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‘Dangerous to Health or Offensive’: The Nuisance and Insanitary Conditions Powers - Some Arguments for Reform

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This paper explores the origins and scope of the power to order the abatement of nuisances and insanitary conditions in Australian public health acts. It argues that, paradoxically, these powers, often expressed in the language and ideas of the 19th century, are both too limited in focusing on the original sanitary roles of public health, and also are too wide in allowing its miasmatic traditions to characterise amenity issues as environmental health issues. This paradox is well reflected in the legal cases that have considered the scope of the powers. Yet the power to order the abatement of nuisances and insanitary conditions remains a central environmental health remedy even though it is of limited value and is often overshadowed by more comprehensive and powerful ways of protecting the environment. The environmental health response should be strengthened and broadened by rethinking the nature of the order power and by setting it within a coherent framework that supports a core idea of ‘harm to health’ around which the Act is organised¹.

Key words: Public Health Acts; Environmental Health Reform

The industrial world of the 19th century threw out desperate images of disease, despair, and unimaginable horror. In his *Bitter Cry of Outcast London*, Andrew Mearns (writing in 1883) describes the city’s poor, many thousands crowded together in “human rookeries”. To get to them, he wrote:

you have to penetrate courts reeking with poisonous and malodorous gases rising from accumulations of sewage and refuse scattered in all directions and often flowing beneath your feet; courts, many of them which the sun never penetrates, which are never visited by a breath of fresh air, and which rarely know the virtues of a drop of cleansing water ... You have to grope your way along dark and filthy passages swarming with vermin. Then, if you are not driven back by the intolerable stench, you may gain admittance to the dens in which these thousands of beings who belong, as much as you do, to the race for whom Christ died, herd together (Porter 1997, p. 400).

The vast scale of these problems provided a quite impossible task for governments. Yet their urgency, highlighted by recurring epidemics notably cholera, prompted urban reform and also the first public health acts. These introduced the power to order the abatement of insanitary and unhealthy conditions as the mainstay of local sanitary practice, a power that remains with us to the present day. Thus, in 1848, powers were given to local authorities in section 1 of the *Nuisance Removal and Disease Prevention Act* to order the removal of “nuisances”; where premises were in a “filthy and unwholesome condition as to be a nuisance or injurious to the health of any person” an order to remedy the condition could be made. These powers were first entrenched in English public health legislation, and a few years later also in Australia where colonial public health laws were passed from the 1850s onwards. The first Australian health act, the *Health Act 1854 (Vic)*, copied English legislation closely and provided local councils with a

range of powers to order the abatement of nuisances, not defined but impliedly “things of an offensive nature or likely to be prejudicial to health” (s13).

Nuisances as a Response to Miasmas

The focus in a health act on environments that were noticeably unpleasant and offensive (generally evidenced by their smells) was an expression of the prevailing idea about the way disease was spread through the atmosphere. Offensive conditions were unhealthy, it was said, on account of the “miasmas” or “effluvia” or exudation emitted by them. The visual and the malodorous became a telltale sign of the source of infections and things that were offensive were by their nature also prejudicial to health. The Marquess of Landsdown, in introducing the Bill, said that the causes of disease, notably cholera, “were atmospheric; that it was influenced by the exhalation of rivers, the currents of air, and certain meteoric changes and vicissitudes” (Hansard 1848, p. 614). This view drove the Act and while miasmas as the exudations or vapours emerging from unpleasant conditions are no longer offered as explanation for the transmission of disease (it was recognised that seemingly unpolluted water could still be a source of disease, and later the germ theory took hold) it remained a persistent idea (Halliday 2001). There are still echoes of it in the order making powers of some Australian states whose health acts continue to reflect the language and the key ideas that go back to the 19th century origins of public health. But in some ways the miasmatic responses proved correct: offensive conditions, such as privies overflowing into water sources, often signified the presence of bacteria, while dung heaps attracted flies and other vectors of disease.

