
South Australia's public health reform: what does it mean for local government?

Cimon Burke KELLEDYJONES LAWYERS

The origins of public health law stem back to the mid-19th century, when the Public Health Act 1848 was passed in Great Britain to counter the high rates of death and sickness that were becoming increasingly prevalent as cities rapidly expanded.¹ This enactment constitutes the first legislative tool entirely dedicated to addressing public health issues and, in particular, improving sanitation and controlling the spread of disease.² It is the cornerstone of the early public health laws in Australia.

Since then, much has changed. Public health reform has occurred in response to Australia's evolving society, dramatically changing our lives for the better. Indeed, the increased life expectancy Australians enjoy today is attributed to our knowledge and awareness of public health issues. Public health law reform is, therefore, critical to ensure the long-term protection of public health and, in turn, the realisation of healthier and safer communities.

In this context, 16 June 2011 marked the commencement of a significant period of public health law reform in South Australia. On that day, the state Parliament assented to the highly anticipated South Australian Public Health Act 2011 (SA) (the Act). As of midnight on 15 March 2013, the Act became fully operational. Compared with its predecessor, the Public and Environmental Health Act 1987 (SA) (the old Act), the Act provides, through the application of the "general duty",³ modernised and sustainable legislation capable of protecting public health now and well into the future. This was recognised when the Act was first introduced to Parliament and was touted as having "the ability to keep pace with a rapidly changing world, anticipate the unexpected and have sufficient powers to take action to protect and promote health".⁴ The Act, therefore, is an important tool in South Australia's public health reform and comes at a time when policy makers recognise and have increased knowledge of the social determinants of health — being the conditions in which people are born, grow, live, work and age.⁵

Local government continues to have a crucial role in addressing public health matters at a localised level.

Across Australia, councils exercise critical functions daily relating to the administration and enforcement of public health laws. The position is no different in South Australia and is expressly recognised in the Act, which provides that a council is the "local public health authority for its area".⁶ The powers and functions of councils in this regard are particularised in the Act and are examined in further detail below, in conjunction with what the author considers to be the most important features of the Act from a local government perspective.

The role of councils in relation to public health

The specific functions of councils under the Act are:

- taking action to preserve, protect and promote public health;
- cooperating with other authorities involved in the administration of the new Act;
- ensuring that adequate sanitation measures are in place;
- having adequate measures in place to ensure that activities do not adversely impact public health;
- identifying risks to public health;
- ensuring that remedial action is taken to reduce or eliminate adverse impacts or risks to public health;
- assessing activities and development in order to determine and respond to public health impacts; and
- providing, or supporting the provision of, educational information about public health, and providing or supporting activities to preserve, protect or promote public health.

In addition to the above, s 38 of the Act also places an obligation on councils to provide, or support the provision of, immunisation programs for the protection of public health. It is implicit in the wording of s 38 that the burden to provide immunisation programs does not rest *solely* with councils. For example, a council may sufficiently discharge its duty under s 38 by doing all in its

power (having regard to any resource limitations) to facilitate the delivery of immunisation programs in its area by various service providers, including by permitting service providers to use council premises for a specified period to deliver immunisation services.

For the first time, the Act requires councils to be proactive in planning for public health. Specifically, s 51 of the Act requires councils to prepare and maintain a Regional Public Health Plan. Preparation of the Regional Public Health Plan will ensure that councils are familiar with the prevailing public health issues in their communities and can implement a strategic direction in performing their functions under the Act in order to adequately respond to these issues.

The general duty

At the heart of the Act is the general duty, the operation of which is a new concept in Australia's public health legislation and represents a risk-based approach to public health law. This approach was one recommended by the National Public Health Partnership's discussion paper.⁷ The general duty has been recognised by a leading public health expert as being the "greatest change in the approach to public health legislation ... with an all-embracing forward-thinking approach designed for the needs for the 21st century".⁸

The general duty is articulated under s 56 of the Act as follows:

A person must take all reasonable steps to prevent or minimise any harm to public health caused by, or likely to be caused by, anything done or omitted to be done by the person.

This provision operates to impose a duty on every person in South Australia to ensure that their actions (including by an omission) do not cause harm to the health of others.

Importantly, the Act defines "public health" as "the health of individuals in the context of the wider health of the community". In light of this definition, it must be noted that the general duty does not apply in respect of harm that endangers the health of an individual in circumstances where that harm is caused by the individual's own actions (or omissions). Such harm does not have the requisite "public" element to it. For example, if an individual ignores medical advice to the detriment of his or her good health, such action does not (and, sensibly, would not) constitute a breach of the general duty.

