

Public Health (Water Risk Management) Amendment Bill 2016

Explanatory Notes

Short title

The short title of the Bill is the Public Health (Water Risk Management) Amendment Bill 2016 (the Bill).

Policy objectives and the reasons for them

There is a community expectation that hospitals and residential aged care facilities should proactively manage and control potential risks to the health of their patients and residents.

The objective of the Bill is to implement measures to improve the management and control of health risks associated with the supply and use of water in hospitals and residential aged care facilities, in particular the health risks associated with *Legionella* bacteria. These include measures that will give effect to the Government's commitment to greater public transparency regarding water testing being undertaken by facilities to detect *Legionella* bacteria.

Legionella bacteria are widely distributed in the environment in natural water sources such as lakes, rivers and streams, and other habitats such as soils and mud. There are over 50 species of *Legionella* bacteria, some of which can cause disease in humans. *Legionella* bacteria from natural water sources can enter and colonise manufactured water systems. These systems are commonly found in commercial, industrial, health care, aged care, child care and education facilities and include:

- air handling systems incorporating water cooling towers and evaporative condensers (collectively known as cooling water systems)
- piped water supplies, and cold, warm and hot water pipework
- spa pools, spa baths and hydrotherapy pools
- ice machines and chilled water dispensers
- air-houses (industrial humidifiers used in paint, electroplating and finishing shops)
- humidifiers and nebulisers, and
- decorative fountains.

Legionellosis is the collective name for acute infections caused by *Legionella* bacteria, of which Legionnaires' disease is the most serious. In Australia, the most common *Legionella* species that cause Legionnaires' disease are *Legionella pneumophila*, which is the species associated with manufactured water systems, and *Legionella longbeachae*, which is commonly found in soils and potting mix.

Legionellosis is not contagious: that is, infections are not spread from person-to-person. Rather, *Legionella pneumophila* needs to be inhaled through aerosols (small droplets of moisture containing the bacteria) for Legionnaires' disease to occur. Aerosols can result from activities such as when water is sprayed through cooling towers, through outlets such as shower heads and taps, high pressure car washes, or through bubbling and pumping water such as occurs in spas.

The likelihood that a healthy person who is exposed to *Legionella* bacteria will develop illness is extremely low. Most people who are exposed to aerosols containing *Legionella* bacteria do not become ill because in most healthy people the body's immune system is able to prevent infection. However, when the body's immune system is compromised the bacteria can reproduce, particularly in the lungs.

International consensus is that the proportion of Legionellosis cases that are fatal tends to be much higher for healthcare-acquired infections. This may be attributable to the fact that those at highest risk are likely to spend increased time as hospital inpatients or as residents of aged care facilities; and that the complexity of the plumbing in these premises may encourage the multiplication of *Legionella* bacteria. Those at highest risk from the effects of Legionellosis include:

- severely immunocompromised patients and some patients receiving high doses of immunosuppressive medication
- people with chronic underlying disease such as diabetes mellitus, chronic liver failure, chronic renal failure, congestive heart failure, HIV/AIDS and some forms of cancer
- smokers, people with excessive alcohol intake and people over the age of 50 years
- people who have undergone recent surgery, intubation (placement of a tube into the trachea to assist breathing) and mechanical ventilation
- people who have aspirated foreign matter into their respiratory passages, and
- people who have used respiratory therapy equipment such as nebulisers.

In September 2013, the Chief Health Officer published the report *Review of the prevention of Legionella pneumophila in Queensland* following an outbreak of Legionnaires' disease in two patients at The Wesley Hospital in late May and early June 2013. The report contained six recommendations to improve the control and management of risks from *Legionella* bacteria in hospitals and residential aged care facilities.

These recommendations included the introduction of interim measures requiring public hospitals, public residential aged care facilities and licensed private health facilities to develop and implement water quality risk management plans, focusing on the management and control of *Legionella* bacteria risks. These interim measures have been in place since mid-2014. The recommendations also proposed that, in the medium-term, amendments be made to the *Public Health Act 2005* (the Public Health Act) (Recommendation 2).

