

Chapter 7

Statutory duties, powers, offences and defences

Section 7.2

A general statutory duty

33. *What should follow from being in breach of the duty: criminal and/or civil liability or should the consequences of breach be limited to administrative powers?*

The AIEH believes that the consequences for breach of duty should be limited to administrative powers.

34. *Should failure to comply with the duty be the basis on which costs are recovered?*

The AIEH believes that there should be provision for cost recovery for failing to comply with the duty. This would coincide with other legislation such as the Environment Protection Act.

35. *Should compliance with the duty provide a defence against some offences under the Act?*

The AIEH believes that compliance with the duty should provide a defence against some offences under the Act.

36. *How might the duty of care work in practice?*

The AIEH believes that the duty of care should not only compliment other legislation where there has been a breach of duty but also act as a 'safety net' to respond to problems where there is no other obvious statutory remedy (eg. operation of solariums). Local authorities should have the discretion and decide how risks within their municipality should be managed.

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Section 7.3

Duty to abate a nuisance

37. *Should a general statutory duty of care, if adopted, replace the separate nuisance provisions and, if so, should municipal councils still retain responsibility for dealing with public health risks similar to nuisances in their municipalities?*

The AIEH is of the view that the current definition of nuisance is extremely broad. The nuisance provisions can be difficult to enforce and be quite unreasonable given that the definition of nuisance requires a nuisance to exist before it can be deemed to be dangerous to health or offensive. Therefore, a situation which exists which is not a nuisance but can be potentially dangerous to health or offensive cannot be adequately dealt with under these provisions. This highlights the need for another mechanism such as a 'duty of care' provision.

We consider it would be appropriate to complement the 'nuisance' provision with a general duty of care and local authorities should still retain responsibility for dealing with public health risks similar to nuisances.

38. *If separate nuisance provisions are retained, should nuisance be defined so as to focus on public health risks and, if so, does removing the term 'annoying' from the definition of 'offensive' achieve this?*

The AIEH believes that should separate nuisance provisions be retained, the definition should focus on matters involving public health risks, rather than annoying or irritating matters. The term 'annoying' from the definition of 'offensive' is useful in solving trivial matters under the Act, which aren't necessarily a risk to public health. Should the term 'annoying' be removed, non-health related problems that are currently caught under the broad nuisance definition could be dealt with via local laws, which should be supported by infringement notices.

39. *If the obligation on municipal councils to abate nuisance in their municipality is retained, should the abatement provisions be removed and municipal councils instead rely on general enforcement provisions under the new Act?*

The AIEH believes that removing abatement provisions and relying on general enforcement provisions under the new Act will simplify the enforcement process and remove the need for multiple types of improvement or compliance notices. The current abatement processes are not necessary in achieving the outcome as non-compliance with them does not give rise to an offence. In reality they do the same as an improvement notice or other direction to comply.

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Section 7.4 Standards of Practice and guidelines	<p>40 <i>Should best practice standards continue to have a role in the regulation of public health risks?</i></p> <p>Best practice standards have a role to play in the regulation of public health risks, but are not required to be prescribed in legislation. The Infectious Disease regulations need to ensure that they address higher risk activities and their critical control points, so that they are enforceable under the new Act. This will ensure that the public's safety is not adversely compromised.</p> <p>Guidelines in particular, the current Guidelines for Personal Care and Body Art industries create an expectation from the industry that they will be enforced. The practice of DHS developing guidelines and codes of practice as minimum standards should be continued and is supported by the AIEH. The AIEH will assist the monitoring process / surveillance practices by developing appropriate audit tools to promote consistency across councils and the membership.</p>
Section 7.5 Risk Management Plans	<p>41 <i>Should RMPs have a role in the regulation of public health risks under the new Act?</i></p> <p>Risk Management Plans similar to those used in the systems developed for the Food Act 1984, the Building Act 1993 and the Safe Drinking Water Act 2003 could be seen as a method of ensuring that proprietors of registered premises and/or licensed activities are complying with the Act. There is currently insufficient evidence / data to validate that these processes are effective (i.e. in terms of food safety programs for the general food industry) and success is very reliant on the implementation process. A Cost benefit analysis must be undertaken before the requirement for RMPs is prescribed.</p> <p>In any instance where this type of management system is implemented the onus must be on the operator to ensure that they are complying with the guidelines and their Risk Management Plans. The AIEH is of the view that in administrating these requirements it would be the role of councils to verify that actions are being taken to demonstrate that RMPs are effective.</p> <p>The Act would also have to include a system of auditing and enforcement of risk management systems, including the auditing function, certificates of audits and avoiding conflicts of interests.</p>

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Section 7.5 Risk Management Plans

42 *Who should be required to prepare RMPs:*

- *persons undertaking a registrable or licensable activity by way of a condition of registration/licence?*
- *persons required to do so by an improvement notice?*

There are varying public health risks in registrable premises, and the AIEH believes that it would not be appropriate to regulate all registered premises to have a Risk Management Plan. There would be definite benefits in requiring an RMP for premises that have a history of poor performance, high-risk registered premises (skin penetration) and for non-registrable premises with similar risks (colonic irrigation).