In determining what is reasonable for the purposes of the general duty, the relevant considerations listed under s 56(2) of the new Act must be taken into account. These considerations embody a risk-based approach and include (but are not limited) to:

- the potential impact of a failure to comply with the duty;
- any environmental, social, economic or practical implications — this requires assessment of the costs of securing compliance with the general duty and the long-term sustainability of any processes put in place to achieve compliance;
- any degrees of risk that may be involved, requiring consideration of the seriousness of any harm that may result if the general duty is breached; and
- the nature, extent and duration of any harm, which extends to taking into account the likelihood of it occurring and the number of people who may be affected by it.

The general duty is purposefully drafted in very broad terms to capture *anything* that adversely impacts upon public health, regardless of the cause. The following are examples of the types of conduct (including conduct that was not capable of being addressed under the old Act) that could trigger the application of the general duty:

- a failure to maintain a leaking septic tank that is discharging effluent onto neighbouring land;
- operating a public swimming pool that does not comply with chlorination requirements;
- the unregulated sale of alcoholic energy drinks; and
- the operation of a clandestine drug laboratory.

The broad and versatile application of the general duty effectively replaces the provisions relating to specific risks to public health contained in ss 15–22 of the old Act⁹ — it was the application of the old Act in this manner (ie, to specific matters only) that limited its effectiveness in dealing with emerging risks to public health, and was the trigger for South Australia's public health reform. The general duty effectively overcomes the limitations of the old Act because it is not prescriptively limited and hence is able to apply to emerging and unforeseen factors that jeopardise and cause harm to public health. This serves to ensure that the Act will continue to be relevant as societal needs, requirements and expectations evolve and change. In this way, the general duty is the mechanism that operates to "future proof" the legislation.

The SA Minister for Health is in the process of adopting guidelines to assist councils in administering the Act and, in particular, to interpret and apply the general duty. In addition, two state public health policies are also being prepared in relation to managing severe domestic squalor and clandestine drug laboratories. These policies will specify that a breach of a policy is a breach of the general duty.

Importantly, if a person acts contrary to the general duty, this does not give rise to an offence or civil liability. Rather, it enlivens application of the enforcement options available to the relevant authority (including a council) to secure compliance with the general duty. This includes the issue of a notice under s 92 of the Act, discussed in further detail below.

The general public health offences

The general public health offences are contained in ss 57 and 58 of the Act and respectively address offences of causing a material risk to public health and causing a serious risk to public health. A material risk to public health occurs where the health of one or more persons has been (or might reasonably be expected to be) harmed by the act or omission of another person. A material risk is one that is more than trivial or negligible, but less than a serious risk. A serious risk to public health is a material risk of substantial injury or harm to the health of one or more persons.

Significant penalties apply to each of the public health offences on a sliding scale. This provides for a “graded” approach to action and penalty imposition, depending upon the nature and severity of the risk. The highest penalties apply where the relevant risk to public health (be it material or serious) is caused intentionally and with knowledge that harm to public health would result. These are the most heinous types of offences under the Act.

Examples of conduct causing harm to public health that might warrant prosecution under the Act include a systemic failure by an owner or operator of a tattoo studio to sterilise and/or properly dispose of needles, resulting in blood poisoning (or worse) of one or more customers, or a deliberate failure by the management of a hotel to comply with the requirements in relation to the operation of a cooling tower where evidence links this failure to an outbreak of legionella.

Enforcement powers: notice-making provisions

Section 92 of the Act is the starting point for enforcement considerations. This section confers power upon a council, as a relevant authority, to issue a notice wherever it considers such action appropriate to:

- secure compliance with a requirement imposed by or under the Act, including with the general duty or a requirement imposed under a regulation or a code or practice under the Act; or
- avert, eliminate or minimise a risk (or a perceived risk) to public health.

The reason for which a notice is issued is important, as it impacts upon the procedure that must be observed under the Act and the rights of a recipient to apply for a review of the notice.

By way of comparison, under the old Act, councils previously had a number of different powers to issue notices and orders to address specific matters. The power to issue a notice under s 92 of the Act replaces all these powers and is intended to operate as a “one-stop-shop” for the enforcement of public health, and thereby ensures a consistent approach with respect to the process to be observed when issuing a notice. It has broad application to enable councils to address any and all risks to public health.

Where a person fails to comply with any notice issued by a council, a council may take default action to carry out the requirements of the notice and recover the costs incurred as a debt from the person who failed to comply.¹⁰ Further, failing to comply with a notice without reasonable excuse is an offence, in respect of which a maximum penalty of \$25,000 or an expiation fee of \$750 applies.

