

# **Draft Submission on the proposed changes to the regulation of water-cooling systems to prevent Legionnaires' disease in NSW: Consultation Discussion Paper**

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## Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing general-purpose councils, associate members including special-purpose county councils and the NSW Aboriginal Land Council. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW thanks NSW Health for the opportunity to respond to the *Proposed changes to the regulation of water-cooling systems to prevent Legionnaires' disease in NSW: Consultation Discussion Paper* (Discussion Paper). Local Government has a direct interest in the foreshadowed changes which propose additional roles and responsibilities for councils and may impact on the health and safety of NSW communities.

## Background

The regulation of water cooling systems is managed through the NSW Public Health Act 2010 and Public Health Regulation 2012.

During 2016 NSW Health commenced a statutory review of the Public Health Act to which LGNSW lodged a submission which raised a number of issues relevant to local government's role in the regulation of water cooling systems. A copy of LGNSW submission to the review of the Public Health Act can be found at [www.lgnsw.org.au/submissions](http://www.lgnsw.org.au/submissions).

Following the release of the *Public Health Act 2010 Statutory Review Discussion Paper* there were several outbreaks of Legionnaires' disease. NSW Health quickly convened an Expert Panel to review the current regulatory framework and determine if any new measures were required to strengthen the prevention and control of Legionella contamination in water cooling systems. The Expert Panel review was conducted separate from the concurrent Public Health Act statutory review.

The *Report on the Statutory Review of the NSW Public Health Act 2010* included a recommendation for legionella control '*The Act should be amended to provide that the owner of a multi tenanted building, is the occupier for the purposes of the provisions relating to regulated systems where the regulated systems service the whole or substantial parts of the building*'. LGNSW is supportive of this recommendation. The report also noted the recommendations from the Expert Panel and that further consultation with the public, industry and local government is necessary. The *Proposed changes to the regulation of water cooling systems to prevent Legionnaires' disease in NSW: Consultation Discussion Paper* is part of that further consultation.

## Purpose

The LGNSW submission that follows is in response to the *Proposed changes to the regulation of water cooling systems to prevent Legionnaires' disease in NSW: Consultation Discussion Paper* (the Discussion Paper), which incorporates the Expert Panel recommendations.

This submission includes comments on the proposed changes in the Discussion Paper that impact on local government. The submission also provides comment on other concerns that were not addressed in the Discussion Paper, but were raised in the LGNSW Public Health Act review submission and in the initial Legionnaires' consultation with NSW Health.

The Discussion Paper and the Public Health Act statutory review report both acknowledge the need for prescribed fees and charges for the activities of councils required under the Public Health Act and Regulation. LGNSW is pleased NSW Health has acknowledged the concerns of local government and has committed to addressing these issues. Furthermore, LGNSW insist that all new fees and charges need to be indexed to account for inflation.

Local government supports practical improvements to the regulation of water cooling systems to increase public health and safety and the prevention of legionella bacteria; but emphasises that any proposed amendments must not increase the burden on local government's limited resources or capacity without providing commensurate funding or adequate cost recovery mechanisms.

Additionally any proposed new system must be thoroughly researched, assessed, and consulted upon prior to progressing to the development and implementation stages.

## Comments

### LGNSW initial comments not reflected in the Discussion Paper

The Discussion Paper states that NSW Health carried out initial consultations with Local Government NSW. It is concerning that the previous issues we raised with NSW Health were not addressed or represented in the Discussion Paper. We raise these same concerns and questions again in this submission. LGNSW hopes NSW Health will give due consideration to these matters and address them in this round of consultations.

### Expert Panel composition

LGNSW welcomes the invitation to participate in the Steering Committee to be established once the current public consultation stage concludes. We are concerned, however, that the proposals under consideration have been generated from an unrepresentative process.

In the Discussion Paper the Ministry of Health states that it supports the recommendations from the Expert Panel and proposes regulatory changes based on those recommendations.

