

Submission to the NSW Ministry of Health on Public Health Act 2010 Statutory Review Discussion Paper

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Opening

Local Government NSW (LGNSW) is the peak body for councils in NSW, representing NSW general-purpose councils and associate members including special-purpose county councils and the NSW Aboriginal Land Council. In essence, LGNSW is the organisation for all things local government in NSW. 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 statutory five-year review of the NSW Public Health Act 2010 (the Act). Local government has a vital interest in public health protection; and has a key role in the delivery of the Public Health Act and Regulation.

Local government's roles and responsibilities are predominantly prescribed in the Public Health Regulation 2012 (the Regulation). LGNSW notes that the Regulation is likely to be reviewed next year and requests that NSW Health extensively consults with NSW councils during this review. The following submission provides comment on the issues that are relevant to the Act and Regulation inclusively.

Purpose

The Public Health Act Statutory Review Discussion Paper (the Discussion Paper) includes 34 issues for consideration. In this submission LGNSW provides comment on 13 of these issues that impact on local government's role in regulating environmental health premises (cooling towers, public swimming pools, and premises carrying out skin penetration procedures); council child care; water utilities, and cemetery services.

This submission also provides comment on other issues of significance to councils which are not addressed in the discussion paper, including NSW Health support for local government, cost recovery, offences, registers, and Public Health Officers powers over local government.

Local government supports practical improvements to public health and safety but emphasises that any proposed amendments to the Act must not increase the burden on local government's limited resources or capacity.

Comments on Discussion Paper Issues for Consideration

The following provides our response to the 13 issues within the Public Health Act Review Discussion Paper that are of particular concern to local government.

Objectives

1) Are the objectives of the Public Health Act valid and appropriate?

3. Objects

1. The objects of this Act are as follows:

- a) To promote, protect and improve public health,*
- b) To control the risks to public health,*
- c) To promote the control of infectious diseases,*
- d) To prevent the spread of infectious diseases,*
- e) To recognise the role of local government in protecting public health.*

2. The protection of the health and safety of the public is to be the paramount consideration in the exercise of functions under this Act.

LGNSW considers that the current objectives of the Act are valid, appropriate and reflect the Act's intentions. However, public health protection is not solely the responsibility of local government and LGNSW strongly suggests that the objectives should also recognise the roles of NSW Health, Local Health Districts and Public Health Units.

2) Should s3 include a new objective relating to monitoring by NSW Health of diseases and conditions affecting the people of NSW?

LGNSW considers it appropriate for the Act's objectives to include the role of NSW Health in monitoring diseases and conditions affecting the NSW population. As detailed later in this paper, LGNSW recommends that the role of NSW Health should be amended to include NSW Health's other health protection responsibilities, such as coordination and capacity building.

Roles and Responsibilities

The Discussion Paper states that *the Ministry does not at this time consider any changes are required in the legislation in relation to the role and regulation of local government. However, the Ministry would hear submissions on the issue.*

LGNSW does not support increasing local government's role or responsibilities under the Act, rather that LGNSW considers that greater clarity and support is required to assist councils in the delivery of its current responsibilities.

In light of the recent outbreaks of legionnaire's disease, LGNSW is aware NSW Health is considering strengthening the compliance activities and risk assessment process for regulated systems, pending advice from the newly-convened Expert Panel.

At present the Act does not specify how often councils' Environmental Health Officers are required to inspect cooling towers, nor provide any scientific or technical guidelines that allow councils to make a risk-based assessment on when to do so.

This is an important issue of public health, and the local government sector requires greater technical clarity and clearer guidelines that will enable council inspectors to continue to play their part in helping to keep the community safe from legionnaires disease.

LGNSW's strong view is that any new proposals regarding council compliance activities for the management of legionnaire's disease and in relation to other environmental health premises must:

- 1. Be developed through extensive consultation with councils**
- 2. Ensure any new or changed requirements for councils are supported by adequate expert risk management, and technical and practical guidance from NSW Health,**
- 3. Allow inspections to occur on a full cost recovery basis, to avoid cost-shifting.**

3) Do sections 3 and 4 adequately recognise the role of local government in the Public Health Act?

Shared responsibility

The protection of NSW public health is a shared responsibility of NSW Health, Local Health Districts, and Public Health Units along with local government and as such the Act should clearly articulate the roles of all agencies.