It must be noted that a council is not the only authority responsible for exercising enforcement powers (including by way of issuing a s 92 notice) under the Act. The Act establishes the office of the Chief Public Health Officer, upon whom, in addition to councils, notice-making powers are conferred. In this regard, the Minister for Health may, as he or she sees fit, develop protocols that must be taken into account by a relevant authority (ie, the Chief Public Health Officer or a council) in issuing a notice under s 92 of the Act.¹¹ Such protocols may include guidance as to which relevant authority should act in various situations. Subject to or in the absence of a protocol, it is reasonable to expect councils to take responsibility for enforcing local concerns about public health — including concerns that are limited to an isolated area. This includes responding, as appropriate, to instances of domestic squalor within a council’s area. Conversely, it is expected that the Chief Public Health Office will address public health matters that affect the state as a whole, and/or areas falling outside the boundaries of a council. An example of this is the regulation of “junk food” advertising to children, which is clearly a matter that has statewide public health implications. The Act, therefore, recognises the importance of a collaborative approach between the state and local governments in managing public health concerns.

The Act introduces an entitlement to apply for a review of a s 92 notice and provides for a right of appeal against such notice. Specifically, in circumstances where a s 92 notice is issued to secure compliance with the general duty, the recipient of the notice may apply to the Public Health Review Panel (a body established under

the Act) to review the notice. A decision of the Review Panel is appealable to the District Court.

Separately, any person who has been issued a s 92 notice has a right of appeal to the Administrative and Disciplinary Division of the District Court. This includes the recipient of a notice issued to secure compliance with the general duty, who may appeal to the District Court without the need to first apply for a review of the notice to the Review Panel.

Where a council's decision to issue a notice is challenged on appeal to the District Court, councils are assisted by the evidentiary provision under s 108 of the Act, which states:

In any proceedings, if the court is satisfied that a designated entity¹² has assessed a risk to public health in connection with the administration or operation of this Act, the court must, in the absence of proof to the contrary, accept that assessment as evidence of the fact that a risk to public health existed or has occurred and, insofar as may be reasonably demonstrated by that assessment, the extent or significance of the risk.

This provision is a useful practical tool that applies equally to prosecution proceedings commenced by a council in relation to an offence under the Act. It operates to reverse the standard of proof in relation to the determination as to what amounts to a risk to public health. In this way, s 108 of the Act recognises that authorised officers appointed under the Act have the relevant expertise and are best placed to determine whether a risk to public health exists and the seriousness of that risk. Councils may, therefore, confidently rely upon the expertise and recommendations of their local authorised officers in making any determination to take enforcement action to address a risk to public health.

Conclusion

The commencement of the Act marks the culmination of an important period of public health reform in South Australia. The key feature of this reform is largely attributed to the operation of the general duty. In particular, the versatility and broad application of the general duty ensure that councils, as the relevant public health authorities for their areas, have sufficient powers to effectively respond to and/or prevent risks to public health.

In light of the limitations of its predecessor legislation, the Act is a necessary progressive development in public health to ensure that local government is suitably equipped to prevent and otherwise address risks to public health. As such, the author's view is that the Act is certainly worthy of recognition as "the most versatile

and innovative piece of public health law in Australia and quite probably a world leader".¹³



Cimon Burke

*Lawyer (Local Government Specialist)
KelliedyJones Lawyers*

Footnotes

1. I Bidmeade and C Reynolds, *Public Health Law in Australia: Its Current State and Future Directions*, Commonwealth of Australia, 1997, p 4.
2. Above, n 1.
3. Section 56 of the Act.
4. South Australian Parliament, Parliamentary Debates, House of Assembly, 24 November 2010 (Dr McFetridge), p 2171.
5. See World Health Organization, *Commission on Social Determinants of Health: Final Report*, available at www.who.int.
6. Section 37(1) of the Act.
7. National Public Health Partnership. *The Application of Risk Management Principles in Public Health Legislation*, Melbourne 2000, available at www.nphp.gov.au.
8. C Reynolds, "Section 56 of the South Australian Public Health Act: the general duty to protect public health" (2012) 9 *Public Health Bulletin SA*, p 31.
9. Sections 15–22 of the old Act address the following public health matters:
 - insanitary conditions on premises, relevant to domestic squalor situations;
 - the control of offensive activities extending to an activity that gives rise to a risk to health or that results in the emission of offensive material or odours;
 - the discharge of wastes in a public place;
 - the requirement to maintain a private thoroughfare (being a private street, road, lane, footway, alley court or other thoroughfare the public is allowed to use) in a clean condition and free of refuse;
 - the provision of adequate sanitation in premises; and
 - water pollution and control of water that is unfit for human consumption.
10. Section 93 of the Act.
11. Section 92(12) of the Act.
12. This includes an authorised officer or a council.
13. Above, n 8, p 31.