

RESOURCE MANAGEMENT LAW REFORM
ANALYSIS OF EXISTING STATUTES:
LEGAL ANALYSIS

WORKING PAPER NO. 7

PART V :
NOISE CONTROL ACT 1982

Part V of VIII parts of
Working Paper No. 7

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RESOURCE MANAGEMENT LAW REFORM

DRAFT WORKING ANALYSIS

NOISE CONTROL ACT 1982

It has been a deliberate strategy to prepare a basic summary of the legislation which is, as far as possible, free of any preconceptions about the state of the law. Input on the practical application of the legislation will be obtained from a variety of sources including government officials, environmental and public interest groups, industry and others. This draft may be helpful as a starting point.

This draft analysis does not include:

- All relevant case references
- Identification and resolution of all the legal issues or areas of doubt under the Act

Further, it is anticipated that as this analysis is expanded it will be possible to present more and more of the information in flowchart or table form, as well as in the text.

Your input is invited. Comments and suggestions should be sent to:

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NOISE CONTROL ACT 1982

I. HISTORY

Long Title

1. The long title for this Act is "An Act to provide for the abatement of unreasonable or excessive Noise".

History

2. Until relatively recently noise was considered to be a type of air pollution. However in 1970 the Board of Health decided against including noise in the proposed Clean Air Act (1972). A sub-committee was appointed to consider the problem of noise control, reporting back to the Minister of Health in 1974. In 1978 an amendment to the Health Act 1956 included noise as a nuisance in section 29(ka) of the Health Act 1956. The Minister of Health introduced a Community Noise Bill in 1982. In the same year the opposition spokesperson on health introduced a Private Members Bill concerning neighbourhood noise. At the select committee stage the two bills were combined and resulted in the Noise Control Act 1982, which came into force on 1 June 1983.

Scope

The Act does not aim to minimise or eliminate noise, its basis is that noise should not exceed a reasonable level (discussed below). In sections 5-8, under the heading "General Obligation of Occupiers", the Act obliges occupiers of residential, commercial and industrial premises to adopt the best practicable means to prevent unreasonable noise. Sections 9-12 deal with "excessive noise" (defined below) and provides for the immediate abatement of a limited range of "excessive noises".

II. SCOPE OF STATUTE IN RELATION TO OTHER STATUTES - PROCEDURES

3. The Act is to be read together with and is deemed part of the Health Act 1956 (s.1(1)). That Act gives local authorities general powers and duties in respect of public health. S.23(b) of the Health Act empowers and directs every local authority:

"to cause inspection of its district to be regularly made for the purpose of ascertaining if any nuisances, or any conditions likely to be injurious to health or offensive, exist in the district:"

The local authority is also empowered to appoint inspectors and other officers which in the opinion of the local authority are necessary to discharge the authority's duties under the Health Act, and to cause all proper steps to be taken to secure the abatement of the nuisance or the removal of the condition.

4. "Nuisances" are defined for the purposes of the Health Act at s.29. The relevant part of that section reads:

" 29. Nuisances defined for purposes of this Act ...a nuisance shall be deemed to be created in any of the following cases...

"(ka) Where any noise or vibration occurs in or is emitted from any building, premises, or land to a degree that is offensive or is likely to be injurious to health:"

Note that s.2 of the Noise Control Act defines "Noise" as including vibrations.

5. The powers in the Health Act are much broader than those in the Noise Control Act. However, they are limited by the requirement that the Noise be offensive or likely to be injurious to health (see Mount Wellington Borough v. Lans (1959) 9 MCD 358; Mount Wellington Borough v. Pacific Chemical and Mineral Development Limited (1959) 9 MCD 362).

6. The recent case of Adams v. Napier County Council (Jeffries J, H.C. - Napier AP 55/865 29/9/1987) held that "screeching cockatoos which can be heard in the early hours of the morning" come within the ordinary meaning of nuisance and that s.29 of the Health Act 1956 covers private as well as public nuisance (see the discussion under "Common Law Position"). Other statutes which deal with noise control are mentioned below under the heading "Links with other Statutes". See also the Appendix.