The Act 4.2

4 Responsibilities of local government relating to environmental health

(2) In particular, a local government authority has the responsibility of appointing authorised officers to enable it to exercise its functions under this Act and ensuring that its authorised officers duly exercise their functions under this Act.

LGNSW recommends the removal of Section 4.2 as it is a duplication of local government obligations under the *Local Government Act* section 8 - Council's Charter. Furthermore, LGNSW considers that the second part of the clause is related to operational management and as such should not be prescribed in legislation.

Compliance Regime

The Discussion Paper states that *requiring local government to have annual inspections of all premises would not allow local governments a discretion to undertake a risk based approach to compliance. LGNSW agrees with this statement that annual inspection requirements should not be imposed on councils and that councils should determine priorities for inspection of premises which reflect local needs and technical advice from NSW Health experts.*

Any future proposal for increasing council inspections (frequency and/or new inspection requirements such as for private water suppliers) must take into account councils' limited resources and expertise. Local government should retain the control to direct its resources to the areas of greatest need and determine the extent of its activities based on expert advice.

Water Suppliers

LGNSW supports the implementation of drinking water quality management systems by council owned and operated local water utilities required by the *Act* and commends NSW Health on the assistance provided to councils' local water utilities in this process.

According to the NSW Department of Primary Industry (DPI) Water Performance Benchmarking Report of 2014/2015, the latest year for which data is available, 95 local water utilities had in place risk-based drinking water quality management systems. This is an improvement from 69 utilities in 2013/14; 48 utilities in 2011/12; 20 in 2008/09; and 5 utilities in 2006/07.

The NSW Ministry of Health is currently assisting local water utilities in the transition to drinking water quality management systems. As of August 2015, NSW Health's Water Unit had assisted 74 rural and regional water utilities to develop their systems.

LGNSW urges NSW Health to continue working with and supporting local water utilities in the ongoing implementation, review and audit of drinking water quality management systems.

4) Should a compliance regime be established in the Act in relation to s25 (which requires suppliers of drinking water to establish and adhere to a quality assurance program)?

Local government water utilities have benefited from NSW Health's assistance in developing and implementing their Quality Assurance Program (QAP). **LGNSW does not believe that compliance with the QAP requirements in the Act need to be enforced by way of financial penalties or offence provision. LGNSW supports an adequate reporting and auditing regime to ensure compliance. Also, NSW Health should continue to provide assistance to councils to implement and improve systems.**

In the case of Private Water Suppliers (PWS), local government supports a proactive approach to protect all supplies of drinking water. LGNSW suggests that, **before considering establishing a compliance regime for PWS, a number of issues need further clarification including:**

- Who will provide ongoing technical support for PWS QAP development and implementation?
 - What mechanism will be provided for improvement feedback or follow up with the PWS?
- Will NSW Health be providing benchmarks for the PWS QAPs?
- Will there be a new requirement for PWS to register to assist compliance activities?
 - If so, this new register should be developed and maintained by NSW Health.
- Who will conduct the PWS inspections and assessment of the QAP?
 - This will require significant resources and expertise and should not be tasked to local government. See item 6 for more comments.

5) If so, should this compliance regime involve a penalty for non-compliance and/or the ability to issue improvement notices for non-compliance?

Unlike local water utilities, any compliance regime for PWS should include enforcement options such as: on-the-spot fines, penalty notices, improvement notices and prohibition orders.

6) Should the Act be amended to recognise a role of local government authorities in relation to the regulation of private water suppliers and water carters?

Most councils do not have the capacity, resources, or expertise to be tasked with the additional requirement to enforce compliance of PWS. Such a requirement would impose onto councils over 1,000 additional inspections. Furthermore, most of these inspections are likely to be required in rural and regional areas where councils' resources and capacity are already severely limited.

Currently the regulation of drinking water is the responsibility of NSW Health. The Discussion Paper proposes transferring that responsibility to local government and providing councils support via training and expert advice. **LGNSW considers this proposal to be unacceptable in its current form and a clear cost shift from the State Government.**

LGNSW does not accept the argument in the Discussion Paper that as councils are likely to already be at the premises for other reasons they could also inspect the drinking water. This is an inadequate reason to transfer the responsibility to local government and does not address the issues that these inspections would be an increased burden on councils' resources and that council Environmental Health Officers (EHOs) would require additional training to undertake the role proposed.

