

Access and facilities for people with disabilities in a tavern

1 THE MATTERS TO BE DETERMINED

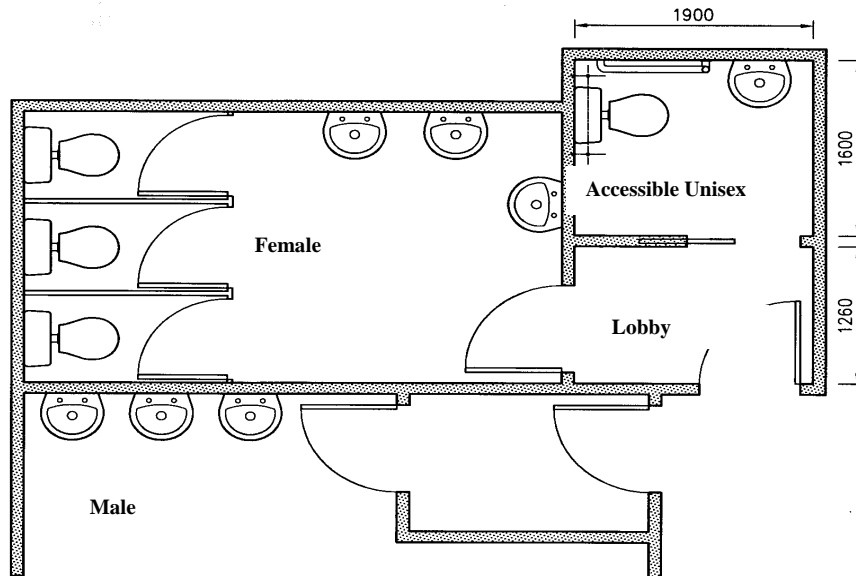
- 1.1 The matters before the Authority arise out of a dispute about access and facilities for people with disabilities in a tavern.
- 1.2 The Authority has been asked to determine the specific matters listed in 4.2 below.
- 1.3 The Authority takes the view that it is being asked in effect to determine whether, in certain particulars, the building complies with clauses D1, G1, and G5 of the building code (the First Schedule to the Building Regulations 1992).
- 1.4 In making its determination the Authority has not considered any other aspects of the Building Act 1991 (“the Act”) or of the building code.

2 THE PARTIES

- 2.1 The applicant was the territorial authority concerned. The other parties were the owner and the building certifier concerned.
- 2.2 The application arose out of complaints to the territorial authority, amongst others, by a private individual (“the complainant”).

3 THE BUILDING AND THE SEQUENCE OF EVENTS

- 3.1 The tavern is on the ground floor of a two-storey building. The tavern consists essentially of a kitchen and bar with customer seating areas and toilet facilities.
- 3.2 Two areas of customer seating are raised 450 mm above the main floor and accessible only by steps.
- 3.3 The diagram below shows the layout of the relevant features of the toilet facilities.
- 3.4 In November 2000, the territorial authority issued a building consent for the fit-out on the basis of a building certificate from a building certifier. The building certifier issued a code compliance certificate in May 2001.



The relevant features of the toilet facilities

3.5 The complainant raised his concerns soon after the tavern was opened. The owner made minor changes, particularly to the relevant signage, but the complainant considered those changes to be inadequate. After lengthy correspondence between the complainant, the parties, and various others, the territorial authority submitted the matter to the Authority for determination in July 2003.

4 THE SUBMISSIONS

4.1 The applicant said:

- From the combined female/unisex toilet lobby (general public area) males using the combined lobby can view the toilet cubicles used in the female toilets as there is no privacy screening to the female space containing soil fixtures, alternately females using the lobby can view the soil fixture in the unisex toilet (Fig 10 G1/AS1).
- There is inadequate space or distance to provide an adequate turning circle between the inward opening lobby entry door and entry into the unisex disabled toilet (Fig 27(b) D1/AS1).
- Two raised seating areas for patrons (one a non smoking area) have only stair access, there is no accessible ramped access.
- The Bar has no accessible section.