If miasmatic theory directed the public health response it also had an important secondary impact, since its focus was on improving the environment and the elimination, in the name of public health, of

the smells, the waste, the sources of water pollution and the acrid smoke of factory chimneys. In this respect our first public health laws were also our first environment protection laws. This point remains true today, but in the 21st century the general environmental surveillance offered by public health powers has been complemented, perhaps overshadowed, by environment protection regulations that comprehensively regulate and monitor areas such as water and air pollution, the control of waste and contaminated sites and noise. All Australian jurisdictions have modern and extensive environment protection laws that impose substantial penalties and offer administrative flexibility and a range of options for dealing with the nuisances that fall within them. Zoning controls, imposed under planning laws, have also sought to keep housing and industry apart, minimising the daily impacts of nuisances on peoples’ lives.

Thus in many cases an environmental health remedy runs parallel with an environment protection remedy and either might be applied to the many cases where the complaint could relate equally to environmental health or environment protection. Further, local government legislation also provides some remedies, also in the form of order making powers, for situations that are aesthetically or otherwise undesirable and some of these powers might also apply in cases where an environmental health order could also have been made.

The overshadowing of the nuisance abatement power by the new environment protection laws might seem to erode its importance, but it still remains a key public health remedy in the health acts of Queensland (s77 *Health Act 1937*); Victoria (s39A *Health Act 1958*); Western Australia (s182 *Health Act 1911*); the Northern Territory (s4 *Public Health Act 1952*); and New Zealand (s29 *Health Act 1956*). South Australia (s3(2) *Public and Environmental Health Act 1987*) and the Australian Capital Territory (*Dictionary Public Health Act 1997*)

use the term “insanitary condition” which calls up similar ideas to “nuisance”. New South Wales (s124 *Local Government Act 1993*) and Tasmania (s199 *Local Government Act 1993*) rely on order making powers in local government legislation which relate to environmental health issues. The United Kingdom, which first put nuisance powers in place in 1848, has now transferred them to environment protection legislation (s79 *Environmental Protection Act 1990*).

A case exists to reassess the scope and value of the nuisance power. It now has significant ‘legislative competition’ from newer and more comprehensive environment protection legislation and is based on a flawed understanding of the way disease is spread. Yet, if reformed and used imaginatively, it also has the potential to provide important remedies in environmental health and remain a significant component of public health law.

The Scope of the Nuisance Power

It is remarkable that in an age of seemingly constant legislative change and reform, the language of our public health laws has remained unaltered for so long. The Queensland (*Health Act 1937*) and Western Australian (*Health Act 1911*) definitions of the term “nuisance” have changed little since they were first drafted. Queensland provides a list of things that might amount to a nuisance when they are “injurious or prejudicial to health”. Western Australia also offers a very long list of circumstances, which might amount to a nuisance, typically in the cases where they are found to be “offensive or injurious or dangerous to health”. The nuisance power, as expressed in the *Victorian Health Act 1958* still captures the essence of its original idea (which is discussed below). A more modern approach is taken in South Australia where an insanitary condition includes premises that give rise to a “risk to health” or whose conditions cause “justified offence” and also in the Australian Capital Territory where the key ideas against which the condition is

tested are whether it amounts to “a public health risk, damaging to public health or offensive to community health standards”.

Using Victoria as the example for a closer analysis of the term, a statutory nuisance is defined by s39A of the *Health Act 1958* (Vic) as nuisances “which are, or are liable to be, *dangerous to health or offensive*” in respect of buildings, land, water, animals, refuse, noise or emissions. Victorians have lived with this phrase for nearly a century, though in 1988, “offensive” was defined to mean “noxious, annoying or injurious to personal comfort”. The definition is interesting since it seems both narrow and wide at the same time. The idea of “dangerous to health” sets a high test, and appears to exclude a range of risks that should be of concern even though they lack the imminent threat implied by a danger. The idea of “offensive” even with the definition “noxious, annoying or injurious to personal comfort” at first glance covers a multitude of possibilities including concerns relating to amenity or the need for orderly planning.

How are we to give shape to the limits of the nuisance power, or its equivalent the insanitary conditions power? There is much case law ranging from the 19th century to quite recent times that provides important principles of its current scope and usefulness. Most importantly, courts have usually come to the term with an understanding of what public health legislation is seeking to achieve and, given the similar language in both the English and Australian statutes, the cases from both jurisdictions are worth considering.