The members of the NSW Health Expert Panel appear to have been "hand-picked" by NSW Health rather selected through industry body nominations. As such, it is debatable whether the Expert Panel is representative of the sectors impacted by these proposed changes. The lack of transparency and industry input weakens the integrity of the process.

LGNSW acknowledges that there was one local government representative on the Expert Panel (an Environmental Health Officer from one council) but is concerned that there was no representation from a whole of council and whole of sector perspective.

Some of the changes proposed by the Expert Panel cannot be supported by LGNSW. LGNSW suggests a new Expert Panel is convened with broader representation of all of the affected sectors including local government, and furthermore the representatives are nominated by the impacted industry representative bodies.

**Recommendation 1:** That a new Expert Panel is convened with broader representation of all of the affected sectors including local government.

## Registers

The Act and Regulation require local government to maintain registers for water-cooling and warm-water systems, public swimming pools and spa pools, and premises where skin penetration procedures are carried out. Local government has already raised significant concerns regarding the cost of administering and maintaining the registers and the inability to recover the associated costs.

The LGNSW submission to the Public Health Act 2010 statutory review raised concerns about the registers and recommended that NSW Health manage the registers centrally and provide access for councils to the information contained in them.

The Discussion Paper proposes additional administrative tasks for councils by requiring councils to receive notification of cooling tower test results in cases of public health risk, receive audited evidence of compliance with risk management plans, and possibly record the unique identification number of each water cooling system on the register.

Whilst NSW Health claims that the proposed additional administrative tasks for local government are small, there is a cumulative effect that is not acknowledged.

At a minimum, LGNSW supports the Discussion Paper proposal that local government would be able to charge fees to receive the audited certifications and undertake inspections of the premises.

Without it, LGNSW strongly opposes the imposition of these additional administrative burdens onto councils. It would be another example of the persistent and unsustainable shifting of costs and regulatory burdens from State agencies to local government without proper funding or a means to fully recover costs being established.

The fee amounts must be set to ensure there is a full cost recovery for all local government responsibilities under the Public Health Act and Regulation and be fully indexed.

A better option would be to facilitate a centralised system, managed by Service NSW or other state agency, where businesses can enter the audit information. This systematic reporting of data would allow NSW Health to monitor, track and analyse trends and areas for strategic improvement. This would align with proposals to centralise food industry regulation.

**Recommendation 2:** A centralised system should be established, managed by Service NSW or other state agency, where businesses can enter the audit information.

## Risk Management Plans and Annual Audits

The Discussion Paper proposes that each water cooling system will have a Risk Management Plan (RMP) and be audited annually by a Third Party Auditor. An auditor could be an authorised officer of a local government authority or NSW Health, or a commercial operator.

## Risk Management Plans

The Discussion Paper suggests amending the Regulation to remove the choice of building occupiers regarding the risk management standard they comply with. Currently occupiers may select from AS/NZS 3666.2:2011, or AS/NZS 3666.3:2011. Rather, the Regulation would require compliance with only AS/NZS 3666.3:2011, which requires a risk assessment to be carried out which identifies, evaluates and reports on a range of mitigation actions to be undertaken and sets out additional control strategies. The Discussion Paper proposes the AS/NZS 3666.3:2011 risk assessment would be formally set out in a RMP, in a form approved by the Health Secretary (similar to the template used in Victoria). It is also proposed that when an auditor believes that the RMP has not been implemented or complied with, they must notify the relevant local government authority which can then assess whether regulatory action is required.