4.2 The applicant accordingly asked the Authority to determine:

- 1) Whether the combined female/unisex lobby complies regarding minimum dimensions for manoeuvrability and privacy with clause D1 and G1 of the Building Code 1992 and NZS 4121: 1985.
- 2) Whether the female toilet without privacy screening to the toilet fixtures complies with clause D1 and G1 of the Building Code 1992 and NZS 4121: 1985.
- 3) Whether the unisex disabled [sic] toilet without privacy screening to the toilet fixtures complies with clause D1 and G1 of the Building Code 1992 and NZS 4121: 1985.
- 4) Whether the two raised seating areas without ramped access complies with clause D1 of the Building Code 1992 and NZS 4121: 1985.
- 5) Whether the Bar without an accessible section complies with clause D1 of the Building Code 1992 and NZS 4121: 1985.
- 6) Any other matters that may arise through determining this matter pertaining to clause D1 of the Building Code 1992 and NZS 4121: 1985.

4.3 Originally, neither the owner nor the building certifier made specific submissions, although the applicant provided previous correspondence from both together with material prepared by the complainant, including photographs, expressions of support from other patrons of the tavern, and so on. However, the building certifier requested a formal hearing. The owner and the building certifier appeared at that hearing, and further written submissions from the applicant, together with further material from the complainant, were tabled and commented on at the hearing.

4.4 The submissions in respect of each of the matters that the Authority has been asked to determine are outlined below in the discussion of the particular matter concerned.

5 DISCUSSION

5.1 NZS 4121

5.1.1 The status of NZS 4121 is established by Section 47A of the Act, which provides:

(1) In any . . . building to which the public are to be admitted, . . . reasonable and adequate provision by way of . . . sanitary conveniences, shall be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building.

(3) Any provision that is made to meet the requirements of disabled persons in accordance with New Zealand Standard Specification No 4121 (being the code of practice for design for access and use of buildings by persons with disabilities) and any amendments thereof (whether made before or after the commencement of this subsection), or in accordance with any standard specification that is in substitution therefor, shall, in respect of matters subject to this Act, be deemed to be one of the documents establishing compliance with the building code for the purposes of section 49 of this Act.

- 5.1.2 The Authority takes the view that section 47A(3) means that NZS 4121 has the same status as the Authority Approved Documents, and that an owner may choose to comply with the relevant Approved Document or with NZS 4121 (or an equivalent alternative solution).
- 5.1.3 The Authority also takes the view, on external legal advice, that the Act's provision that "any amendments [to NZS 4121] (whether made before or after the commencement of this subsection)" in section 47A(3) means that from 2 April 2001, when NZS 4121:2001 superseded NZS 4121:1985, compliance with the earlier version no longer establishes compliance with the building code. Much the same applies to an amendment to one of the Approved Documents that the Authority issues under section 49 of the Building Act. In appropriate cases, therefore, the Authority provides a transition period for the coming into force of changes to the Approved Documents. Standards New Zealand does not appear to have a similar procedure. In most cases, that would not matter because New Zealand Standards other than NZS 4121 have no statutory effect under the Building Act unless and until they are cited in an Approved Document. However, changes to NZS 4121 come into force immediately.
- 5.1.4 Accordingly, as NZS 4121:2001 had come into force before the code compliance certificate was issued, this determination must be made in terms of compliance with NZS 4121:2001, or an equivalent alternative solution, even though the fit-out was designed and built in reliance on NZS 4121:1985. (The Authority does not need to consider the situation if NZS 4121:2001 had come into force after the code compliance certificate had been issued but before the determination, and reserves its position on that matter unless and until it arises in a future determination.)
- 5.1.5 Changes to NZS 4121 that are relevant to this determination are discussed below.

