly disassociate themselves and make sure that it is not repeated. They may need to exclude people from the meeting.

To help make sure that councillors make non-discriminatory decisions, Council staff who prepare papers for Council or provide verbal advice to councillors should set out or explain any unlawful discriminatory consequences of certain courses of action or certain decisions. If they don't do this, they could be considered to be jointly liable, along with Council itself, if someone later lodges a discrimination complaint about Council's action/decision.

Resolve complaints before they get to the Anti-Discrimination Board

It is a good idea to monitor Council's services regularly to make sure that all the non-discriminatory measures put in place are working effectively. Some methods of how to do this are set out below.

Ensure that decisions are made in a way that is transparent and that the reasons for any decision which may have an adverse impact are fully explained. This prevents complaints by people who have assumed they have been discriminated against because they cannot think of any other reason.

Create and publicise a fair **complaint handling procedure** for people who wish to complain about the nature of the treatment they received from Council. That way Council should be able to resolve any community complaints without them needing to come to the Anti-Discrimination Board. It's also good business practice to deal with customer complaints as promptly and fairly as possible. This allows Council to fix any discrimination problems that it discovers could also be affecting other members of the community.

Make sure that complaints procedures make it clear what types of complaints they are to be used for and when other processes should be used instead. There will be some complaints that are best handled using a more rigorous appeals process or even in court (for example, community complaints about planning decisions).

Keep confidential records and statistics about any service provision complaints Council has received — who's made the complaint, about what and whom, how it was handled and the outcome.

Note that when Council first publicises a new customer complaints process, it may find that it receives more customer complaints. This does not necessarily indicate that all Council's hard work to make its service provision non-discriminatory is in vain. It is more likely to mean that people now have the confidence to ask council to address problems.

Important points about customer complaints procedures

A customer complaints procedure should have the following features.

Easy to use and trustworthy — it should be written down in easy to understand English and publicised widely. It may also need to be translated into relevant community languages and Braille, and/or be released in audio format.

Confidential — only the people directly involved in the complaint, or in sorting it out, should have access to information about complaints.

Impartial (fair) — all sides get a chance to tell their side of the story and are kept informed of the progress of their complaint and how it has been decided to resolve it. No-one in charge of sorting out the complaint makes any assumptions or takes any action until all relevant information has been collected and considered.

Free of unfair repercussions or victimisation — Council should take all necessary steps to make sure that the person complaining isn't victimised for complaining, whether their complaint turns out to be valid or unfounded. Council staff being complained about must also not be victimised. If a Council employee is found to have breached council policy this will need to be dealt with in line with Council's disciplinary procedure and the complainant should be told that this is what is being done.

Allow complaints to be sorted out with a minimum of fuss — many complaints should be able to be sorted out on the spot or by immediately consulting a senior officer. Many customer complaints revolve around poor communication, or people not understanding council rules and processes, rather than anyone having done anything wrong.

Sensitive and serious — the people who help sort out complaints should be specially trained to take complaints seriously and to treat all complaints sensitively.

Timely — aim to deal with all complaints as quickly as possible. Set time limits for the different stages. Aim to sort out all complaints within four weeks if at all possible. Most complaints should be able to be sorted out even faster than this.

Applying disciplinary rules to customers or clients

It is OK to refuse to serve someone if they are being abusive or to ask them to leave if they are a threat to other customers or staff. However, Council must make sure that it does not apply these rules in a discriminatory manner.

It cannot be assumed that everyone from a particular group is the same, just because one member of that group has been disruptive before. Council must treat everyone as an individual. For example, Council cannot refuse service to an Aboriginal person who is being disruptive but provide the same service to a person from another background who is also being disruptive.

If employees are being unlawfully harassed or vilified, they have a right to complain to the Anti-Discrimination Board if Council is unable to stop or prevent the harassment or vilification.

Where to get further advice or information

There are several places where more information or help is available.

Talk with staff in other councils about what they have done to make their services as non-discriminatory as possible.

Use the Anti-Discrimination Board. The Board can be contacted:

- for confidential (and anonymous, if desired) advice on handling a particular discrimination or harassment issue or grievance;
- about seminars for managers and HR staff;
- for staff training programs;
- for advice on development of procedures and policies;
- to get any of the Board's other detailed publications (see back cover).

See back cover for details of how to contact the Board.

Other Anti-Discrimination Board Publications

For more details or to order copies visit: <http://www.lawlink.nsw.gov.au/adb> or phone (02) 9268 5555

ADB Factsheets

Cover each individual ground or type of discrimination covered by NSW anti-discrimination law.

Workplace Guidelines

Guidelines for managers and supervisors: Everyone who supervises others in the workplace needs one of these guidelines.

Guidelines for non-supervisory staff: The guidelines for non-supervisory staff are for people who do not have any supervisory responsibility in the workplace.

Grievance procedure guidelines: Everything you need to know to develop best practice grievance procedures.

Exemption Guidelines: Explains the types of exemptions available under the Anti-Discrimination Act and how to seek an exemption if required.

Equal Time

The Anti-Discrimination Board's free email newsletter, published three times per year.

Posters

The ADB has a series of attractive posters that promote the rights of people in NSW. The posters are a colourful and stimulating way of reminding people about their rights and responsibilities under anti-discrimination law.

Anti-Discrimination Board of NSW

www.lawlink.nsw.gov.au/adb

Discrimination enquiries and complaints

Phone (02) 9268 5544

Toll free 1800 670 812

Email enquiries: adbcontact@agd.nsw.gov.au

Email complaints: complaintsadb@agd.nsw.gov.au

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Level 4, 175 Castlereagh St, Sydney NSW 2000

PO Box A2122, Sydney South NSW 1235

Phone (02) 9268 5555

Fax (02) 9268 5500

TTY (02) 9268 5522

Wollongong

84 Crown St, Wollongong NSW 2500

PO Box 67, Wollongong NSW 2520

Phone (02) 4224 9960

Fax (02) 4224 9961

TTY (02) 4224 9967

Newcastle

Level 3, 97 Scott St, Newcastle NSW 2300

PO Box 1077, Newcastle NSW 2300

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