The scope of the nuisance remedy was delineated in the English case *Queen v. Parlby* (1889) where the court commented, in relation to “premises in such a state as to be a nuisance” in the *Health Act 1875*:

we do not attempt to define every class of case to which the first head applies [i.e. a nuisance], but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as, for instance, where houses have been

inhabited by tenants whose habits and ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life and limb. (p. 525).

A later case from New South Wales, *ex parte Harris* (1902) also tended to limit the application of the term, holding that premises, which required alterations and repair, did not amount to a public health nuisance even if there was evidence that they might be injurious to health. Rather the premises had to be “decayed, filthy, or impregnated with disease, or so dilapidated as to be dangerous” (p. 197). So, here, the court concluded (perhaps too narrowly and possibly on account of Sir Matthew Harris being Mayor of Sydney as well as a prominent landlord) that a nuisance did not exist even though there were problems with the ventilation and the drains of the premises.

The statutory nuisance had to have a sanitary significance and could not be relied on to sustain orders in cases that were more about the general unreasonable use of land. In *Great Western Railway Company v Bishop* (1872) water falling onto a public road was found not to be a statutory nuisance. Lord Cockburn said “[i]t is plain that the object [of the *Nuisance Removal Act*] was to protect the public health. ... I think that affords us a guiding principle by which to construe this Act, and that ‘nuisance,’ the general term used in the Act, must be taken to mean a nuisance affecting public health” (p. 552). This view was accepted in later cases, thus in *Springett v Harold* (1954) a house which was in need of decorating (the walls and ceilings were stained and peeling) was held not to be a nuisance. Nor was an unsightly rubbish tip where the health hazard was the dumping of materials, such as builders’ rubble, that could injure persons using the area (*Coventry City Council v Cartwright* (1975)). The view that physical injuries do not amount to a nuisance was upheld in *R v Bristol City, ex parte Everett* (1999), which

involved a very steep set of stairs. The Court of Appeal found that the scope of the term “prejudicial to health” or “injurious, or likely to cause injury to health” was not intended, when the Act was drafted, to cover physical injury and should not now extend to it, notwithstanding that the term was now in another Act (the *Environmental Protection Act 1990*). Since the terms “nuisance” and “insanitary condition” remain in health legislation in Australia, and principally are organised around sections and parts dealing with sanitation, there is an even stronger argument that this traditional interpretation (that excludes its application to physical dangers) will be applied here.

The position in Australia reinforces the English case law. In *McLaughlin v Halliday* (1985) the Victorian Supreme Court held that the term “offensive matter” as defined in the *Health Act 1958* (Vic) (“dust sludge mud soil ashes rags waste matter filth blood offal dung manure or any other material which is offensive or likely to become offensive.”) could not apply to cardboard and paper waste. The court found that this definition created a class of materials “immediately identifiable as being offensive in that they are essentially dirty or noxious or noisome or essentially injurious to human health, or inconvenient to human well-being” (p. 53). But the principle may not be universal and a statutory nuisance remedy was allowed in *Adams v Council of the Shire of Taringa* (1927) even though there was no obvious health impact and the problem seemed only to involve water that had accumulated on the plaintiff’s land.

Air quality issues (notably smells and visual pollution) whether of environment protection or environmental health concern have always been likely to amount to a statutory nuisance or insanitary condition. Miasmatic ideas were applied in this context in *Bishop Auckland Local Board v Bishop Auckland Iron & Steel Company* (1882) where an accumulation of cinders and ashes satisfied the court that a nuisance “producing noisome effluvia” existed and

therefore was injurious to human health. Obvious air pollution, for example the release of large quantities of smoke by a brick kiln in circumstances that clearly constituted a common law nuisance (washing was soiled by smuts and the amenity of the area was reduced) was allowed as a statutory nuisance (*McKell v Rider* (1908)). So was the release of “quantities of black smoke [from a brewery] as to be a nuisance” (*Weekes v King* (1885)). Granted, the health impacts of air pollution could often be quite significant, as seemed to be the case in *Whitehead v Victor Leggo Chemical Company* (1926) where the smoke coming from the defendant’s factory “appeared to be composed mostly of sulphuric fumes”. The emission of noxious and potentially toxic gasses as nuisances or insanitary conditions also have a relatively modern application in *Caruso v Boucher* (1974), which involved the escape of chloropicrin, a fumigant used in glass houses and said to be “injurious to health or offensive” within the meaning of s83(1) of the South Australian Health Act 1935 (people complained of sore throats and watering eyes).