III. OWNERSHIP/ALLOCATION OF RESOURCE

7. The resource which this Act is designed to protect, peace and quiet, is not capable of ownership.

IV. COMMON LAW POSITION

8. Noise is dealt with under the common law as a nuisance. There are two main types of nuisance: public and private. A public nuisance is one which causes substantial and unreasonable interference with the comfort and convenience of life of a class of people. The nuisance will generally be so widespread that it would be unreasonable to expect one person to stop it. Possibly, for example, a large pop music festival. In order to sue for public nuisance, a private individual must show some particular or special loss over and above that caused to the public at

large. The Attorney-General may bring on action in public nuisance on his/her own initiative or at the request of an individual, but the Attorney-General is not obliged to do so. A person can sue for private nuisance when there is an unreasonable interference with their [owner or occupier?] use and enjoyment of land. Generally a private nuisance action arises where there is a state of affairs, that is either continuous or recurrent.

9. Owing to the nature of noise, the common law found it difficult to assess the level of liability of the producer of the noise. Guides included the locality of the neighbourhood and the requirements of District Schemes. The test is an objective one based on what people generally consider to be acceptable.

Rylands v Fletcher

10. The case of Rylands v Fletcher (1868) LR3(HL), established a separate form of liability. The rule in Rylands v Fletcher is, briefly, where a person brings onto land, for his or her own purpose, something (a "non-natural use") likely to do mischief if it escapes, and it does escape, then he or she will be liable for any damage caused as a consequence of the escape. In Halsey v Esso Petroleum Co. Ltd [1961] 1 WLR 683, judgment was given for damages and injunctions based upon private and public nuisance and Rylands v Fletcher with respect to noise and fumes coming from an industrial plant.

Remedies

11. Remedies available under the common law include a restrictive injunction to stop an existing noise or an injunction to prevent a proposed noise from starting. A successful plaintiff may receive damages on the basis of the interference caused to his or her use and comfort of land.

12. The Common law remedies are both costly and slow, and may not provide a remedy at the end of the process if the plaintiff cannot prove his or her case.

V. NOISE CONTROL

13. Noise Control officers: A local authority may designate any of its officers as noise control officers (s4). Where no officer is appointed, the local authority's Health Inspector or Health Inspectors (where there is more than one), and Engineer, are deemed to be noise control officers for the purposes of the Act (s4(2)). By a 1987 amendment to the Act, a local authority may contract with any person who is the holder of a security guard's licence for that person to carry out the duties of a noise control officer for that local authority (s.4A(1)) (this section was inserted into the Act following the decision of Anscoll v Palmerston North City Council, discussed below).

14. General Obligation of Occupiers: S.5 imposes a general duty on the occupier of any premises (which includes any tenant, agent, manager, foreman or any person acting or apparently acting in control of premises or any machinery on those premises) to adopt the best practicable means of ensuring that the emission of noise from those premises does not exceed a reasonable level. Failure to do so constitutes an offence, and the occupier may be fined up to \$2,000.00, with an additional fine not exceeding \$200.00 for each additional day that the offence continues.

15. The Health Department's Guidelines to the Noise Control Act 1982, discusses in Appendix I what is meant by a "reasonable level of noise". Sections 5 and 6 both use the phrase but it is not defined in the Act. A reasonable level of Noise is a subjective phenomenon which cannot be measured. A sound level meter cannot measure whether a level of noise is reasonable or unreasonable. The level of reasonableness will differ from case to case but the Guide lists 13 relevant factors (not all of which will be present in any one case):

1 The time of day - a noise which is reasonable during daylight hours may be totally unreasonable at night.

2 The duration - a noise which occurs for a short time is more likely to be thought reasonable than one which is sustained.

3 How often the noise occurs - an infrequent noise may be reasonable but repeated often, it may be unreasonable. Generally the more often a noise occurs the less likely it is to be reasonable.

4 The frequency or pitch - very low or very high frequencies are more likely to cause annoyance than middle range frequencies.

5 The tonal quality - a single or very dominant tone is more likely to be unreasonable than the same level of broad spectrum ("white") noise.

6 The kind of activity producing the noise - a noise from an economically or socially productive activity is more likely to be reasonable than one associated with unproductive or antisocial activity.

7 The purpose of the noise - a noise intended to warn or inform the public such as a fire siren, church bell or burglar alarm may be considered reasonable unless unduly prolonged.

8 The location of the premises making the noise - a noise from premises adjacent to a noise-sensitive area such as a quiet residential neighbourhood or a hospital

is more likely to be unreasonable than one from an industrial zone, or an isolated building.

9 The kind of premises making the noise - premises used for industry or recreation may reasonably make more noise than residential premises.

10 Compliance with town planning ordinances or bylaws - a level of noise which does not exceed planning ordinances or bylaws is likely to be reasonable.

11 The sound level of the noise - a sound level measurement may help to determine whether a level of noise is reasonable.