Water suppliers, NSW Health Public Health Units and contractors have reported many benefits from having one central source of information to coordinate and support all suppliers of drinking water. Fracturing these responsibilities across a large number of authorised authorities instead of NSW Health continuing to centrally manage could create information variance, inconsistent practices and confusion across the State.

LGNSW does not support the transfer the regulation of PWS and water carters to councils. Councils are concerned about the following issues:

- There are no provisions for full cost recovery of all required councils' activities
- NSW Health would need to provide initial and ongoing training for EHOs
- The new PWS register should be centrally maintained by NSW Health, and
- NSW Health experts would need to continue to receive and assess PWS QAP.

Definitions

7) Should the definition of skin penetration include all procedures that penetrate a mucous membrane?

LGNSW considers that the Act definitions should be amended to keep up-to-date with emerging trends and techniques about risks public health, including mucous membrane penetration.

Currently the Act and Regulation include the definition of Skin Penetration as any procedure that involves skin penetration such as acupuncture, tattooing, ear piercing, hair removal and colonic lavage. To provide clear explanation of body modification skin penetration, the definitions in the Act should include other forms of skin penetration techniques for example; scarification, sub dermal implants, skin divers, etc.

It is important to note that any broadening of the definitions will result in additional compliance activity required by councils and related training for council staff to build their expertise in these new areas. Councils should be able to recover the costs of any additional inspections.

8) Should there be additional regulation to limit people who can perform high risk procedures such as eyeball tattooing to relevant registered health practitioners?

Procedures and treatments that are high risk for complications, injury or infection should only be conducted by relevant registered health practitioners.

Some of these skin penetration treatments and procedures including eye ball tattooing pose a greater risk to public health and should be viewed as a medical procedure required to be conducted by a registered health practitioner. NSW Health should assess and determine the levels of risks for these procedures and regulate accordingly.

Local government does not have the skills or knowledge to regulate these high risk procedures and they go beyond the accepted role of local government to regulate simple skin penetration procedures. **NSW Health should be tasked with the regulation of the premises that conduct high risk skin penetration procedures.**

9) Should the Act be amended to ensure that the owner of a tenanted building, or the person that the owner has arranged to manage the building, is considered the occupier for the purposes of the provisions relating to regulated systems?

Local government supports the Act being amended to ensure the owner of a tenanted building or persons that the owner has arranged to manage the building are considered to be the occupier for the purposes of the provisions relating to regulated systems such as air-handling, water cooling, and warm water systems.

10) Should the Act be amended to clarify that the definition of public swimming pool applies to a pool in a residential premises where the pool in question is used by members of the public as part of a commercial undertaking by the occupier of the premises?

Local government supports the Act being amended to clarify the definition of a public swimming pool to include a pool in a residential premise where the pool in question is used by members of the public as part of a commercial undertaking by the occupier of the premises.

If some residential swimming pools are defined as public swimming pools, NSW Health will need to provide local government with the powers to enter private residential land and guidance to address any compliance difficulties.

The Act's definition of a public swimming pool includes *a pool provided at a hotel, motel or guest house or at a holiday units, or similar facility, for the use of guests*. The definition will also need to provide clarification if a pool provided by a short term residential letting (e.g. Airbnb) is defined as a public swimming pool or not.

Childcare and Immunisation

Councils are a large provider of early childhood education and care services in NSW. As at December 2013, 91 councils in NSW directly provide early childhood education and care services (or 61% of all NSW councils). This represents around 7% of all early childhood education and care services in NSW. Councils provide many types of early childhood education and care including long-day care centres, occasional care, family day care, preschools, and play groups.

LGNSW is a member of the 'Local Government Children's Service Manager's Network', and through this network, a sample number of views were collated from council staff working in children's services. Staff were asked to comment on questions 26, 28 and 29 of the Public Health Act 2010 Statutory Review Discussion Paper.

26) Should the Act be amended to allow a public health officer to direct an unvaccinated child whom the officer reasonably believes has been in contact with a case of a vaccine preventable disease be excluded from child care or school, regardless of whether there is an outbreak at the school or child care the child attends?

LGNSW received varying responses from council staff working in children's services. Those council staff who agreed that the Act should be amended did so from a public health perspective in order to prevent and reduce the risk of passing a vaccine preventable disease onto others. For those who disagreed, there was a sense that the wording of the proposed amendments was ambiguous and open to interpretation. Council officers sought greater clarity about what was meant by "contact" with the disease, and felt that the term "reasonably" requires further clarification. It was suggested to include more specific terminology such as "has been in immediate contact with..." would be clearer for practitioners.

