



## Private Nuisance in NSW

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).*

*While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.*

*This factsheet was last updated on 29 April 2015*

### What is private nuisance?

Private nuisance occurs when someone substantially and unreasonably interferes with, or disturbs someone else's ordinary and reasonable use of the land they own or occupy.<sup>1</sup> The interference occurs without direct entry onto the affected person's land.<sup>2</sup>

### What does private nuisance cover?

Nuisance can be used to address some environmental concerns, including interference with enjoyment of property caused by dust,<sup>3</sup> noise,<sup>4</sup> vibration, sewerage, odours,<sup>5</sup> light<sup>6</sup> and the flow of water.<sup>7</sup>

In NSW, private nuisance laws are generally derived from case law (the common law), rather than statutes and legislation.

---

<sup>1</sup> [Grand Central Car Park Pty Ltd v Tivoli Freeholders \[1969\] VR 62](#) at 72 per McInerney J (Public nuisance); [Sedleigh-Denfield v O'Callaghan \[1940\] AC 880](#) at 896-7 per Lord Atkin.

<sup>2</sup> The appropriate remedy for direct interference with the use and enjoyment of land owned or occupied by someone (ie when entry onto the land is involved) is trespass.

<sup>3</sup> [Thompson v Sydney Municipal Council \(1938\) 14 LGR \(NSW\) 32, SC \(NSW\)](#).

<sup>4</sup> [Vincent v Peacock \[1973\] 1 NSWLR 466](#).

<sup>5</sup> [Halsey v Esso Petroleum Co Ltd \[1961\] 2 All ER 145](#); [Baulkham Hills Shire Council v AV Walsh Pty Ltd \[1968\] 3 NSWLR 138](#) (offal plant); [Bone v Seale \[1975\] 1 All ER 787](#).

<sup>6</sup> [Raciti v Hughes \(1995\) 7 BPR 14,837, SC \(NSW\)](#).

<sup>7</sup> A number of cases have recognised that where water occurs naturally on one property and damage occurs through its natural flow onto another property, no liability in nuisance will lie. See: [Neath RDC v Williams \[1951\] 1 KB 115](#); [Rouse v Gravelworks Ltd \[1940\] 1 KB 489](#). However, where the natural drainage of water has been impeded with artificial structures such as drains or concreting, liability can arise. See: [Bennetts v Honroth \[1959\] SASR 170](#); [Simpson v Attorney-General \[1959\] NZLR 546](#).

### **To sue someone for private nuisance, you must show:**

1. That you have a legal interest in the land (e.g. freehold owner) or a right to occupy or exclusively possess the land (e.g. tenant);
2. That the defendant has interfered with the use and enjoyment of that land, and;
3. That the interference was both substantial *and* unreasonable.

The question of whether or not the interference is substantial and unreasonable is one of degree and will depend on the circumstances of the case.<sup>8</sup> Interference is not considered to be substantial where it is no more than that which the average person in that neighbourhood can reasonably expect in the circumstances and the defendant is using his or her land for its ordinary purposes.<sup>9</sup>

In determining whether the nuisance has occurred, the Court may consider:

#### The frequency, extent and nature of the interference<sup>10</sup>

Interference must be at a level that would substantially interfere with the ordinary physical comfort of a person.<sup>11</sup> Inconvenience to a sensitive or fussy person<sup>12</sup> or interference with a sensitive use<sup>13</sup> will not constitute a nuisance.

Duration and timing of the nuisance will also be relevant.<sup>14</sup> For example, noise in the middle of the night or at other quiet times will be more likely to be found to be a nuisance.

#### The ordinary use of land in the area<sup>15</sup>

The Court considers what interference ought to be ordinarily expected on land in a certain area. For example, an emission of fumes and odour in a residential area would be more likely to be considered a nuisance than if the same occurred in an industrial area.<sup>16</sup>

#### Whether the use of the land causing the nuisance is ordinary and reasonable<sup>17</sup>

The ordinary use of a residence within a residential area will not be a nuisance, even if some inconvenience to a neighbour is caused.<sup>18</sup> On the other hand, if the land is being

---

<sup>8</sup> *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145 at 151, 155 per Veale.

<sup>9</sup> *Bamford v Turnley* (1862) 3 B & S 66.

<sup>10</sup> *Oldham v Lawson (No 1)* [1976] VR 654 at 655 per Harris J.

<sup>11</sup> *Walter v Selfe* (1851) 4 De G & Sm 315 per Knight-Brice VC.

<sup>12</sup> *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145.