12 The level of other sources of noise nearby - a noise level which does not make a great contribution to the total noise level is likely to be reasonable.

13 The potential to avoid or abate the noise - a noise level which results from a failure to adopt the best practicable means to control it is unreasonable.

16. Abatement Notices: Where a noise control officer has reasonable grounds to believe that:

- 16.1 the occupier of any premises is failing to comply with s.5 (adopting the best practicable means to keep the level of Noise emitting from the premises within a reasonable level); or
- 16.2 the occupier is contravening any regulation made under the Act; or
- 16.3 Noise emitting from any premises is such as to constitute a nuisance for the purposes of s.29(ka) of the Health Act;

the officer may give the owner a notice in writing requiring that the noise be abated to a reasonable level within the time specified in the notice (generally seven days but a shorter or longer period may be imposed as the officer considers appropriate) (section 6).

17. The abatement notice shall inform the occupier of:

- the manner in which the notice may be enforced under section 7 (see below); and
- the occupier's rights to seek the return of any property, seized under section 7, or under section 13; and
- the occupiers right of appeal under section 14 (see below) (section 6(2)).

Failure to comply with the terms of the notice constitutes prima facie evidence of an offence against s.5 of the Act.

18. If the occupier of the premises does not comply with the requirements of the notice, the noise control officer shall take all reasonable steps as he or she considers necessary to reduce the noise level, including seizing and impounding the noise source (s.7). The police may provide assistance to the noise control officer following a request by the officer (s.8).

19. Excessive Noise: Under s.9 of the Act any person who considers that excessive noise is being emitted from any premises, may complain to a noise control officer or, where no such officer is available, to the principal administrative officer. Excessive noise is defined in section 2 as

"... any Noise emitted by -

- (a) Any musical instrument; or
- (b) Any electrical appliance; or
- (c) Any vehicle except when being operated on
 - (i) Any road within the meaning of section 2(1) of the Transport Act 1962; or
 - (ii) Any motorway within the meaning of section 2 of the Public Works Act 1981; or
- (d) Any machine no matter how powered, while being operated in or at any residential premises; or
- (e) Any person or persons, while attending any gathering or meeting in or at any residential premises or place of assembly -

Where the Noise is of such nature as to unreasonably interfere with the peace, comfort, and convenience of any person (other than a person in or at the premises from which the Noise is being emitted)."

Clearly the definition does not cover a number of noise sources (such as barking dogs) and specifically excludes others (noisy cars using a suburban street as a race track for example). This is discussed in the Health Department's "Guidelines to the Noise Control Act 1982", at page 2. The "Guidelines" define the scope of the Act as being mainly concerned with unreasonable and excessive community noise. Other sources of noise such as vehicle noise, occupational Noise and noisy dogs are to be dealt with under their specific statutes and regulations (eg the Traffic Regulations 1976, the Factories and Commercial Premises Act 1981, and the Dog Control and Hydatids Act 1982).

20. The noise control officer upon investigating a

complaint made under section 9(1) shall take either of the following steps:

20.1 If the officer (or a constable) is of the opinion that the noise is excessive, direct the occupier of the premises, or such other person as appears responsible for causing the excessive noise, to forthwith abate the noise to a reasonable level (section 9(2)(a), (3)); or
20.2 Refer the complaint to the police if the noise control officer considers that there is a real risk of violence or for any other special reason (section 9(2)(b)).

21. Although it appears from the wording of subsection 9(2) that subsection 9(3) only applies in respect of subsection 9(2)(a), subsection 9(3) contemplates a police constable, presumably acting in response to a request made under subsection 9(2)(b), issuing a directive under subsection 9(3).

22. The direction given under section 9(3) has the effect of prohibiting the person to whom it was given, and any person who knew or ought to have known of the direction (s10(2)), from causing or contributing to the emission of excessive noise from or within the vicinity of the premises for up to 12 hours from the time when the direction was given, the period being specified in the direction (s10(1)).

23. Failure to comply with a direction given under s9(3) may result in the noise control officer, or police constable, removing from the premises, rendering inoperable, or locking or sealing so as to make unusable, the source of the excessive noise where that source is an instrument, appliance, vehicle or machine (s.11)(1). The noise control officer may not exercise any of the powers under s.11 unless accompanied by a police officer (s.11(2)). Failure to obey the direction to abate excessive noise for the time specified in the direction is an offence and carries a maximum fine of up to \$2,000.00 (s.12). An additional fine of up to \$500.00 may be imposed upon anybody who renders operable or unlocks or unseals the source of the noise (s12(4)). The police have the power to arrest any person whom a constable has good cause to suspect of having committed an offence against section 9(1)(s12(3)).