Organic smells also qualify as nuisances and the early cases, if not the later cases, were also shaped by miasmatic thinking. In *Malton Board of Health v Malton Farmers Manure and Trading Company* (1879) the nuisance produced from the defendant’s manure works was said to be injurious to human health because the effluvia to which sick persons were exposed might cause them to become worse. Piggeries were also the subject of orders (*Banbury Urban Sanitary Authority v Page* (1881) and *Burton v Bysouth* (1900)). Other cases where a statutory nuisance was allowed include *Bullows v J Kitchen & Sons Ltd* (1910) which involved “very foul odours” coming from a noxious trade establishment, which were widely diffused and lasted for some hours and *Colville v Dale* (1899) which involved smells from a boiling-down works and bone-mill.

Noise has also been the subject of an

insanitary conditions order and is specifically included in a number of statutory definitions of nuisance (*Jurkovic v Corporation of the City of Port Adelaide* (1979)). While in the United Kingdom, a court accepted that the failure to insulate premises from outside noise meant that they were “in such a state as to be prejudicial to health” (*London Borough of Southwark v Ince* (1989)).

Assessing the Term “Nuisance” in the Light of Recent Case Law

Can we reconcile the cases and judicial approaches to the term “nuisance,” or its related term “insanitary condition,” in a way that gives us a useful guide to the scope of the power? We can conclude that the term emerged from a focused understanding of the visible environmental health issues of the day. As Richards J said in *R v Bristol City Council, ex parte Everett* (1998):

When powers to take action against premises that were “prejudicial to health” or “injurious to health” were conferred by the mid 19th century statutes, the object of concern was plainly the direct effect on people’s health of filthy or unwholesome premises and the like: in particular, the risk of disease or illness (p. 613).

However, a close adherence to the origins of the term can lead to odd decisions that are seen in some of the recent cases. In *Coventry City Council v Cartwright* (1975) putrescible waste was removed from the dump, while builders’ rubble that might injure persons as they walked across the land remained. The waste, had it not been taken away, might have constituted a nuisance, on the traditional grounds that it was offensive; the rubble, certainly the greater threat to health was not a nuisance. Another case, which illustrates this point, is the House of Lords decision in *Birmingham City Council v Oakley* (2003). The case involved premises that did not have a hand basin in the toilet, making it inconvenient for persons to wash their hands, and in the case of children perhaps making it unlikely that they would.

The local justices saw this as a problem, concluding that washing hands “is important to good hygiene practices especially with regard to the younger members of the household” and more particularly that “[i]t is unacceptable in the interest of hygiene having used the WC to expect persons to either: (a) wash [their] hands in [the] kitchen sink or (b) cross [the] kitchen to [the] bathroom as both of these involve the risk of cross infection within the kitchen area”. On this basis a statutory nuisance order was imposed.

The application of the statutory nuisance power in this case was challenged and when it reached the House of Lords a majority of the Law Lords hearing the case decided that the situation did not amount to a statutory nuisance. They took the view that, though unsatisfactory, the facilities were not in themselves defective. If there was a prejudice to health, this had nothing to do with the state or condition of the premises; rather it resulted “from the failure to wash hands or the use of the sink or the basin after access through the kitchen”. It was said by Lord Slynn that “[t]here must be a factor, which in itself is prejudicial to health. I do not think that the arrangement of the rooms ... not in themselves insanitary so as to be prejudicial to health falls within the [scope of a statutory nuisance]” (p. 1943). However, Lord Clyde who dissented found that the circumstances were prejudicial to health. “In the ordinary use of language it seems to me that the state of premises may include a deficiency due to the absence of a facility or a particular positioning of the facilities. ... There was clearly something inadequate with the premises themselves so far as health and hygiene were concerned”. In his Lordship’s view it was reasonable to conclude “that the risk of cross infection which [the justices] feared was due to the state of the premises” (p. 1952).