In addition to health risks posed by *Legionella* bacteria, drinking water supplies in hospitals and residential aged care facilities may also be susceptible to health risks arising from a range of hazards such as disease-causing microorganisms and chemical contaminants, and issues such as interruptions to the drinking water supply.

Achievement of policy objectives

The Bill implements a legislative framework to:

- improve the management and control of health risks associated with the supply and use of water in hospitals and residential aged care facilities, in particular the health risks associated with *Legionella* bacteria, and
- provide greater transparency of water testing activities being undertaken by these facilities.

The object of the Public Health Act is to protect and promote the health of the Queensland public. This object is achieved, in part, by provisions in the Act for preventing, controlling and reducing risks to public health; inquiring into serious public health matters; responding to public health emergencies; and providing for compliance with the Act to be monitored and enforced. Therefore, the Public Health Act is the appropriate legislative instrument for the proposed amendments.

The Bill amends the Public Health Act to insert a new chapter 2A, new sections 389A and 389B; and to amend existing section 385 and schedule 2.

The Bill will initially apply to public hospitals that provide inpatient services; private health facilities licensed under the *Private Health Facilities Act 1999* (the Private Health Facilities Act); and aged care facilities at which a residential aged care service is provided by the State under the *Aged Care Act 1997* (Cwth) (the Aged Care Act). Public hospitals that do not provide inpatient services will not be captured by the legislation as these types of facilities are considered to present a lesser health risk. Private health facilities captured by the legislation will include both private hospitals and private day hospitals as both of these types of hospitals provide inpatient services.

The Bill makes provision for other aged care facilities to be prescribed by legislation, which will enable the requirements to be eventually implemented across the private residential aged care sector through a phased approach.

- **Water risk management plans**

Water risk management plans are recognised internationally as the most effective method of managing health risk associated with water-related hazards. The Bill provides that the responsible person of a prescribed facility must ensure that there is a compliant water risk management plan for the facility, unless the person has a reasonable excuse. A maximum penalty of 500 penalty units applies for a contravention of this provision. The responsible person is:

- for a public hospital providing inpatient services, and a State aged care facility – the chief executive of the relevant Hospital and Health Service
- for a private health facility – the licensee for the private health facility under the Private Health Facilities Act, and
- for any other aged care facility – the approved provider that provides the service under the Aged Care Act.

The Bill also provides that the responsible person must, unless they have a reasonable excuse, ensure the facility operates in a way that complies with the facility's water risk management plan. A maximum penalty of 500 penalty units applies for a contravention of this provision. The Bill also provides that the responsible person must, unless they have a reasonable excuse, take all reasonable steps to ensure that each person who has an obligation to comply with the plan while the facility is operating, does so. A maximum penalty of 200 penalty units applies for a contravention of this provision.

To ensure that water risk management plans are robustly designed, the Bill outlines in detail what a water risk management plan must contain. The Bill also enables the Government to prescribe additional plan elements in regulation. This approach will ensure that the legislative framework has sufficient operational flexibility.

To assist in ensuring the suitability and quality of water risk management plans, the Bill enables the chief executive of the department to request a responsible person for a prescribed facility to provide the chief executive with a copy of the facility's water risk management plan. The responsible person must comply with the request unless the person has a reasonable excuse. A maximum penalty of 200 penalty units applies for a contravention of this provision. The Bill also enables the chief executive of the department to require the responsible person for a prescribed facility to amend the facility's water risk management plan if the chief executive is satisfied that the plan requires amendment in order to achieve compliance. The responsible person must comply with the request unless the person has a reasonable excuse. A maximum penalty of 500 penalty units applies for a contravention of this provision.

- **Notification of positive *Legionella* results**

The Public Health Act currently does not contain any obligations for persons to notify the department if *Legionella* bacteria are detected in a hospital or a residential aged care facility's water distribution system. To address this, the Bill requires the person in charge of a prescribed facility to notify the department within one business day after being notified of a test result confirming the presence of *Legionella* bacteria in water used by the facility, unless the person has a reasonable excuse. If the contravention is intentional, a maximum penalty of 1000 penalty units applies. Otherwise, a maximum penalty of 200 penalty units applies for a contravention of this provision.