Council run children's services do and should have in place procedures to ensure the safety of children and staff, including exclusion periods for non-immunised children. LGNSW considers that these should continue to be clearly stated and agreed to by the parents of the children in writing upon enrolment. With this written agreement, LGNSW considers the spread of communicable diseases may then be left to the discretion of parents or staff to enact these procedures.

LGNSW recommends that, before amending the Act to allow a public health officer to be able to direct an unvaccinated child to be excluded from care, the proposed wording be tightened and clarified through consultation.

28) Should the Public Health Act be amended to remove the conscientious objector exemption to enrolment in a childcare facility from the Act, such that children who are not vaccinated due to their parents' conscientious objection cannot enrol in child care?

Again LGNSW received a range of views from council staff on the question of conscientious objector exemption. Some supported the removal of the conscientious objection exemption, arguing that children should be excluded from childcare if they have not been immunised unless there is a medical reason why they cannot be immunised.

However, most surveyed did not support the removal of the conscientious objector exemption for a range of reasons including:

- all children have a right to access high quality education and care
- all parents have a right to refuse vaccinations for their child
- this amendment could be exclusionary and affect children's educational chances later in life
- issues with the intervention of the State Government into services they do not manage
- there are other health and safety matters at child care centres for which the State Government does not intervene to exclude children
- risks of unregulated centres opening up which cater only for non-immunised children.

There were also questions regarding the impact this policy change would really have on increasing the numbers of immunised children. For example, one regional staff officer had only experienced a small number of conscientious objection cases in 13 years in the children's services industry, while another suggested that with the new removal of subsidies by the Federal Government for non-immunised children, the addition of this amendment would not significantly incentivise parents to immunise their children. LGNSW therefore recommends that the conscientious objection exemption is not removed, rather the requirements to obtain a conscientious objection statement should be strengthened.

29) If the exemption is not removed from the Act, should other options be pursued to strengthen the requirements to obtain a conscientious objection exemption for enrolment in child care in NSW?

The surveyed council staff who are working in children's services were in agreement that the requirements to obtain a conscientious objection exemption should be strengthened.

It was suggested that parents be required to provide a periodic review of their conscientious objection or to provide a second exemption opinion from a different General Practitioner (GP). While this approach is desirable, it was recognised that this may prove difficult in remote areas where there is only one GP. It was also suggested that services be permitted to implement further provisions such as charging unimmunised families an additional holding fee/bond to cover period of absences should an outbreak occur.

Council staff also cautioned against families pressuring GPs to provide conscientious objection exemptions, and/or medical exemptions. LGNSW recommends that alongside strengthening the requirements for families to obtain conscientious objection exemptions strict guidelines and training for GPs also be provided for both types of exemptions.

Cemeteries and Crematories

Councils in NSW manage around 950 cemeteries and 8 crematoria; furthermore councils conduct around 50% of the burials in NSW and 10% of burials in Sydney.

Local Government NSW is represented on the Cemeteries and Crematoria NSW (CCNSW) Cemeteries Industry Consultative Group.

34) Is it still appropriate for the Public Health Act 2010 to continue to regulate the work, health and safety aspects of the disposal of bodies and the regulation of cremations, internment and exhumation, preparation rooms, equipment and apparatus in mortuaries, crematories and cemeteries (where these are unconnected to public health)?

LGNSW considers that it is best practice for compliance coordination to be managed through one authority. If it is fractured across a number of compliance agencies (WorkCover & CCNSW) it could lead to confusion and reduce the strength of public health protections. The current Act provisions should remain and NSW Health should maintain oversight.

Key issues not included in the Discussion Paper

NSW Health Support

Council EHOs' capacity and expertise is often cited as a factor which limits the ability of councils to undertake activities under the Act. To assist councils in the inspection of environmental premises directed by the Act, LGNSW recommends that NSW Health provides councils with greater technical guidance for inspections, standards, risk assessment, and expert support.

EHOs also conduct food safety inspections of food premises under the *Food Act 2003*. Established in 2008 the Food Regulation Partnership arrangements between councils and the NSW Food Authority provide a best practice framework in building and maintaining capacity and expertise of EHOs. The NSW Food Authority provides EHOs with technical advice, advisory guidelines and protocols. It also facilitates regional and state meetings for information sharing, and professional development training. A review of the Partnership in 2011 found that the partnership was effective in improving the safety of retail food in NSW.

