

# Legal framework concerning provision of Changing Places public toilets



## About this factsheet

The Changing Places Consortium has launched a campaign on behalf of the thousands of people with profound and multiple learning disabilities and their carers, and the many other disabled people who cannot use standard accessible toilets.

They need Changing Places toilets. These are toilets with enough space for disabled people and their carers, and the right equipment, including a height adjustable changing bench and a hoist.

The area that often raises most concerns – the legal aspects associated with the provision and use of Changing Places toilets – can easily become an obstacle to progress.

This factsheet provides an overview of legislation that is relevant to the provision and use of Changing Places toilet facilities. It also identifies the practical implications of installing this type of facility.

The information is intended to support organisations to provide Changing Places toilets by helping them to:

- understand existing policy and current accepted practice
- identify relevant factors associated with this e.g. benefits, risks, manual handling issues
- take these factors into account e.g. explore ways to manage identified risk.

The legal framework in this factsheet has been supplied by Michael Mandelstam, an expert in community care law and moving and handling law. Jacqui Smith, independent manual handling expert, has read and commented on this information. The legal framework needs to be considered in relation to Changing Places toilets; providers themselves must take their own advice and decisions about risks and associated legal issues.

The factsheet also contains guidance from the Changing Places Consortium about how, in its view, the issues raised can best be approached.

## Introduction

The provision of Changing Places toilets – accessible public toilets with hoisting facilities and changing benches – is undeveloped in the United Kingdom.

One of the concerns about their development involves legal issues – in terms of obligations to provide such facilities, and potential liability if things should go wrong and an accident occurs.

The following is a broad overview of some of the relevant legal issues.

Overall, the perceived risk of providing hoisting and changing bench facilities may deter some providers, who fear legal liability in case of accident. It is essential that providers remember, however, that *liability does not normally arise simply because an accident has occurred*. Liability will normally arise if inadequate risk assessment has been performed, and a balance between risk and benefit not properly struck.

The relevant law does not demand that all risk be removed. Instead, broadly it requires that a provider weigh up the benefits of a particular service against the risks involved – and whether those risks can be suitably managed (as opposed to eliminated), while still preserving the benefits i.e. access to public toilets by disabled people who need hoists and changing benches.

## Key legislation

### 1. Provision of public toilets by local authorities

There is a **power** (rather than a duty) under s.87 of the **Public Health Act 1936** on local authorities to provide “public conveniences”. The fact that this precisely is a power only, rather than a duty, would explain why at present cash-strapped councils choose to close down public toilets.

Closure and the ensuing non-provision of public toilets generally by local authorities might seem not to be directly discriminatory against disabled people – since everyone is affected. However, it could be argued that it is indirectly discriminatory in the sense that disabled people may be worse affected. For instance, people with mobility problems may find it more difficult to make ad hoc use of other toilets (eg. within various business premises) in the area, people with bladder problems cannot hang on as long as people without such problems etc.

For disability access generally, there are well-established key-holder schemes, whereby access to accessible public toilets is restricted to those disabled people who have applied for a key. However, these toilets do not, by and large, have hoisting and changing bench facilities.

## 2. Disability Discrimination Act 1995

Under s.19 of the **Disability Discrimination Act 1995**, there is a **duty** on providers of services to the public not to discriminate against disabled people.

The duty states, amongst other things, that it is unlawful to discriminate by “refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public” (s.19).

Alternatively, it is discrimination in the case of a service provider “failing to comply with any duty imposed on him by section 21 [making of reasonable adjustments] in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service” (s.19).

On the face of it, these two duties in s.19 of the Act would appear directly relevant to the use of public Changing Places toilets by certain groups of disabled people. However, there are provisos.

### **Provisos under Disability Discrimination Act: discrimination, and justification for less favourable treatment.**

Discrimination occurs in the case of a provider if, “for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply” (s.20).

It is also discrimination if a s.21 duty to make reasonable adjustments (see below) is not complied with.

However, in both cases, it is only discrimination if the provider cannot show that the less favourable treatment is justified.

Less favourable treatment can be justified on a number of grounds. The Act states that less favourable treatment could be justified if the provider of services believes, and it is reasonable in all the circumstances for him/her to believe, that one of these grounds applies (s.20):

- **Health and safety.** One of the grounds capable of justifying less favourable treatment, and relevant to public Changing Places toilets, is that of health and safety. The Act states: “in any case, [where the less favourable treatment] is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person)” (s.20).

There are clearly very real health and safety issues around the use of hoists and changing benches in public toilets. However, if a provider were to put forward such an argument, it would have to show that its health and safety argument was based on proper and well-informed risk assessment.