The majority view in this case leads to the odd conclusion that if the toilet smelt, that would quite possibly be the basis of a statutory nuisance order but if it lacked the

facilities necessary to protect health (the hand basin) then that was not in itself a nuisance. Such a conclusion goes against good public health sense, which advocates the provision of environments and facilities to make ‘healthy choices easy choices’. A technical interpretation such as this is only in the interests of landlords who try to evade their responsibilities to provide a safe and sanitary environment for their tenants.

However, in other respects the statutory nuisance or insanitary condition power can be read too widely. Its origins in nuisance more generally and its focus on amenity issues, perhaps given public health flavour by the idea of “effluvia”, means that there is always the possibility that environmental health grounds will be used to provide an environmental or amenity remedy or a land use planning remedy, with the environmental health nexus strained to say the least. A good example of this is illustrated by the South Australian District Court decision *Tavitian v Public And Environmental Health Council & City of Playford* (2003) where an insanitary conditions order was based on assorted clutter in the appellant’s premises including “garden waste, iron, timber, plastic, tyres, dilapidated motor vehicle bodies containing refuse and rubbish, motor parts, mattresses and a variety of metal frames, tubing, fencing materials and general refuse and rubbish”. It was said to amount to an insanitary condition “by reason of the fact that: (1) the premises are so neglected that there is a risk of infestation by rodents or other pests; and (2) the condition of the premises is such to cause justified offence to the owner of land in the vicinity of the premises”. The court took issue with the fact that the order seemingly had been made on the assumption that “a risk of infestation necessarily resulted from the mere existence of the accumulated clutter”. More particularly, there was no evidence that the premises were filthy “such as might, without more, give rise to an inference of a risk of infestation” (para 43). The fact that the

premises were unsightly was not enough to amount to an insanitary condition (para 49). Indeed, it was the appellant's view (which the court may have sympathised with) that the "Council's case against him was a planning objection to his use of his yard disguised as a public health objection" (para 48).

For the Future

The origins of the statutory nuisance and the rise of environmental controls raise significant questions for the future. The case law suggests that the term is locked within its historical sanitary context and could not be applied in a range of new circumstances where we might expect an environmental health response. Should we continue with the power, but remain mindful of the constraints and the limits alluded to by the courts? Should we continue to address environmental health at all, perhaps vacating the field and leaving environmental health as the sole responsibility of environment protection agencies? Is there a case for an independent environmental health approach and if so what form should it take? This author believes that the traditional values and ideas that encompass the 'environmental health approach' are worthwhile and should be defended. An environmental health approach is a holistic approach, reflected in the training of its practitioners. Environmental health draws links between the social and the environment and those complex relationships between history, place and opportunity that so powerfully shape people's health and wellbeing, the health and wellbeing of Aboriginal Australians being a powerful case in point. Our current environmental health practice is also a 'rich' and a 'deep' discipline, the product of a long tradition that urged, and continues to urge, social and environmental reform based on sound evidence drawn from epidemiology, medical investigation and social inquiry.

If the environmental health response is to

maintain its capacity to remedy environmental health problems, is there another way of crafting the power in order to free it from its constraints while strengthening the environmental health focus of the remedy? In 2000 the National Public Health Partnership released a discussion paper that advocated a "risk based" approach to environmental health legislation (National Public Health Partnership 2000). Rather than allowing the Acts to provide a range of specific remedies, it raised the possibility of having a concept, "risk to health", as the general idea or "spine" around which the administrative powers notably orders, or penalties should be organised. A statutory duty lay at the basis of this. It was a duty to avoid harm to health, which might be expressed as follows:

A person must not undertake any activity that may result in harm to health unless the person takes all reasonable and practical measures to eliminate the possibility of that harm occurring (National Public Health Partnership 2000 part 6.3).

Those who breached their duty might then be subject to an order to abate or remediate the problem.