24. Powers of Entry: For the purposes of ss.6, 7, 9 and 11 a noise control officer or a police constable may enter the premises to which the abatement notice relates or, as the case may be, from which the noise is being or has been emitted (s.15(1)). If the premises are a dwelling house the noise control officer, if acting under ss.6 or 9, may only enter the premises if accompanied by a police constable (s.15(2)).

VI. RESTITUTION OF PROPERTY

25. Property impounded by a noise control officer under ss.7 or 11 may be returned to the occupier upon application to the local authority S13(1). In the case of property seized by the police under s.11, the owner or occupier must apply to the police no sooner than 72 hours after the time of seizure and pay all police costs with respect to the seizure (s13(3)). Where the goods are recoverable under s13(1), the authority must be satisfied that the return of the property is not likely to lead to the resumption of the emission of an unreasonable level of noise from the premises, and that all costs connected with the seizure have been paid (s.13)(2)). The local authority or police may return the seized goods without awaiting a request to do so (s13(4)).

VII. COSTS

26. Any costs incurred in the procedure for the abatement of noise (s.7(4)) and/or seizing, transporting and storing any property are borne by the defendant (s13(2),(3)). The bulk of any fine that is imposed by the Court, is paid to the local authority which instituted the prosecution (s14A). (see below "Incentives").

VIII. TIMELINESS

27. The procedures under the Act for the abatement of Noise are imposed as the need arises, that is, there are no time restrictions on the noise control officers. The Act allows for instant reaction to halt excessive noise. Although the abatement notice must specify a period in which noise must be reduced to a reasonable level, the period may be as short as the noise control office chooses (s6(1)). A person may be charged under section 5 for unreasonable noise without being served with an abatement notice, the notice merely raises a presumption of guilt (s6(3)).

IX. OFFENCES AND DEFENCES

28. S.5 of the Act makes it an offence for the occupier of any premises to fail to adopt the best practicable means of ensuring that the emission of noise from the premises does not exceed a reasonable level.

29. Further offences are created by s.12:

29.1 S.12(1):

"every person given a direction under s.9(3) of the Act to abate the noise emitting from the premises of that person to a reasonable level, fails to abate the noise or causes or contributes to the emission of excessive noise at any time

during the period of 12 hours commencing with the time at which the direction was given, will be liable to a fine";

29.2 S.12(4):

"any person who renders operable or makes usable a noise source within 12 hours of the source being rendered inoperable (under s.11) commits an offence and is liable to a fine not exceeding \$500.00."

30. It is not necessary for the prosecution to prove that the defendant did not intend to commit an offence under s.5, the burden of proving that he or she did not intend to commit the offence is placed on the defendant. The defendant is provided with a number of defences in ss.5(4) and 5(5):

s5(4) Subject to subsection (6) it shall be a good defence in a prosecution under section 5 if the defendant proves -

- (a) that the failure to comply with the section was due solely to mechanical failure; and
- (b) that the failure could not easily have been provided against; and
- (c) that the non-compliance could not reasonably have been prevented by action taken after the failure occurred.

s5(5) Subject to subsection (6) it shall be a good defence to a prosecution under section 5 if the defendant proves -

- (a) that he or she did not intend to commit an offence against section 5; and
- (b) that he or she took all reasonable steps to comply with the section.

31. Subsection (6) provides that the defences available in subsections (4) and (5) shall not apply unless within seven days after the service of the summons, or within such further time as the court may allow, the defendant has delivered to the prosecutor a written notice stating that he or she intends to raise the defences discussed above and specifying the reasonable steps that he or she will claim to have taken.

X. APPEALS

32. Appeals against the issue of an abatement notice issued under s.6, or against the refusal of an application for the

THE TOWN AND COUNTRY PLANNING ACT

41. The Town and Country Planning Act 1977 gives, as a general purpose of district planning, the effective promotion and safeguarding of the health, safety, convenience and general welfare of the people in the district (s4). Davidson CJ in Bitumix Limited v Mount Wellington Borough Council [1979] 2 NZLR 57, at page 61, held that as Noise can be harmful to health and affect people's convenience and general welfare "It is within the purpose of a district scheme to control noise". In the case of Auckland Play Centres Association v Auckland City Council [1979] NZTRA 46, the Court concluded that town planning is concerned not only with preventing nuisance Noise, but also with maintaining a quiet environment.