<sup>13</sup> *Robinson v Kilvert* (1889) 41 Ch D 88 per Cotton LJ.

<sup>14</sup> *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 at 414 per Vaughan Williams J.

<sup>15</sup> *Sturges v Bridgman* (1879) 11 Ch D 852 at 865, CA.

<sup>16</sup> *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; [1961] WLR 683.

<sup>17</sup> *Bamford v Turnley* (1862) (1862) 122 ER 27 at 33.

<sup>18</sup> *Clarey v The Principal and Council of the Women's College* (1953) 90 CLR 170.

used maliciously or recklessly in a way that causes nuisance to the neighbouring land, the Court will usually find such conduct to be a nuisance.<sup>19</sup>

## Liability for nuisance

To be found liable for nuisance, the defendant must be at fault. Fault on the part of the defendant requires the following:

1. the defendant knew or ought to have known of the nuisance (i.e. a person may still be liable where a nuisance was created without their knowledge);
2. the interference or damage to the neighbour's property from the nuisance was reasonably foreseeable; and
3. the defendant did not take reasonable action or steps to end the nuisance.<sup>20</sup>

### *Private Nuisance: Practical example*

The use of herbicides may result in spray drifting onto and killing vegetation on neighbouring property, causing interference with the use and enjoyment of that land. If the user failed to take precautions to prevent drift onto neighbouring land on a windy day *and* if it could be reasonably predicted that the drift would occur unless precautions were taken, the defendant could be liable in nuisance.

### **Can I fix the problem myself?**

In circumstances where a nuisance requires an immediate remedy, the person suffering the nuisance may take action to abate or stop the nuisance. This includes entering the defendant's property to stop the source of the nuisance.<sup>21</sup> However, this measure may not be appropriate where the action required to abate or stop the nuisance is disproportionate to the damage suffered.<sup>22</sup> If you decide to attempt to abate a nuisance which involves entering the defendant's land, you must inform the defendant before entering their land, unless there is an immediate threat to life or property.<sup>23</sup> You must be careful not to cause unnecessary damage to the defendant's property when taking action to stop the nuisance.<sup>24</sup> If you take too long to abate the nuisance, you may lose your right to abate.<sup>25</sup> If you are an owner or occupier of land, you are under a duty to abate a nuisance on your land once you become aware of it.<sup>26</sup>

---

<sup>19</sup> *Christie v Davey* [1893] 1 Ch 316 at 326-7 per North J.

<sup>20</sup> *Robson v Leischke* [2008] NSWLEC 152 per Preston CJ.

<sup>21</sup> *Farley & Lewers Ltd v A-G* 1962] SR (NSW) 814 at 817. *Young v Wheeler* (1987) Aust Torts Reports 80-126 at 68,970 per Wood J, SC(NSW).

<sup>22</sup> *Burton v Winters* [1993] 3 All ER 847 at 852.

<sup>23</sup> *Lemmon v Webb* [1895] AC 1 at 8.

<sup>24</sup> *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 245 per Lord Atkinson.

<sup>25</sup> *Burton v Winters* [1993] 1 WLR 1077 at 1081-2 per Lloyd LJ, CA.

<sup>26</sup> *Attorney-General v Heatley* [1897] 1 Ch 560 at 573.

Abatement is an alternative to legal action.<sup>27</sup> Therefore, if you take action that is successful in preventing damage caused by the nuisance, you will not also be entitled to damages or another remedy in Court for the nuisance.

You should always be careful about taking any action yourself because if a Court later finds that there was no nuisance the defendant may then be able to sue you for trespass.

## Defences to private nuisance

The following might be defences to a claim in private nuisance:

- If the person alleging the nuisance (the plaintiff) voluntarily assumed the risk or consented to the nuisance.<sup>28</sup>

*For example, where the plaintiff, knowing there would be a danger to their property, showed a willingness to accept the danger.*

- The defence of ‘an act of God’ may be available where the act committing the nuisance could not have been reasonably predicted.<sup>29</sup>

*For example, strong winds causing damage.*

- Where a nuisance was created by a third party and the defendant had no knowledge of it, it may be possible to use the defence of ‘an act of third party’.<sup>30</sup>

*For example, the occupier of a property may not be liable for a nuisance created by an independent contractor working on their property.*

- A defendant that has gained a right, for example, in the form of an easement, to cause a nuisance may be able to argue ‘prescription’.
- Where the nuisance was created in order to avoid a real and imminent harm, it may be possible to argue the defence of ‘necessity’.<sup>31</sup>
- Statutory authority to carry out an activity which causes a nuisance is also a defence provided the nuisance is an inevitable result of the carrying out that activity.<sup>32</sup>

*For example, if the damage caused to a plaintiff’s property is an inevitable result of an activity which is authorised under an Act, the defence of statutory authority may apply and there will be no remedy in nuisance. However, if the damage is not inevitable, but merely a consequence of the way the person or body decided to carry out its activities, the defence of statutory authority would generally not apply.<sup>33</sup>*

---

<sup>27</sup> *Young v Wheeler* (1987) Aust Torts Reports 80-126 at 68,970 per Wood J, SC (NSW).