Furthermore the Discussion Paper proposes *that the occupier will be required to provide evidence to the local government authority that a RMP has been developed, and that it has been satisfactorily audited, with a penalty provided for non-compliance. It is not proposed that the actual RMP or audit reports are provided to the local government, rather that certification that they have been done would be provided to the local government. It is proposed that the RMP and audit report would be made available immediately to authorised officers as part of an outbreak investigation, or for the purpose of quality assurance surveys, and to allow regulatory enforcement activities.*

Local government supports a more rigorous risk management approach to the regulation of water cooling systems. However, councils are concerned about:

- the effectiveness and minimum standards for RMPs, including the proposed template form
- what measures are in place to ensure the competence of the auditors reviewing the RMP
- the lack of independent assessment and transparency, particularly where commercial auditors are involved
- councils' access to the RMP and other documents held by the occupier
- the additional responsibility, capability requirements, and liability of councils when an auditor notifies a council of an occupier not implementing or complying with the RMP
- the liability of councils due to receiving audit certification
- the resources required to investigate and issue penalties for non-compliance.

**Recommendation 3:** That NSW Health address each of the above issues, including provision of clear liability protections for councils.

## Annual Audit

The Discussion Paper proposes *that the Auditor should be independent of the occupier and the person employed to maintain the water-cooling system on their behalf. The auditor would need to be a suitably qualified person, being someone who has training, qualifications and experience in the operation and maintenance of regulated systems. This could be determined either by a person holding certain qualifications and/or approved as an auditor by NSW Health. An auditor could be an authorised officer of a local government authority or NSW Health, or a commercial operator.*

The Discussion Paper proposes:

*The role of the auditor would be to:*

- *evaluate the adequacy of the RMP in meeting the requirements of AS/NZS 3666.3:2011*
- *assess whether the RMP is properly implemented*
- *recommend changes to the RMP where necessary with reasonable justification.*

*An audit will involve a review of all relevant documents including:*

- *the RMP*
- *all maintenance activities undertaken in relation to the system; this includes records of any services, cleans, inspections and repairs to the system*
- *all microbiological test results of samples taken from the system*
- *all notices/orders/warning letters or other correspondence issued to the occupier*

*As the audit would involve a review of the records, it is expected that in most cases, the audit could be done off-site.*

Local Government has a range of concerns, questions and recommendations responding to the proposed new audit and auditor requirements. These include:

- **Capabilities and Qualifications of auditors** – The Discussion Paper states that the auditors will hold certain qualifications and be approved by NSW Health. The details of these qualifications need to be clarified. It is essential that the auditors have clearly recognised and validated accredited qualifications, training and ongoing professional development (in particular on AS/NZS3666.3:2011, effective RMPs, the operation of the types of water cooling systems being audited). NSW Health must also ensure that auditors hold relevant competencies before accrediting them.
- **Regulation of auditors** – It is essential that NSW Health or other Regulators have oversight of the auditors, with the resources to receive and investigate complaints, undertake spot checks, conduct regular reviews of the auditors, and have the power to issue penalties for non-compliance.
- **Offsite Paper Audits verses Onsite Inspections** – There are safety and document validity concerns associated with allowing offsite audits and not requiring annual inspection to be included in the annual audit. An onsite inspection provides a visual inspection of the water cooling system and a way to verify documentation.
- **Liability** – NSW Health needs to provide advice and guidance regarding the liability of auditors and insurance requirements.
- **Public verses Commercial auditors** - The audits would be a regulatory responsibility and as such should be undertaken by public authorities. Commercial auditors could have a financial conflict of interest and/or lack independence and transparency.

The proposed auditor arrangements will in principle create issues similar to those experienced with private certifiers in the planning system, including lack of independence, weak compliance and disciplinary oversight, and reduced specialist competencies leading to incorrect assessments, approvals and public health risks. The private certifier model in the planning system is fundamentally flawed and would be totally unsuitable in the riskier public health context.

LGNSW suggests NSW Health investigate alternative audit models, including the NSW Environment Protection Authority (EPA) framework to create a more robust site auditors scheme. The EPA site auditor scheme ensures the protection of the environment and human health through proper management of contaminated land with improved community access to competent technical advice and increased certainty for assessments.

**Recommendation 4:** That auditors have clearly recognised and validated accredited qualifications, training and ongoing professional development (in particular on AS/NZS3666.3:2011, effective RMPs, the operation of the types of water cooling systems being audited). NSW Health must also ensure that auditors hold relevant competencies before accrediting them.