42. Section 77 of the Town and Country Planning Act imposes a general duty on persons in the district to keep objectionable elements in connection with certain uses of land to a minimum. "Objectionable element" includes noise and vibration (s77(1)). The Second Schedule to the Town and Country Planning Act includes as matters to be dealt with in a district scheme: the preservation or conservation of amenities (clause 5(iii)); the design and arrangement of buildings, including insulation from internally or externally generated noise (clause 7(e); and, the avoidance or reduction of damage, danger or nuisance caused by the emission of noise and vibrations (clause 8(b)).

43. Noise can clearly be restricted under a district scheme. A local authority may also use restrictive zoning and by-laws under the Local Government Act to regulate and control noise from building operations.

44. Noise abatement under the Town and Country Planning Act can be effective and the powers granted under the Act are extensive but it does not provide immediate solutions. For example under s77(8), where the s77 is breached, the local authority must serve a notice on the owner or occupiers of the land or buildings from which the noise is emanating giving the owner or occupier between one and three months to deal with the noise.

LOCAL GOVERNMENT ACT 1974

45. Local Government Act 1974 Part XXXV of this Act makes provision for public health and well-being within a territorial authority's district. Section 595 allows an authority to do all things necessary for the preservation of public health and well-being and to give effect to the provisions of the Health Act 1956. Local authorities have the power to make bylaws for amongst other things, the conservation of public health and well-being (s684(1)(8) and to regulate, control or prohibit the making of noise in roads or public places or in or upon land or buildings (s.684(9)), where the noise is likely to cause nuisance or annoyance to persons nearby or residing in the vicinity.

46. Section 238 of the Local Government Act gives the Council (or its delegated officials, ss710 and 715) the power to enter any land or building, if practicable after giving the owner 24 hours notice, to do anything which the Council is empowered to do under the Local Government Act or any other Act.

CONCLUSION

47. Under the Traffic Regulations 1976 a person may not operate a vehicle which creates excessive Noise (reg 29). The other Acts mentioned generally cover specific complaints and do not provide unnecessary duplication with the Noise Control Act. Indeed, the Noise Control Act contemplates specific complaints, such as barking dogs, being dealt with under specific legislation (in that case s54 of the Dog Control and Hydatids Act 1982).

APPENDIX

OTHER NOISE CONTROL STATUTES IN NEW ZEALAND

1. Transport

Civil Aviation Act (1964) Section 23 - regulates the noise and vibration due to aircraft and the conditions under which they are acceptable. (Ministry of Transport Civil Aviation Department).

2. Civil Aviation Regulations 1953

Note: S.188 provides that after consultation with such persons interested in civil aviation as the Minister may direct, the director may, for the purpose of abatement of noise made by aircraft, impose limitations, restrictions, and prohibitions in respect of aircraft operations, including the closure of specified aerodromes to all aircraft, or any specified aircraft, during specified hours.
(Administrator: Minister of Civil Aviation not the local territorial authority).

Transport Act 1962

Relevant clauses cover vehicles on a public roadway. S77 power to make regulations to minimise noise from vehicles (Ministry of Transport Road Division).

Traffic Regulations 1976

Regulation 29 - offence to operate a vehicle creating an excessive noise in First Schedule to the Regulations sets out maximum noise output permitted from new vehicles (reg 29(2)). Regulation 29 sets out general noise control for vehicles.

3. Harbours Act 1950

Sub-Section 232 (42) By-laws for Harbours Board to regulate, control and prohibit nuisances created by the speed, use, management of vehicles at sea.

4. Health Act 1956

Section 29(ka), 534 Power to abate nuisances.
(Administrator: Health Department and local authorities).

5. Local Government Act 1974

Local Government to enforce the Health Act, produce By-laws to control noise in the area. Section 623, 684(1)(8) and (9). (Administrator: Department of Internal Affairs (local authority).)

6. Town & Country Planning Act 1977

Local Authority has power to consider noise control in zoning, to control objectionable elements including noise. Section 77. (Administrator: Ministry of Works & Development.)

7. Enforcement - Summary Offences Act 1981

Replaces the Police Offences Act 1927 and deals with offences against public order and offences resembling nuisance and other miscellaneous summary provisions.

S.35 offence to set off fireworks or explosive material in any public place in such a manner as to be likely to cause injury to or alarm any person. (Administrator: Department of Justice).

Source: M. D. Andrews "Legal Controls on Community Noise in New Zealand", unpub. paper for degree of LLB(Hons), A.U., 1986.