<sup>28</sup> *Kiddle v City Business Properties Ltd* [1942] 1 KB 269 at 274-5; *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476 at 481.

<sup>29</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 at 886.

<sup>30</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 at 904.

<sup>31</sup> *Southport Corp v Esso Petroleum Co Ltd* [1956] AC 218.

<sup>32</sup> *Managers of Metropolitan Asylum District v Hill* (1881) LR 6 App Cas 193 at 212 per Lord Watson.

<sup>33</sup> *Lester-Travers v City of Frankston* [1970] VR 2.

## How to bring a claim in nuisance

A claim in nuisance is commenced by filing a Statement of Claim in the Supreme Court of NSW.

You only have 6 years from the date the nuisance began to commence an action.<sup>34</sup>

Visit: [The Supreme Court of NSW's page on Approved and Prescribed Forms](#) to download and view a Statement of Claim form

## Remedies granted by the Court

The plaintiff can seek an injunction, which is an order requiring the defendant to stop the activity creating the nuisance, and damages (compensation) for any loss caused as a result of the nuisance.

### Mediation

If the issue cannot be resolved between you and your neighbour, you may wish to consider going to mediation. Community Justice Centres (**CJC**) offer free mediation services to help people resolve disputes without having to go to court. The CJC will talk to you about your situation and assess whether mediation is a viable option. They will then contact your neighbour to invite them to attend mediation. Mediators do not take sides, and they will not make a decision about the dispute. Mediators try to make sure that each person has a chance to have their say, keep the discussion on track, and help you come to an agreement where possible.

Visit: [The NSW Communities & Justice page on Welcome to Community Justice Centres](#) for more information about CJCs

## Public nuisance

Public nuisance occurs when a person causes a nuisance which endangers the life, health, property or comfort of the public generally, or obstructs the public in the exercise of its rights.<sup>35</sup> The essence of public nuisance is 'substantial and unreasonable interference with rights common to the general public'. Unlike private nuisance, it is not a requirement that the public nuisance must impact on the use and enjoyment of land.

---

<sup>34</sup> [Limitation Act 1969 \(NSW\)](#), s. 14(b).

<sup>35</sup> *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 at 190-1.

Public nuisance is a criminal offence although civil action may be brought on behalf of the community by the Attorney-General.<sup>36</sup> Legal action can also be brought by a person who suffers damage to an extent over and above that suffered by the public generally.

There are a number of specific public nuisance offences. For example, an occupier of premises can apply for a noise abatement order where the occupier is affected by offensive noise.<sup>37</sup>

#### *Case study: Public nuisance*<sup>38</sup>

A mining company allowed earth and mud to enter a watercourse, interfering with fish stocks. A group of commercial fishing operators took action against the mining company in public nuisance. The court refused the claim on the basis that the watercourse was open to all members of the public to fish; therefore the commercial fishing operators suffered no special loss above that of the average member of the community.

Often the grounds on which public nuisance arise are very similar to private nuisance and it is possible that the same act can be both a private and a public nuisance. The main difference between the two is that in the case of public nuisance, anyone affected can complain, whereas private nuisance can only be used to protect private, proprietary interests.

### Nuisance caused by trees

Trees are a common cause of nuisance. Branches and roots can damage neighbouring properties. The [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) (**Tree Disputes Act**) allows disputes over trees to be dealt with relatively quickly and cheaply in the Land and Environment Court.<sup>39</sup>

Where the Tree Disputes Act applies, it must be used to settle the dispute and an action in nuisance cannot be pursued.<sup>40</sup>

Read: EDO Factsheet on **Tree Disputes in NSW** for more information about the Tree Disputes Act

---

<sup>36</sup> [Walsh v Ervin \[1952\] VLR 361](#) at 368.

<sup>37</sup> [Protection of the Environment Operations Act 1997 \(NSW\)](#), s 268.

<sup>38</sup> [Ball v Consolidated Rutile Ltd \(1991\) Qd R 524](#).

<sup>39</sup> [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#).

<sup>40</sup> [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#), s. 5.