5.2 Manoeuvring space

- 5.2.1 The plan of the toilet facilities as shown on page 2 above, has a combined lobby with plan dimensions of 1900 mm by 1260 mm. The question is whether that provides the necessary manoeuvring space.
- 5.2.2 The owner and the building certifier contended that it did so on the basis of Figure 14 of NZS 4121:1985 (set out below).
- 5.2.3 Figure 14 of NZS 4121:1985 does not appear in NZS 4121:2001. In any case, the figure does not show the combination of inward-opening door and sliding door used in the lobby, and does not allow for two or more people to be in the lobby at the same time, as could well be the case because the lobby serves two separate toilet compartments. In that respect, the Authority considers that the lobby must be treated as a corridor.

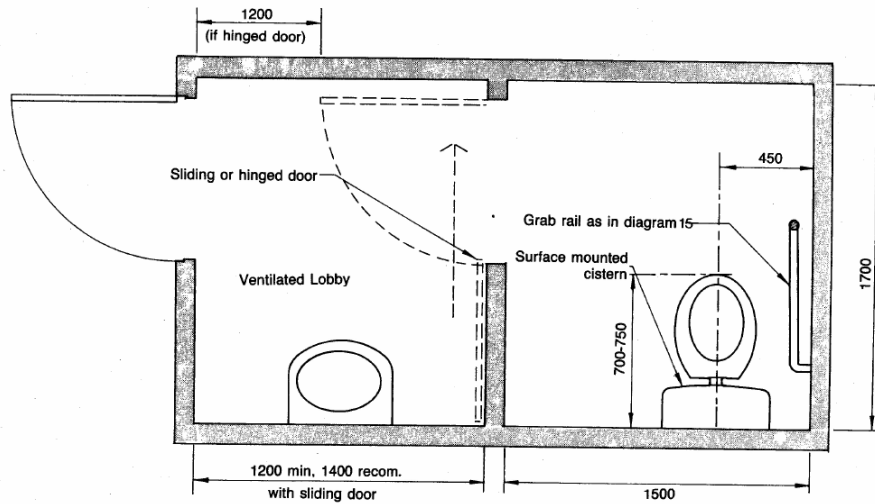


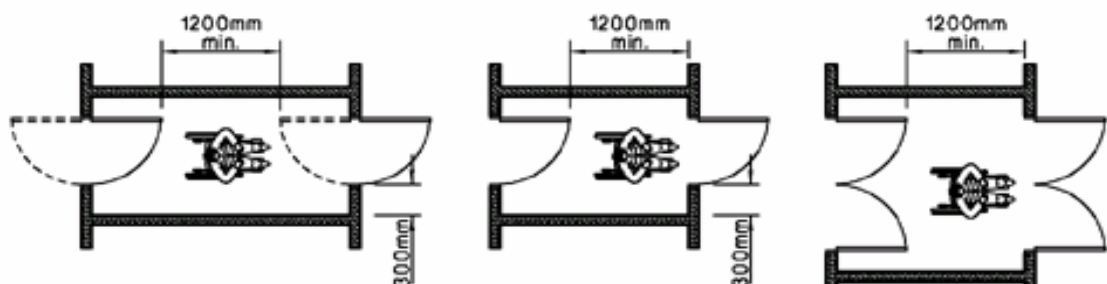
Figure 14 of NZS 4121:1985*

5.2.4 The relevant requirement of the building code for corridors is:

D1.3.4 An accessible route . . . shall:

- (b) Have adequate activity space to enable a person in a wheelchair to negotiate the route while permitting an ambulant person to pass,

5.2.5 The applicant referred to Figure 27(b) of D1/AS1 (see below), which is very similar to Figure 19 of NZS 4121:2001 (see below), but again neither of those figure shows the combination of a side-hung door and a sliding door as used in the lobby concerned. Nevertheless, from the dimensions shown in those the Authority considers that there is insufficient space in the lobby to ensure that wheelchair users can conveniently enter through the side-hung door then close that door before opening the sliding door into the toilet compartment, particularly if an ambulant person wishes to use the lobby at the same time.



(b) Accessible route

Figure 27(b) of D1/AS1.

* Reproduced by permission of Standards New Zealand. NZS 4121:2001 can be purchased from Standards NZ at www.standards.co.nz.