*(White v Clitheroe Royal Grammar School: a case where the court found discrimination when a diabetic schoolboy was excluded from a school trip. The school argued justification of less favourable treatment on the health and safety ground. But the court found that no adequate risk assessment had been carried out to support this argument).*

- **Provision to members of the public.** Another ground capable of justifying less favourable treatment refers to the treatment being necessary because the provider would otherwise be unable to provide the service to members of the public (s.20). (For example, if for some reason the provision of certain specialist facilities meant that other people could no longer use the public toilet at all).
- **Less favourable treatment:** the comparison. For discrimination to be shown, there needs to be a comparison between the disabled person and somebody else. That somebody else could be a non-disabled member of the public or a disabled person with a different type of disability.

For instance, if public toilets were provided that were accessible only by non-disabled people, then the comparison could be between a disabled and a non-disabled person. However, if public toilets were provided that were accessible by some categories of disabled people, but lacked the facilities (eg. hoists and changing benches) which other categories of disabled people required, then the comparison could in principle be between the disabled person and people with other disabilities.

*(For example, Ross v Ryanair. This case involved assistance for people who required a wheelchair at Stansted Airport, and the charge made for providing it. Discrimination was found. However, for more disabled people, who already had a wheelchair, assistance was free. This was in one sense more favourable treatment for people who were more disabled. Nonetheless, the court found discrimination on the basis of different classes of disability, and less favourable treatment of those disabled people who were not permanent wheelchair users).*

- **Making reasonable adjustments.** Unless justified, it is unlawfully discriminatory to treat a disabled person less favourably by failing to take steps such as are reasonable (in all the circumstances of the case) to change any practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people to make use of a service which is provided to other members of the public (s.21).

Likewise if a physical feature makes it impossible or unreasonably difficult for a disabled person to make use of the service, the provider has a duty to take such steps as are reasonable in all the circumstances of the case to a) remove the feature, b) alter it so that no longer has that effect, c) provide a reasonable means of avoiding the feature, or d) providing a reasonable alternative method of making the service available (s.21). What constitutes “reasonable steps”, “in all the circumstances of the case” is relatively untested in case law. The resources of the organisation may be relevant, when one thinks of the financial pressures on local authorities, for example. Councils of differing sizes and varying resources may have responsibility for provision of public toilets. Generally, more would be expected of an organisation with greater resources than with less.

*(For example, two particular cases reached the Court of Appeal. One concerned the regular provision of a taxi for a disabled person to change platforms at a railway station, and the other the provision of wheelchairs free of charge at airports. Serious arguments were not put forward about, and the courts were thus not concerned about, the financial repercussions, given the resources of the organisations involved (Roads v Central Trains; and Ross v Rynair).*

## Disability equality duty on public bodies

Under s.49A of the **Disability Discrimination Act 1995**, there is a general duty placed upon public authorities. This includes a duty to eliminate unlawful discrimination, to promote equality of opportunity for disabled people, and to encourage participation by disabled people in public life. The duty may involve treating disabled people more favourably than other people. Though non-specific, this duty does mean that local authorities will need to be seen to think through, and sometimes act on, a range of issues. There is no reason to suppose that such issues should not include the question of public toilets.

**The Changing Places Consortium is calling for all large public places to provide Changing Places toilets.** Without Changing Places toilets, many thousands of disabled people, their families and carers are denied equal access to the services that most people take for granted.



Installing Changing Places toilets is a clear indication that an organisation takes its responsibilities under the Disability Discrimination Act seriously. It shows that the organisation concerned is positive about creating equal access for disabled people. In particular, installing a Changing Places toilet is a practical step through which public bodies can demonstrate that they are taking positive action to promote equality of opportunity for disabled people, as outlined in the Disability Equality Duty.

## Further relevant legislation

### 3. Health and safety at work legislation

#### Health and Safety at Work Act 1974

Under s.2 of the **Health and Safety at Work Act 1974**, all employers have a duty to “ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”.

This duty could be relevant, for example, in respect of any attendants employed in public Changing Places toilets where hoists and changing benches were provided. The provider would, for instance, have to be clear about the role and function of such attendants, and about competence level, training, supervision, policies, and procedures.

A risk assessment under s.2 of the 1974 Act, the **Management of Health and Safety at Work Regulations 1999**, and the **Manual Handling Operations Regulations 1992**, might conclude that the risks posed to such an attendant would be high and possibly unmanageable.

The carrying out of an adequate risk assessment by an attendant for each user and/or carer wishing to use the facilities might well be judged virtually impossible. The risks of physical assistance or other intervention might therefore be assessed as very high – and the responsibility involved immense. Even for a highly trained and competent attendant, it might be concluded that the risks could be very difficult to control.

Under s.3 of the 1974 Act, there is a duty on an employer to “conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risk to their health and safety”.

Section 3 might potentially apply, for example, to either injury or risk of injury to non-employees i.e. users (or their carers) of the toilet. For instance, if inadequate information, instructions or warnings were displayed or provided, if a hoist was not maintained adequately – or if an appropriate emergency alarm was not in place.