Recommendation: LGNSW recommends that NSW Health investigates establishing a framework for communication, support and capacity building similar to the Food Regulation Partnership arrangements to assist in building and maintaining councils' capabilities for public health protection.

Cost Recovery

Local government has the power to charge fees in relation to inspections under the Local Government Act. The Public Health Act is unclear about whether councils have the power to charge fees in relation to environmental health premises inspections and, there are varying interpretations (from full cost recovery to no charge). A number of council health protection activities prescribed under the Act are also funded from councils' general revenue e.g. developing and maintaining registers required by the Act and Regulation.

LGNSW notes that the Regulation allows councils to charge a fee for issuing improvement and prohibition orders. However, the Act should include provisions to allow councils to recover all the costs associated with the delivery of the Public Health Act and Regulation. The Food Act and Regulation fee structure is an acceptable model example.

The Food Act and Regulation provides the powers to recover the costs associated with the functions of the Act and Regulation for: notification processing, annual administration, and improvement notices. The NSW Food Authority provides clear advice to councils and the food retail businesses on all the fees and charges. The Food Regulation outlines the inspection fees for the NSW Food Authority and it recommends local government use this as a base for its own inspection fee structure.

The Swimming Pools legislation is another example where councils are able to charge a fee to recover the costs associated with inspections and administration.

Recommendation: LGNSW recommends that NSW Health includes provisions to allow for full cost recovery of all the activities prescribed, and provide advice to industry, local government and health sectors of these fees, in the Act and Regulation.

Offences

The Review should include an all-inclusive assessment of the types of offences under the Act and Regulation relative to risks to public health and the need to address some risks immediately.

Council EHOs have expressed concerns that the Act does not allow them 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 for failing to correctly operate or maintain the regulated systems that may cause legionella outbreaks.

Recommendation: LGNSW recommends that compliance within the Act would be improved if EHOs had the ability to issue a penalty infringement notice for not complying with an improvement notice.

Registers

The Act and Regulation requires 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. Potentially in the future councils may be required to also maintain a register for private water suppliers and water carters.

Local government has significant concerns regarding the cost of administering and maintaining any business or activity registers and the inability to recover the associated costs. As outlined above, other legislation provides provisions to charge an administration fee to recoup these costs.

Recommendation: LGNSW recommends the Act and Regulation be amended so that NSW Health manages any registers and provides the information to councils. A less preferable option would be to allow councils to charge a fee to recover the costs for administering and maintaining any registers.

The NSW Government Swimming Pool Register and NSW Health Tobacco Retailer Notification Scheme both require registrations and are centrally managed for the purpose of assisting compliance activities. These examples would be effective models for NSW Health to replicate for centrally managing the registers required by the Act and Regulation.

Powers of Public Health Officers over Local Government

The Act states:

122 Functions of public health officers

- (1) *The public health officer for a part of the State has the following functions:*
- (b) *to co-ordinate activities and local government authorities in that part of the State in relation to the reduction of any risks to public health in that part of the State,*
 - (c) *to co-ordinate the activities of authorised officers in relation to the enforcement of this Act and the regulations within that part of the State,*

Whilst local government accepts there may be the need for public health officers to have some coordinating powers in relation to council employees during emergencies or outbreaks, local government rejects the command nature of these provisions and their implied perpetual application.

Furthermore, it is not clear how public health officers would co-ordinate the work of local government employees and if it would be done in consultation and consideration of council resources.

Conclusion

LGNSW is pleased to have the opportunity to provide input to the Public Health Act 2010 Statutory Review Discussion Paper offered by the NSW Ministry of Health.

Local government in NSW has an important role in public health protection by regulating environmental health premises. This role is prescribed in the Public Health Act and Regulation; however there are issues of clarity, capacity and costs that hinder councils' undertakings.

The key concerns for councils in NSW are the:

- financial burdens for compliance and administration and the need for a cost recovery mechanism;
- potential increased compliance requirements; and
- the need for stronger offence penalties.

LGNSW recommends that:

- registers should be centrally managed by NSW Health on a state-wide basis,
- the Act should reflect the shared responsibilities of NSW Health, Local Health Districts, and Public Health Units as well as local government in NSW for health protection,
- NSW Health provides greater support and coordination to build capacity of councils in NSW to undertake their responsibilities under the Act.