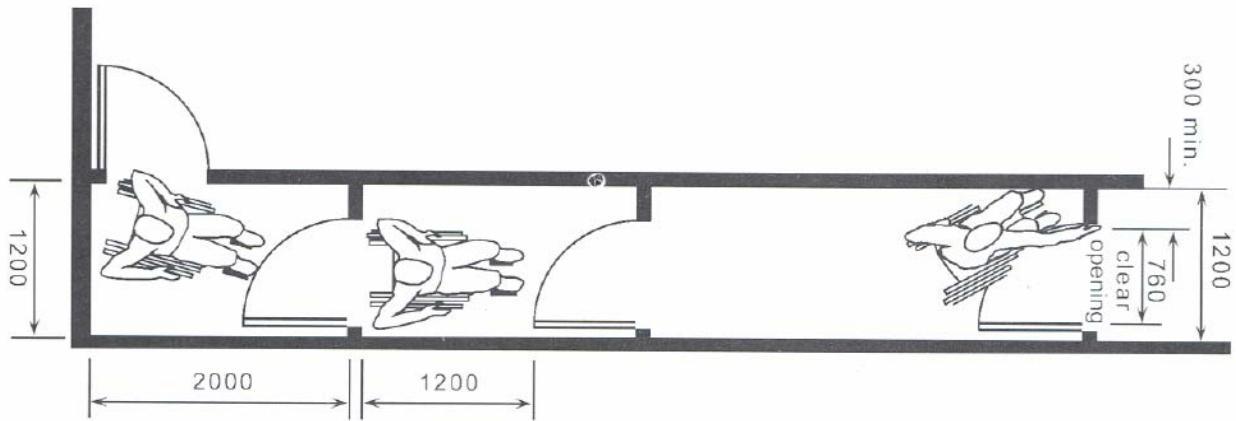


Figure 19 of NZS 4121:2001*

5.2.6 The Authority therefore concludes that the lobby does not comply with clause D1.3.4 of the building code in respect of manoeuvrability.

5.3 Privacy

5.3.1 As to privacy, the relevant requirement of the building code is:

G1.3.2 Sanitary fixtures shall be located, constructed and installed to:

(d) Provide appropriate privacy,

5.3.2 Related provisions are paragraph 1.1.5(c) of G1/AS 1 and clause 10.4 of NZS 4121:2001, which both provide that unisex facilities shall be located so that access is not via an area reserved for one sex. In particular, paragraph 6.3 of G1/AS1 reads:

6.3.1 Lobbies between the space containing sanitary facilities and general public areas are not necessary to meet privacy and line of sight requirements, but if provided:

- a) They shall be independent for each sex if the facilities are single sex or,
- b) They shall be unisex for unisex facilities.

5.3.3 The owner and the building certifier said that the lobby was not a public area. The lobby complied with paragraph 6.3.1 in that it led to both female and unisex facilities and so was not required to be a single sex lobby. The Authority disagrees. Paragraph 6.3.1 must be interpreted so as to achieve the purpose of clause G1.3.2 of the building code, namely preserving privacy. That cannot be achieved by the provision of a lobby to single-sex toilet facilities if the lobby is to be used by both males and females.

5.3.4 The owner said that, apart from the complainant, people with disabilities who visited the tavern appeared to have no difficulty in using the toilets. As it said in Determination 2003/11, the Authority considers that the fact that people with disabilities used the toilet facilities is irrelevant, merely demonstrating that they adapted to the situation not that the situation is acceptable.

5.3.5 The applicant referred to Figure 10 of G1/AS1, which should be read with paragraph 6.1.1 of G1/AS1:

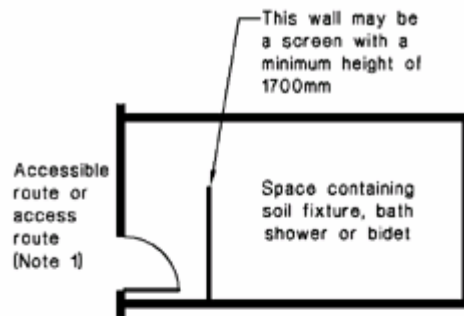
6.1.1 There shall be no direct line of sight between a general public area and a WC, urinal, bath, shower or bidet. See Figure 10 for acceptable layouts.