#### Management of Health and Safety at Work Regulations 1999

These regulations contain, amongst other things, an explicit obligation to carry out a risk assessment in relation to both employees (r.2) and non-employees (r.3).

## **Lifting Operations and Lifting Equipment Regulations 1998, and Provision and Use of Work Equipment Regulations 1998**

To the extent that a hoist was used by an employed attendant, the employer would have responsibilities concerning the examination and maintenance of the hoists under these two sets of regulations.

If the hoist were not used at all by the attendant, then arguably these two sets of regulations would not apply – since they apply only to equipment used at work. However, s.3 of the 1974 Act and r.3 of the **Management of Health and Safety at Work Regulations 1999** might then be relevant – in terms of the duties to non-employees that they contain. In circumstances where s.3 of the 1974 Act (and r.3 of the 1999 regulations) apply, the Health and Safety Executive has stated that it would expect the standards associated with the 1998 sets of regulations to be adhered to in any case.

Likewise, changing benches would require maintenance.

## **Medicines and Healthcare products Regulatory Agency (MHRA) advice and guidance**

The provider would need to ensure that hoist provision, inspection, and maintenance arrangements were generally in accordance with relevant advice issued by the MHRA.

## **Manual Handling Operations Regulations 1992**

If an attendant were employed, situations might arise where foreseeably the attendant was called on physically to assist a user of the toilet. The 1992 regulations would then have to be complied with. As suggested above, a risk assessment under these 1992 regulations, together with s.2 of the 1974 Act and r.2 of the 1999 regulations, might conclude that the risks posed to such an attendant were high and unmanageable.

## The Changing Places Consortium advocates the following:



- **Organisations that provide a Changing Places toilet should carry out a full risk assessment.**
- **Organisations that provide a Changing Places toilet should not place responsibility on staff to assist people to use Changing Places toilet facilities.** Changing Places toilet facilities are intended for use by disabled people who require the assistance of a carer to use the toilet or have their continence pad changed. Anyone wishing to use Changing Places facilities should reasonably be expected to be accompanied by a carer who is familiar with the disabled person's needs and with the use of specialist equipment including hoists and changing benches. The Changing Places Consortium strongly recommends that the disabled person using the Changing Places facility must be accompanied by a carer or assistant. If the person is in any doubt how to use the equipment, they should be advised not to use the facility. Providers of a Changing Places toilet may wish to keep the toilet locked and ask users to self-declare that they are familiar with the use of equipment, either verbally or in writing, before access is granted. Registering people to use a key-holder scheme would remove the need for access to be granted by a member of staff on every visit.
- **An emergency alarm should be fitted in the Changing Places toilet.** If an emergency situation were to arise, the disabled person and/or carer would be able to raise the alarm. In an emergency, staff should call the appropriate emergency services.
- **All specialist equipment, including hoists and changing benches, should be fitted, regularly inspected and maintained according to manufacturers instructions.** Organisations should ensure that a regular maintenance and inspection programme is adhered to. Equipment should also be checked by staff on a daily basis to ensure that batteries are fully charged and equipment is ready for use.
- **Instructions that show how to use equipment, and any relevant warnings, should be clearly displayed in the facility.** Manufacturers will generally provide instruction sheets for use – organisations should ensure that these are displayed close to equipment and are legible. For example, information such as the maximum weight that the hoist and changing bench can take should be clearly displayed.

## Common law

### 4. Common law of negligence: liability to disabled people or their carers.

Although issues may arise under health and safety at work legislation, if a disabled person or carer were injured using a public toilet hoist and changing bench, they would have to use the **common law of negligence** to sue and seek financial compensation.

The basic test of negligence is whether there is a duty of care, whether it has been breached by carelessness, and whether harm has been caused by the breach.

The test of carelessness would include consideration of whether the risks of providing hoists in public toilets had been properly evaluated – and then balanced against the benefits (i.e. disabled people being able to use the toilets). Generally speaking, the principle is that the greater the risk, so the greater the safeguards required. If the risks are too great, they may justify non-provision, notwithstanding potential benefits.

Clearly, a point may come where the risks are perceived to be so great that, benefits notwithstanding, the task, activity or facility in question could not be justified. But this will not be known until there has been a thorough risk assessment of both the risks and how they might be reasonably managed.

#### Considering the management of potential risks

Examples of the sorts of risk that would need to be considered, and whether they could be reasonably managed, are as follows. They are just examples with suggestions attached: they should not be regarded as exhaustive or definitive.