A duty expressed in general terms restates the function of the public health acts, namely to prevent situations that pose a threat to human health. It should respond to all of the concerns legitimately caught by the nuisance or insanitary conditions powers, insofar as these are grounded in a concern for human health. Recognising that health is broadly defined to include states of "mental and social wellbeing" the adverse impacts of a poor environment, of noise and odour will, if justified, be calculated to harm human health and the duty would extend to these issues as well. But it would also cover the situations that, for the reasons alluded to in *Birmingham City Council v Oakley* (2000), lie beyond the scope of the 19th century sanitary concerns. Structures that are inherently unhealthy, rather than defective; premises that are dangerous in some way; procedures that potentially pose a risk of

harm such as colonic irrigation, solariums, rapid detoxification and, most recently 'sweat lodges' (procedures that are not in themselves regulated and whose operators and promoters often are not licensed health professionals); or cases where persons are being exposed to tobacco smoke (if not already covered by regulation) - all fall within the general duty. The point is that the duty and its order making power would operate against a general principle rather than within a defined area.

Thus a general duty would provide a remedy for the things that seem often to 'fall between the cracks' and in these cases the generic environmental health remedy operates as a safety net. The duty and its accompanying order could also cover cases where persons with a communicable disease might in some way be placing others at risk. But there are other cases where it would not be appropriate to issue an order. Such a case might be a 'fast food' restaurant, where the argument for issuing it is no more than that the food is unhealthy, leading to obesity. While obesity is an emerging environmental health issue of great concern, the singling out of one outlet makes no sense in dealing with a multi causal and complex issue, unless there is something in the restaurant's activities that makes it stand out from others. The issue of obesity and high-energy fast food is better dealt with through a mix of health promotion strategies and marketing controls and, where premises are in breach of their existing responsibilities, prosecutions or orders under the food laws.

The duty could go wider again; the causes of global warming and the problems that will emerge from unsustainable lifestyles together present our greatest identifiable risk to health. Potentially, our environmental health remedies, which hitherto have been so local and limited in their scope, might contribute towards our response to these very significant problems. The way it might contribute and the support it might offer to other 'whole of government' policies such as sustainability can only be

speculated on at this stage. But the recognition that our first order environmental issues will have dire impacts on human health must cause us to explore how environmental health can help address these questions.

For all the reasons outlined above, the duty has to cover a range of possibilities, especially future possibilities and it must necessarily be broad and general. It is not possible to spell out its scope or its range, rather we must allow the duty to 'unfold' and meet new issues as they arise. However, on occasions it may also be important to be more specific and to allow authorities to declare particular risks to health to fall within the duty or to authorise the publication of codes or guidelines that set out what amounts to compliance with it in particular cases. It may also be important to direct decision makers to formal criteria when deciding whether or not to issue an order. The Australian Capital Territory provides for this in s69(2) of its *Public Health Act 1997*. Here the person issuing the order must have regard to the number of persons affected by the problem, its significance (the degree of risk, damage or offensiveness that it presents), the extent to which the person responsible for the problem has taken reasonable precautions to "avoid or minimise [its] adverse effect" and the reasonable precautions that persons adversely affected have or have not taken to "avoid or minimise [its] effect".

The duty must also be enforceable. First, by the power to issue an abatement or compliance order and to specify the requirements for compliance, and second, with sanctions that apply for failure to comply with the order. The National Health Partnership Report also envisaged statutory offences for creating a risk to health, where the risk was significant and harm occurred or might have occurred as a result.

Conclusion

Over the past 10 years Australian governments have invested resources and energy into reviewing public health law and while issues such as HIV/AIDS and, more recently, the possibilities of bioterrorism and emerging pandemics have occupied much of this work, the sanitary origins of our laws should not be overlooked. The case for continuing a

human health directed 'gaze' on our local environments remains strong. But there is a need to rethink and modernise the basis on which environmental health can act and the remedies that it can offer. A generic approach offers a more relevant and versatile option, which can continue the legitimate concerns of 19th century environmental health but not be imprisoned by them.

Endnote

1. A note on the terminology: in this paper 'public health' tends to be used in relation to the legislation and the historical development of the discipline. 'Environmental health' is used more generally since it reflects the current interest and description of the work of practitioners in the field. In many respects the terms are interchangeable, with the latter being a more contemporary version of the former.

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Christopher Reynolds

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