(There is no corresponding figure in NZS 4121:2001.)

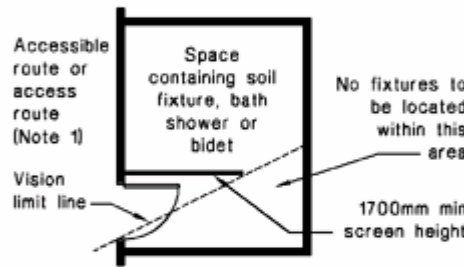
5.3.6 G1/AS1 is an acceptable solution but is not the only means of complying with the building code's requirements for privacy. (Figure 10 is not concerned with manoeuvrability for wheelchair-users, which comes under clause D1 of the building code as discussed in 5.2 above.)

5.3.7 From comparison with the examples shown in Figure 10, the Authority considers that the lobby concerned does not provide appropriate privacy for the users of either the female toilets or the accessible toilet.

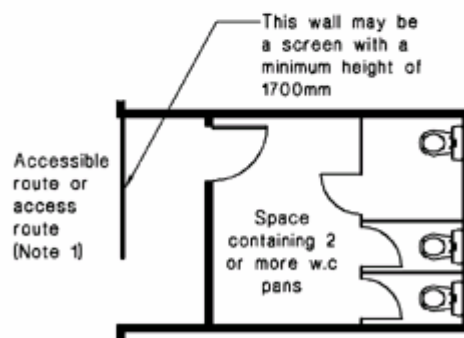
5.3.8 The Authority concludes that the toilets do not comply with clause G1.3.2 of the building code



(a) Visual separation by screen



(b) Visual separation by screen



(c) Separation of WC pans

Note 1:
Accessible facilities have to be located on an accessible route

Figure 10 of G1/AS1

5.4 Raised seating areas

5.4.1 As to the raised seating areas, the relevant requirement of the building code is:

D1.3.2 At least one access route shall have features to enable people with disabilities to:

- (c) Have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene as required by Clause G1 "Personal Hygiene".

5.4.2 The seating areas of the tavern are spaces where people with disabilities may be expected to work or visit. The owner said that those areas comprised 22% of the total seating area, whereas the territorial authority said that they comprised 44%. The discrepancy apparently arose because the territorial authority did not take account of outdoor seating areas forming part of the tavern premises and covered by its liquor licence.

- 5.4.3 The territorial authority submitted that there was no suggestion in clause D1.3.2 that access need be provided to only parts of the spaces in which people with disabilities may be expected to work or visit. In this case, there was “neither reasonable or adequate provision for access by wheelchairs to the raised seating areas that form a significant portion of the public part of the building”.
- 5.4.4 The Authority disagrees, and notes that NZS 4121:2001 requires only a certain number of “wheelchair spaces” to be provided in places of assembly or entertainment. Accordingly, the Authority takes the view that not all parts of a space within a building needs to be accessible provided that people with disabilities are able to carry out normal activities and processes in the building. In this case, the raised seating areas are not separate spaces but parts of the seating area. People with disabilities must have access to the seating area, but not necessarily to every seat.
- 5.4.5 The fact that one of the raised areas is a non-smoking area means, unless there is also a non-smoking area on the accessible part of the floor, that people with disabilities are deprived of the benefit of such an area. The Authority draws the matter to the attention of the owner, but recognises that the designation of public area as non-smoking areas is a management matter that the Authority cannot control.
- 5.4.6 The Authority concludes that the seating space complies with clause D1.3.2 despite the fact that some parts of that space are not accessible.