**Recommendation 5:** That NSW Health ensures competence of the auditors and undertakes regular reviews of auditors (every 2-3 years).

**Recommendation 6:** That NSW Health investigates alternative audit models, including the NSW Environment Protection Authority framework for the site auditor scheme prescribed under the *Contaminated Land Management Act 1997*.

### Unique identification numbers for water cooling systems

The Discussion Paper proposes a new requirement for clear and unique identification numbers for each water cooling system in NSW linked to laboratory tests results. However, there is no detail provided on who is responsible for generating these unique identification numbers, and if these identification number will be required to be recorded in the register.

Requiring each council, business, or laboratory to develop their own identification numbering system may create cross border confusion between local government areas, particularly during an outbreak; and will potentially create duplication and inconsistencies for businesses that operate across multiple LGAs.

Having NSW Health responsible for managing the registers centrally, including water cooling systems, could allow easy and consistent state-wide unique identification numbering for the water cooling systems across NSW.

**Recommendation 7:** That NSW Health develops a centrally managed register of the water cooling systems with unique identification numbers consistently allocated and recorded.

### Notification of test results to councils

The Discussion Paper proposes that local government should be notified of water cooling system test results where elevated levels of bacteria are identified.

LGNSW agrees that councils should be notified of these results, however argues that the results should be lodged with NSW Health as the lead agency for responding to legionella outbreaks. These results could also be recorded in the recommended state-wide register to support NSW Health monitoring of public health legionella risks and trends.



Furthermore, there is a distinct lack of detail regarding the expectations of councils and required responses when they receive these results. Additionally what is the associated liability for councils receiving the results?

As raised by LGNSW in previous representations and consultations with NSW Health, it is essential that NSW Health provides scientific or technical guidelines that allow councils to make a solid risk based assessment on when to inspect water cooling systems.

The Discussion Paper does include the proposal for an authorised officer (local government) to be able to require additional testing when there are concerns that a water cooling system may present a risk because of poor compliance with a risk management plan or notification of high levels of bacteria. This proposed new power for local government is supported.

**Recommendation 8:** That test notifications are lodged with NSW Health and results recorded in a centrally managed state based register.

**Recommendation 9:** That NSW Health provides scientific or technical guidelines that allow councils to make solid risk based assessments on when to inspect water cooling systems.

## Fees and charges

In determining the fees and charges structure, LGNSW requests NSW Health consult extensively with local government to ensure there is full cost recovery of the activities undertaken. The fees and charges framework needs to be clear and advice provided to industry and local government.

**Recommendation 10:** That NSW Health extensively consults with local government to ensure there is full cost recovery fee for the activities undertaken.

## Training and Capacity Building

The Expert Panel recommended that NSW Health build capacity in the relevant workforces, yet this was not addressed in the Discussion Paper.

It is paramount that NSW Health prioritises training, education and up skilling of councils and other stakeholders. NSW Health needs to provide greater technical guidance for inspections, develop minimum standards and a risk assessment framework, and provide expert support.

LGNSW continues to recommend that NSW Health establish a framework for communication, support and capacity building similar to the Food Regulation Partnership arrangements, to assist in building and maintaining councils' capabilities.

**Recommendation 11:** That NSW Health establish a framework for communication, support and capacity building similar to the Food Regulation Partnership arrangements to assist in building and maintaining councils' capabilities.

## Other Considerations

There are a number of concerns of local government that were not included in the Discussion Paper.

## Compliance Framework

NSW Health should consider the development of a compliance framework based on levels of risks and population exposure and specific geographical factors. It also needs to address the particular challenges presented by rural and regional location. This framework could be modelled on the enforcement agencies categories framework prescribed in the Food Act 2003 that sets three categories for each enforcement agency's role, responsibilities and powers in food regulation.