Model Risk Management plans like those developed by the department for Food premises in the Food Act 1984 could be created for the implementation of the Health Act.

The new Act should set out the broad criteria that must be addressed by a risk management plan, including:

- Identifying the risks
- Determining the likelihood of the risks
- Setting out steps to manage the risks
- Ensuring compliance with the requirements by auditing, verification or monitoring.

The onus for the RMPs must be on the owner occupier or business, not the municipality.

Improvement notices issued to persons creating a nuisance or public health risk could require that person to develop a Risk Management Plan.

The AIEH believes that for individuals who are required to develop risk management plans there may be economic impacts, and should not be automatically required to have independent audits. Councils should have discretion on the auditing requirements of an RMP.

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Section 7.6 Registration and licensing

43. *What criteria should be used in deciding which activities should be subject to the requirement of registration or licensing?*

The AIEH supports the rationale for registration being that the nature of the business being conducted from the premises is such that without certain standards of hygiene and cleanliness being observed, there is an increased risk of transmission of disease. This rationale applies for individuals conducting a public health risk activity and should be continued for certain specified purposes such as pest control operators.

44. *What regulatory parameters for registration/licensing would provide a more up-to-date, flexible, graduated and responsive approach to the level of public health risk?*

Registration and licensing of any activity where there is a potential for a risk to public health that isn't subject to other legislation by more appropriate authorities should be registered or licensed under the new Act. This process should be based on potential for risk and be flexible enough to include other premises that are found needing to be monitored (reflecting community needs).

Classification of premises in regards to the risk involved would provide a graduated and more responsive approach. A definition of the risk classification involving types of businesses / activities must be included.

General provisions applying to all registered or licensed premises should be set out in the new Act, including

- a. Grant, renew, vary suspending of registrations
- b. Determination of whether the registration/ licence applicant is a fit and proper person
- c. Setting of registration/licensing periods

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Section 7.6

Registration and licensing

45. *Are there any other public health risk activities that should be regulated under the new Act through the system of registration or licensing and, if so, what specific requirements should be imposed on those activities?*

The Secretary should have the power to declare specific or classes of activities as registrable based on emerging and potential public health. The AIEH supports the view that other establishments that may provide a risk to health are regulated, for example colonic irrigations, solariums and child play centres.

There should be specific minimal requirements imposed on these premises that should be prescribed and not simply included in codes / guidelines. These include firstly the registration of premises, the possible development of risk management plans, and notification of defined incidents.

Swimming Pools and Spas are currently regulated under the Infectious Diseases Regulations, which reflects the risk they pose to the public due the number of people that use them and the potential for illness. The registration of public pools and spas should be included in the regulations. This could include an inspection or water sampling to be undertaken at least once per year to ensure compliance.

Solariums have the potential to cause skin cancer if not properly regulated. Currently solariums operate under a code of practice and it is felt that it is important to register and regulate solariums to ensure that the customer's health is not put at risk. These premises should have RMPs that reflect industry best practice. Colonic Irrigation is an emerging area of concern with the possibility of infections and the spread of blood borne viruses. For this reason it is felt justified having these premises registered similar to the skin penetration premises and have RMPs in place to ensure standards are maintained.

46. *Should there be a positive obligation on persons conducting activities subject to registration/licensing to notify authorities in event of certain types of incidents occurring?*

Persons conducting activities subject to registration/licensing should be required to notify authorities in the event of defined incidents occurring. These notifications must be part of the Risk Management Plan.

47. *Should there be an obligation placed on proprietors of non-registered premises (for example, swimming pools and brothels) to notify authorities where there has been an incident that might present a risk to public health?*

Proprietors of non-registered premises (for example, swimming pools and brothels) should also be required to notify authorities where there has been an incident that might present a risk to public health.

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Section 7.7

Enforcement Powers

48. *Should all enforcement powers be brought together in one part of the Act?*

The AIEH supports all enforcement powers being brought together in one part of the Act.

49. *Should the enforcement provisions of the Health (Infectious Diseases) Regulations 2001 be broadened to cover other public health threats not involving infectious diseases?*

Yes, The AIEH supports broadening the enforcement provisions of the Health (Infectious Diseases) Regulations 2001, and this may require a change name of regulations to reflect as such i.e. anthrax – public health risks.

The changes need to also consider the interrelationship with current other emergency provisions.

The changes need also to consider providing for emerging issues which may not currently be identified as a threat but which may arise in the future and require the ability to control.