5.5 The bar

- 5.5.1 The top of the bar is 1100 mm above the finished floor for its entire length. The relevant requirement of the building code is:

G5.3.4 Where reception counters or desks are provided for public use, at least one counter or desk shall be accessible.

- 5.5.2 The acceptable solution G5/AS1 says:

3.0 People with disabilities

3.0.1 Acceptable activity space shall comply with NZS 4121.

- 5.5.3 NZS 4121:1985 referred only to “public counters and desks”, but NZS 4121:2001 says:

11.1 Public counters and desks

11.1.1 General

Reception counters and desks for public use on an accessible route shall have at least one space for use by people in wheelchairs as visitors and staff working in the reception area (see figure 36). Such a space shall be at least 900 mm wide.

11.1.2 Other forms of counters and desks

Additional examples of public counters such as in public bars, shops, supermarket checkouts shall comply with 11.1.1 as shown in figure 37.

- 5.5.4 The requirements of NZS 4121:2001 were discussed in the article “Accessible Reception Counters and Desks” in BIA News No.112, April 2001, which referred to two reports on the subject commissioned by the Authority.

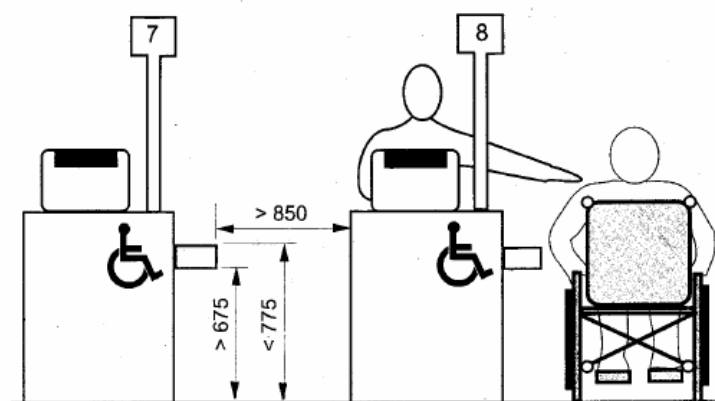
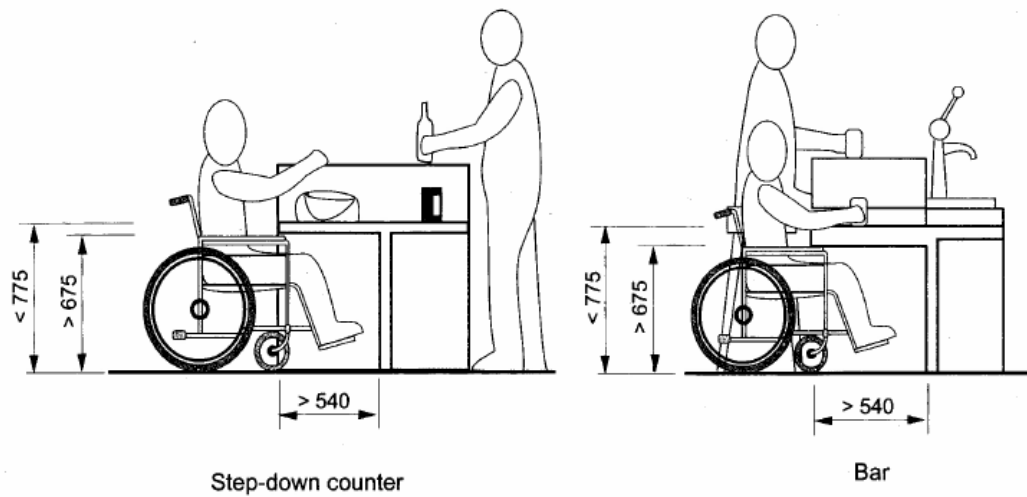


Figure 37 of NZS 4121:2001*

5.5.5 The Authority accepts that staff of the tavern will generally attend to people with disabilities. Nevertheless, the bar makes no provision whatsoever for wheelchair-users, so that it clearly is not an alternative solution that complies with the building code even though it does not comply with NZS 4121:2001. The Authority accordingly considers that the bar does not comply with clause G5.3.4 of the building code.

