

Submission by Chris Reynolds on the Draft Policy Paper - Review of the Health Act 1958 (Vic)

Thankyou for the opportunity to comment on the Draft Policy Paper; the painstaking way in which Victoria has developed its proposals and the opportunities for consultation and comment enhance a key idea in public health policy formulation, that it be a collaborative process. Furthermore, there are many aspects of the recommendations for a new Act that I do agree with, notably the objects and guiding principles, and while some will need thinking through in practice (eg reconciling the idea of proportionality with the precautionary principle – possibly by confining the proportionality principle to the powers relating to communicable disease & related issue), they are an advance on any jurisdiction's current public health laws.

However, I would urge you to re-think your approach to the Duty & Offence (both key ideas in a modern approach to environmental health regulation). It seems to me that Part 4 of the Policy Paper will, if implemented, stand to continue an old and unimaginative view of the discipline. Specifically, the idea of nuisance and the moving away from a generic 'outcomes based' approach outlined in the earlier discussion paper continues the existing approach to public health, notwithstanding the new and different issues facing human health in this century. These issues (including the impacts of climate change and the health impacts of unsustainable activities) require a new and flexible approach as a key aspect of its environmental health responses. But the Policy Paper does not envisage one.

In order to be succinct, I've limited my comments to the specific areas discussed below (Duty/Offence/Nuisance). You might like to set those issues within a broader context set out in pp 35-64 of the Western Australian Discussion Paper A New Public Health Act for Western Australia (June 2005). They make an argument for a comprehensive, integrated & flexible approach to existing and future environmental health issues.

I've not made any comments on the communicable disease parts of the paper. Again my current thinking accords with the WA Discussion Paper and will also be fed into the Discussion paper currently being prepared for the CDNA/NPHP. I would expect Victoria to have access to that work (should it be at all helpful) prior to the date for finalising new public health legislation

The Statutory Duty

The proposed duty of care is an important initiative, but, given the recommendation (p47) it seems to me to now have too limited an application. To confine the duty to a registration or licence holder and have it then apply only to 'serious harm' narrows its general application. That's especially the case with public health laws that, unlike environment protection laws, does not operate routinely by way of licence or registration. Indeed, on this argument why have the duty in statute at all? – Just make it a standard condition of all licences or registrations and tailor it to each premises etc as appropriate.

The general duty is worth reconsidering. The central point of having it is that it then replaces an antiquated & limited concept (nuisance) with a forward thinking generic idea that applies across the whole community (as nuisance or insanitary condition powers currently do). This is not a new or untested idea. As the Policy Paper acknowledges, statutory duties exist in a variety of contexts, for example in environmental regulation (s25 of the South Australian *Environment Protection Act 1993*). This applies to all persons whose activities may cause pollution, while licences can then be issued subject to compliance with the general duty (as they routinely are in SA).

If there are concerns about the scope of the duty, they can be clarified wither in the drafting or in regulations that rule things in and out of its scope. The statute could also specify that no criminal or civil liability flows from any alleged breach of the duty (either for a person in breach or administering the Act)

The Offence of ‘risk to health’

I think that it is a great pity that the idea of a generic offence has been abandoned. The case for an offence was made first in the August 2004 Discussion Paper and repeated in the WA Discussion Paper. Rather than rehearse the arguments here (they can be found in the WA paper) I’ve responded to the specific list of reservations given in the Daft Policy Paper. It seems to me that none of them present a cogent reason for not proceeding with the idea.

Reasons for opposition	Comment on those reasons
Unnecessary (particularly if stat duty was introduced)	The offence was always intended to be a component of a scheme which included the statutory duty – it’s integral to it, not unnecessary <i>because</i> of it. In any event you’re proposing a limited duty that will be contingent on a licence or registration being issued.
Too broad leading to uncertainty and compliance problems.	The offence is broad – that is the point and value of having it. But it is not unique and you are not really moving into uncharted waters by introducing an outcome based offence. EPAs across Australia administer harm related offences which are no less broad and they and courts (where prosecutions occur) appear to cope with the offence. One way of dealing with the ‘breadth problem’ might be to exclude things from the scope of the term (eg providing that it applies to harm to others & not harm to self).
Does not depend on actual harm.	It shouldn’t! Good public health is about prevention <i>not</i> responding once something has happened – people who place others at risk should be culpable. Environmental offences work this way as well.
Leads to strict liability	Only partially, the most serious offences require the prosecution to prove knowledge or recklessness (that was the point of having 2 tiers of offence within the serious and the material categories. I would envisage that a new Act would also include a defence of due diligence. What’s proposed here is no different to the food laws, or the environment protection laws.
Discretionary enforcement & marginalisation of disadvantaged groups	I don’t understand this point. All enforcement is discretionary, that’s why DPPs, EPAs etc have formal enforcement policies that set out their prosecution criteria (which can be found on their websites). Mostly we regard this discretion as a good thing. But how will minorities be disadvantaged? Generally they are the victims of poor public health not the cause of it. My