50. *Are the enforcement powers in the Health Act appropriate to allow authorised officers and EHOs to carry out their duties?*

The AIEH supports maintaining and strengthening these powers, and strongly feels they should not be eroded in any way. The ability to issue “on the spot fines” would enhance an officer’s ability to resolve issues expediently by adding this step without necessarily taking court action. This would need to be supported by some guidance or framework by the Department to ensure consistency in approach in the issuing of “on the spot” fines, as they would may not be as clearly defined as for parking or local law offences.

The range of duties undertaken by authorised officers often raises the need to consider OHS issues in an uncontrolled environment. There is a need for ongoing further training in this area.

The Department should also consider establishing a “Memorandum of Understanding” with Victoria Police for when an officer needs assistance.

The AIEH also has identified a need to increase penalties for assault or obstruction of an officer. The “Proof of identity” should be the same as in the Food Act.

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Section 7.7

Enforcement Powers

51. *In addition to the power to take samples and make copies of seized documents, are there any other additional powers that should be included in the new Act?*

The AIEH membership has identified some deficiencies in the power to act in an emergency situation e.g. turn off alarms / noise equipment (would need to confirm that detention powers exist).

The AIEH membership has identified a need for further powers in line with ongoing changes in technology and acceptable forms of evidence.

The AIEH membership has identified a need and supports the option to widen the powers relating to search and inspect.

52. *Should the power to search for and seize goods without a warrant be widened to allow the Secretary to search for and seize things other than goods, such as records, biological agents or other items?*

Yes. The AIEH supports the option to widen the powers relating to search, inspection, & seizure to include "any other relevant item or thing"

53. *Should the new Act contain a procedure for the issuing of improvement and prohibition notices by authorised officers?*

Yes, the AIEH supports the Act containing a procedure for the issuing of improvement notices.

There would also be a requirement for the development of appropriate standard documents and protocols.

54. *Should notices cover:*

- *nuisance?*
- *licensable or registrable public health risk activities?*
- *where the activity may otherwise contravene the Act?*

The AIEH supports the Act enabling notices to be issued in relation to all 3 of the above scenarios. In the case of Nuisances, there should be further clarification on offences within the Act.

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Section 7.7

Enforcement Powers

55. *Should the new Act establish general criteria for issuing notices?*

The AIEH supports the new Act establishing general criteria for issuing notices with more specific information being provided in guidelines, which will help to achieve uniformity and provide guidance.

56. *Should the new Act set out an inclusive list of the types of work a person subject to an improvement notice could be required to perform?*

The AIEH is of the view that the Act should contain an inclusive list of the types of work a person subject to an improvement notice could be required to perform, however the Act needs to be clear that other actions may also be required by a notice to allow for differing situations and solutions.

57. *What method of review should apply to improvement and prohibition notices?*

The AIEH is of the view that the review method would need to be somewhere that has an ability of a quick turnaround and that it is a forum that is independent or seen to be independent. There have been identified time deficiencies in the current VCAT system with backlogs of several months, which is totally inappropriate for health related issues.

One possibility is that the review/appeal position be similar to that in the Food Act where the review is retained by the Magistrates Court. Other options could be the local government ombudsman or VCAT.

An alternative would be the establishment of a separate tribunal to address public health issues.

The Act should prescribe the specific timeframes for appeal. In addition the issue of the status of an improvement or prohibition notice pending an appeal should be considered and defined in the review of the Health Act, as these would have been implemented due to some immediate public health risk. If the notice still stood, this would be different to other legislation generally where decisions are set aside or not formalised pending appeal outcomes.

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Given that the world has changed dramatically since September 11, the need to be able to act quickly and with flexibility should now be imperative, as no-one can be sure what may happen next.

The mood and feeling within the community is that there is an expectation that the government will look after whatever goes wrong (eg Longford) and that the timing for "radical" changes with the powers of governments is now.

The proposed change in the Health Act to broaden the emergency provisions to include other public health emergencies will support this.

Section 7.8
Emergency Powers

58. *Should emergency powers be general for 'public health emergencies' or be specific to infectious disease?*

At present the Governor in Council is empowered to proclaim an emergency to stop prevent or limit the spread of infectious disease. In our current environment the AIEH supports the broadening of this to proclaim a clearly defined public health emergency. The definition should be based on existing models or framework.

In order to enable an effective response for the emergency to be contained or controlled without delay, the emergency powers of the Secretary should be as general as possible. If these powers are restrictive then the ability to act effectively is lost.

59. *Should the proclamation of an emergency be extended to four weeks, with renewal periods not exceeding two weeks, to a maximum of six months?*

The proclamation time once again needs to be flexible in order to adequately address the situation. Imposing a maximum time could have some limitations to any proposed corrective action or Order from the Secretary and may not allow enough time to implement such action.

60. *Should there be a fast track mechanism for notifying a disease associated with public health emergency?*

The AIEH strongly supports a fast track mechanism for disease notification associated with a public health emergency.