5.6 Other matters

5.6.1 The applicant asked the Authority to determine any other matters “that may arise . . . pertaining to clause D1 of the Building Code 1992 and NZS 4121: 1985”.

5.6.2 The Authority takes the view that it would be contrary to natural justice for it to determine any matter of which all parties did not have adequate notice and reasonable opportunity to make submissions.

6 CONCLUSIONS

6.1 The Authority concludes that:

- (a) The lobby to both the female and the accessible unisex toilet facilities does not comply with the requirements of clause D1 of the building code for manoeuvrability.
- (b) The lobby to both the female and the accessible unisex toilet facilities does not comply with the requirements of clause G5 of the building code for privacy in respect of the female toilet facilities.
- (c) The seating area complies with the provisions of clause D1 of the building code for accessibility despite the fact that the raised parts of that area do not have ramp access.
- (d) The bar without an accessible section does not comply with clause G5 of the building code.

7 WHAT IS TO BE DONE

7.1 The code compliance certificate

7.1.1 Section 20 of the Act says:

A determination by the Authority in relation to a matter referred to it under section 17 of this Act may incorporate waivers or modifications and conditions that a territorial authority is empowered to grant or impose and shall—

- (a) Confirm, reverse, or modify the disputed decision to which it relates or determine the matter which is in doubt; and
- (b) Be given to the parties concerned and, in the case of a determination under section 71 or section 81(2) of this Act, be submitted to the District Court; and
- (c) Be binding on the parties concerned, except as provided by section 72 of this Act.

7.1.2 The Authority has considerable sympathy for the owner and the building certifier as regards the bar. At the time the building consent was issued the bar could not be said to be contrary to NZS 4121:1985, because that was silent as to bars. However, before the code compliance certificate was issued, NZS 4121:2001 had come into force, and the bar was clearly contrary to that document. The Authority, acting on external legal advice, accepts that it has no choice but to reverse the building certifier's decision to issue the code compliance certificate in respect of both the lobby to the female and the accessible unisex toilet facilities and the bar.

7.1.3 When a territorial authority refuses to issue a code compliance certificate on the grounds of non-compliance with the building code, or is advised by a building certifier that completed work does not comply, the territorial authority is required under section 43(6) or 43(7) to issue a notice to rectify. The Authority takes the view that a notice to rectify is also required when the Authority effectively cancels or modifies a code compliance certificate.

7.1.4 Failing to comply with a notice to rectify is an offence under section 80(1)(c).

7.2 Alterations required

- 7.2.1 Given the Authority's decision about the code compliance certificate, it will be necessary for both the toilet facilities and the bar to be altered so as to comply with the building code so that a new code compliance certificate may be issued.
- 7.2.2 It is not for the Authority to decide how the building is to be altered so as to comply with the provisions of the building code for access and facilities for people with disabilities. That is a matter for the owner to propose and for the building certifier or the territorial authority to accept or reject, with any of the parties entitled to submit doubts or disputes to the Authority for another determination.

8 THE AUTHORITY'S DECISION

- 8.1 In accordance with section 20 of the Act, the Authority hereby determines that:
- (a) The lobby to both the female and the accessible unisex toilet facilities does not comply with the requirements of clause D1 of the building code for manoeuvrability.
 - (b) The lobby to both the female and the accessible unisex toilet facilities does not comply with the requirements of clause G5 of the building code for privacy in respect of the female toilet facilities.
 - (c) The seating area complies with the provisions of clause D1 of the building code for accessibility despite the fact that the raised parts of that area do not have ramp access.
 - (d) The bar without an accessible section does not comply with clause G5 of the building code.
- 8.2 In accordance with section 20 of the Act, the Authority hereby reverses the building certifier's decision to issue the code compliance certificate in respect of the lobby and the bar.

Signed for and on behalf of the Building Industry Authority on this day of
2004

John Ryan
Chief Executive