- **Risk of hoist malfunctioning.** Management of the risk of the hoist malfunctioning would include, for example, an inspection and maintenance agreement with a reliable third party specialist. However, a further issue to be considered is the risk of power failure, and the possible consequences. Most hoists have back-up batteries, but a policy should include provision for regular checking of equipment, for example, each night, by an attendant to ensure that the handset is in position for re-charging etc.
- **Risk of providing sling as well as hoist.** Provision of slings would present considerable cross-infection risks. One possible way around this would be to have a dispenser for disposable slings for which users would have to pay. Even then, there would still be some cross-infection risk, for example, where the sling hooks on to the hoist. Management of this risk might involve users having to use a chemical wipe to clean the hooks before using the hoist. Similarly, cross infection risks would have to be managed in respect of the use of changing benches.

Whether permanent or disposable slings were provided, difficulties would arise as to the appropriateness of the sling in terms of the size and whether the user and/or carer were used to the particular type of sling.

Overall, the risk of providing slings may be judged too great – with management of this risk involving users bringing their own slings. This would have the advantage that both user and carer would be familiar with the sling.

- **Compatibility of slings with hoist.** If users bring their own sling, there is a risk that it might be incompatible with the particular model of hoist provided in the toilet. Ways of managing this might vary. For instance, publicising the service/toilet locally with details of the hoist and telling people, both in the publicity and in prominent notices in the toilet, that they must first check with the manufacturer(s) that their sling is compatible with the hoist in question.

The information could state very clearly that if this compatibility has not been checked or there is some uncertainty, the user should not use the facility.

A more controlled way of ensuring compatibility could be for a key-holder scheme to be operated. The toilet provider might, for example, have a basic list indicating compatibility or incompatibility of commonly used hoists and slings. Potential users would have to submit details of their sling. In case of doubt, they would – in order to obtain a key – have to produce evidence (for example, from the manufacturer or supplier) that their sling is compatible with the hoist.

- **Competence of user and carer.** Clearly, there is a risk that if the user and/or carer are not competent to use the hoist, sling and changing bench, accidents could occur.

Notices publicised generally and in the toilet itself, could state that only users and carers accustomed to hoisting, should use the hoist and changing bench.

If a key-holder scheme were operated, it would tend to add in safeguards – even if competence is in effect self-declared by the user and/or carer.

If such a key-holder scheme were operated, it would have to be made clear that the assumption would be that the user and carer were competent to use the hoist, sling and changing bench. It would be their responsibility to ensure that they were. In case they are in doubt, they should be advised not to use toilet.

## The Changing Places Consortium advocates the following:



- **Organisations should not provide slings.** Signage and literature should clearly advise people that they should provide their own slings for health and safety reasons.
- **Clear information should be provided on the type of hoist provided in the facility and which slings are compatible.** If there is any uncertainty as to whether the hoist is compatible with the person's own sling, the person should be advised not to use the facility.
- **The organisation should ensure that the facility is kept as clean and hygienic as possible.** Equipment to assist people using the facility to maintain hygiene should be provided, including wide tear off paper roll to cover the changing bench and a large waste bin for disposable pads. Chemical wipes could also be provided. Clear instructions on how to maintain hygiene should be clearly displayed. The organisation should ensure that the facility is regularly cleaned, as any public toilet should be.

## 5. Community care legislation (and human rights)

Greater prevalence of Changing Places would assist local authorities with the meeting of people's community care needs, by enabling a wider range of activities in the community.

An example of this is provided by the judicial review case of *R(A&B) v East Sussex County Council*. Part of this dispute revolved around outings in the community for two women with profound physical and learning disabilities. Because of issues around the changing of incontinence pads, and lack of suitable public facilities, the council argued that shopping trips would have to be restricted in duration. The case was a protracted one. The court concluded that the local authority had to try to strike a balance between risks on the one hand, and benefits to the two women on the other. Accessible public toilets might arguably have made this balance a little easier to strike.

## Further information



The Changing Places Consortium is unable to provide legal advice. However, if you have any concerns about the provision of Changing Places toilets please do not hesitate to contact us and we will try to assist you.

It is important to remember that providing Changing Places toilets will bring enormous benefits to many thousands of disabled people and their families and carers. Current provision for disabled people often involves people who need assistance to use the toilet being changed on a dirty toilet floor, or being forced to stay at home. Changing Places toilets really can change lives.

Thank you for reading this factsheet. We hope it has helped you to consider the legal implications of installing a Changing Places toilet – and that you will be able to provide a Changing Places toilet in your venue.

## How to contact the Changing Places Consortium

### ***For all enquiries in England, Wales and Northern Ireland contact:***

Telephone: 020 7696 6019

Email: [changingplaces@mencap.org.uk](mailto:changingplaces@mencap.org.uk)

### ***For all enquiries in Scotland contact:***

Telephone: 01382 385 154

Email: [PamisChangingPlaces@dundee.ac.uk](mailto:PamisChangingPlaces@dundee.ac.uk)