	<p>experience in WA for example is that the greatest statutory issue with indigenous public health in that State is that the very old Health Act does not apply to their communities (because the Crown isn't bound by the Act) and so cannot be used against person's or corporations who might place their health at risk. That's seen as a distinct problem. More generally it seems to me to be a good thing that upgraded public health laws are there to protect all communities in Victoria. I'd be interested in some concrete examples that can illustrate just how minority groups will be disadvantaged by the offence.</p> <p>Overall, it was certainly never intended in any thinking ever done on these offences that somehow they should end up being used selectively against minorities (there's enough laws that do that at present) any more than the 'harm based' environmental offences are used this way.</p>
Affront to civil liberties	That really is a throw away line, used as I recall by landlords about the first basic public health laws in the 19 th century (and by the tobacco industry in more recent times to support their interests). You could just as easily say the same thing about environmental offences or the food laws: are these the civil liberties to harm people's health, pollute neighbourhoods or poison consumers?
Criminal proceedings should be in the Crimes Act	That's simply not the case – look at the range of offences in public legislation, often carrying substantial custodial penalties (look at your Food Act as an example). If you believe that there may be concerns about local councils applying serious penalties, the use of the 'big ticket' penalties can be restricted to the Department or with leave of the Minister or the Attorney General.
Relevant conduct may be covered by other offences	That's true, and there are other examples of this in the statute book as well. But the proposed offence will also cover areas that are not otherwise provided for. The important thing is to ensure that when an incident occurs, there is a demarcation of responsibility and that action is taken under a particular act in accordance with an agreed framework.
May lead to alternative charges.	Whether or not that's desirable, it is an issue of enforcement and how authorised officers etc choose to administer the offence. It seems to me to be an avoidable problem not one that inevitably taints the offence itself.

Overall, it seems to me that the list of reservations contains no good reasons for jettisoning the proposed offence. I agree that there may be concerns about its application in certain cases or the need to clarify what is and what isn't a risk to health. Careful drafting and sensitive administration of the provision should be able to deal with these issues, as they are dealt with by other Agencies or jurisdictions across Australia.

Retaining ‘nuisance’

I don't think that there are good arguments for retaining the statutory nuisance power. I do appreciate that persons who have long worked with the idea of nuisance feel that they know its scope and application (though a court may not agree with them), but it seems to me that it is time to completely rethink what is really a relic of 19th century miasmatic thinking, locked into its past, overshadowed by modern environmental offences & remedies and unable to respond to new challenges in public health. Most obviously it is not a versatile power, new problems and issues do not fall within the scope of ‘nuisance,’ (and the British case law makes this point quite clear) whereas a general statutory duty with abatement powers is outcome based and not locked into a specific context.

Rather than argue the case out in detail here, I'm attaching an article that was published last year (Reynolds C Dangerous to Health or Offensive': The Nuisance and Insanitary Conditions Powers - Some Arguments for Reform.' 2004, 4(4) *Environmental Health* 13) which makes a case for the approach that I think Victoria should take.

Conclusion

To conclude, the point of the general scheme outlined in the first Discussion Paper (August 2004) was to create a new way of responding to traditional and emerging public health issues. The existing framework (the nuisance and its abatement power) emerged from the first 19th century public health laws and remains little changed from those times. The case law suggests that the term is still locked into its sanitary origins and an imaginative use of the power would, in many cases, be beyond its legislative scope. If environmental health powers are to make a contribution to the human health problems of the future it is better to have them cast as broadly as possible. The original scheme (in the August 2004 paper) sought to do that and in my submission it should, in general terms at least, be adopted.

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