**Recommendation 12:** That NSW Health consider incorporating compliance categories into the regulatory framework.

## Alternative Annual Inspection Arrangements

The Expert Panel reviewed other jurisdictions' regulatory frameworks for water cooling systems. LGNSW believes that other existing regulatory arrangements for annual health and/or safety inspections should have also been considered, including the arrangements for annual fire safety inspections.

**Recommendation 13:** That NSW Health does not proceed with the proposed annual audit framework before reviewing and considering existing NSW annual compliance frameworks that could be adopted.

## Offences

The LGNSW submission to the Public Health Act statutory review raised a concern regarding offences under the Act and Regulation. The submission expressed *concerns that the Act does not allow councils to undertake compliance activity reflective of the risk involved. Councils are able to issue an improvement notice for a low risk infringement, yet for high risk offences the issue might not be addressed until after prosecution; for example there are offences for failing to comply with installation requirements of a regulated system such as air handling systems and failing to notify council of the new regulated systems, but there are no offences to for failing to correctly operate or maintain the regulated systems that may cause legionella outbreaks.* LGNSW believes that compliance would improve if the review included consideration of offences for non-compliance with regulation of water cooling systems, including the ability to issue a penalty infringement notice for not complying with an improvement notice.

**Recommendation 14:** That NSW Health includes consideration of offences and penalties in the review.

## Conclusion

LGNSW welcomes the opportunity to provide comment on the proposed changes to the regulation of water cooling systems.

Local government in NSW has an important role in public health protection by regulating environmental health premises, including water cooling systems. This role is prescribed in the

Public Health Act and Regulation; however there are issues of specification, capacity and costs that hinder councils' undertakings that should be addressed.

LGNSW recommends that:

- **Recommendation 1:** That a new Expert Panel is convened with broader representation of all of the affected sectors including local government.
- **Recommendation 2:** A centralised system should be established, managed by Service NSW or other state agency, where businesses can enter the audit information.
- **Recommendation 3:** That NSW Health address each of the above issues, including provision of clear liability protections for councils.
- **Recommendation 4:** That auditors have clearly recognised and validated accredited qualifications, training and ongoing professional development (in particular on AS/NZS3666.3:2011, effective RMPs, the operation of the types of water cooling systems being audited). NSW Health must also ensure that auditors hold relevant competencies before accrediting them.
- **Recommendation 5:** That NSW Health ensures competence of the auditors and undertakes regular reviews of auditors (every 2-3 years).
- **Recommendation 6:** That NSW Health investigates alternative audit models, including the NSW Environment Protection Authority framework for the site auditor scheme prescribed under the *Contaminated Land Management Act 1997*.
- **Recommendation 7:** That NSW Health develops a centrally managed register of the water cooling systems with unique identification numbers consistently allocated and recorded.
- **Recommendation 8:** That test notifications are lodged with NSW Health and results recorded in a centrally managed state based register.
- **Recommendation 9:** That NSW Health provides scientific or technical guidelines that allow councils to make solid risk based assessments on when to inspect water cooling systems.
- **Recommendation 10:** That NSW Health extensively consults with local government to ensure there is full cost recovery fee for the activities undertaken.
- **Recommendation 11:** That NSW Health establish a framework for communication, support and capacity building similar to the Food Regulation Partnership arrangements to assist in building and maintaining councils' capabilities.
- **Recommendation 12:** That NSW Health consider incorporating compliance categories into the regulatory framework.

- **Recommendation 13:** That NSW Health does not proceed with the proposed annual audit framework before reviewing and considering existing NSW annual compliance frameworks that could be adopted.
- **Recommendation 14:** That NSW Health includes consideration of offences and penalties in the review.

Whilst LGNSW is concerned about the proposed new arrangements and questions the representativeness of the Expert Panel, we look forward to working with NSW Health and welcome NSW Health's invitation for LGNSW and a local government practitioner to participate on the Steering Committee that will commence following the closure of this public consultation stage.