The criteria for what constitutes a confirmed detection of *Legionella* bacteria, including analytical methods and detection thresholds, and the information to be provided in notifications, will be prescribed in regulation. The mandatory *Legionella* bacteria notification requirement will enable the department, where necessary, to ensure that facilities that have confirmed the presence of *Legionella* bacteria in their water distribution systems are instigating timely and appropriate remedial responses in line with their water risk management plans.

- **Periodic and public reporting of water test results**

To implement the Government's commitment to increased transparency regarding *Legionella* testing being undertaken by hospitals and residential aged care facilities, the Bill provides for periodic reporting by facilities to the department, and for public reporting of that information by the department.

The Bill requires the person in charge of a prescribed facility to provide a report to the department, about the results of tests for *Legionella* bacteria undertaken in accordance with the facility's water risk management plan during a prescribed period, unless the person has a reasonable excuse. The person in charge will have a maximum of 30 business days after the conclusion of that prescribed period in which to submit the report. The reporting period and details of the information to be provided in the periodic reports will be prescribed by regulation. A maximum penalty of 200 penalty units applies for a contravention of this provision. However, the Bill also provides that a person must not give the chief executive a report containing information that the person knows is false or misleading. The maximum penalty for this offence is 1000 penalty units.

The Bill enables the chief executive of the department to publish, in a report, notices given by facilities about the presence of *Legionella* or reports about prescribed tests for *Legionella* undertaken in accordance with water risk management plans. The Bill also enables the chief executive to include any other information that the chief executive considers relevant to the notices or reports. However, the Bill also provides that if the other information is adverse to a person the information may not be included in the report unless the chief executive gives the person an opportunity to make submissions about the information before the report is prepared, and any submissions made by the person are fairly stated in the report.

- **Powers of authorised persons**

The Bill provides powers for authorised persons to enter a prescribed facility for the purpose of monitoring compliance with water risk management plans. The proposed new power under section 389A to enter a prescribed facility (except any part of an aged care facility that is a resident's private dwelling) is modelled on the existing power for authorised persons to enter a health care facility to monitor chapter 4 of the Public Health Act (Infection control for health care facilities). The proposed power may be exercised only if the prescribed facility (a hospital, private health facility, or residential aged care facility) is open for carrying on a business or otherwise open for entry. Also, the authorised person is expressly prohibited from entering a part of the facility where a person is undergoing a health procedure or consulting a health practitioner.

The proposed new power under section 389B enables an authorised person to enter a part of a residential aged care facility that is a resident's private dwelling. This power may only be exercised if the department has been notified under new section 61H that *Legionella* bacteria have been confirmed at the facility, or that someone at the facility has, or had, a notifiable condition resulting from *Legionella* bacteria. The Bill also provides that before entering the occupant's private dwelling, the authorised person must identify himself or herself to the occupant, explain that he or she is permitted to enter and give the occupant an opportunity to allow entry. The authorised person must also be accompanied by a person employed by the facility to provide residential aged care, such as a nurse or carer.

Alternative ways of achieving policy objectives

Amending the Public Health Act is the only way of effectively achieving the policy objectives.

Estimated cost for government implementation

Additional costs associated with the implementation of the Bill will be met from within existing Department of Health and Hospital and Health Services resources.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

• **Matters to be prescribed in a regulation**

The Bill enables the following matters to be prescribed in regulation:

- specific hazards
- residential aged care facilities, other than State aged care facilities, that will be prescribed facilities (clause 4 new section 61A)
- additional content that may be included in a water risk management plan (clause 4, new section 61D)
- the prescribed test for confirming the detection of *Legionella* bacteria, and any other requirements for inclusion in the notification to the department (clause 4, new section 61H), and
- additional requirements for periodic reports, and the reporting period (clause 4, new section 61I).

Prescribing these matters in regulation may be considered to breach section 4(5) of the *Legislative Standards Act 1992* (the Legislative Standards Act) which requires legislation to have sufficient regard to the institution of Parliament. However, operational flexibility is required to enable the Government to amend the content of water risk management plans, and the notification and periodic reporting requirements. Further, the legislation needs sufficient flexibility to accommodate the Government's intention to implement the legislation in private sector residential aged care facilities using a phased approach.

The proposed amendments will be subject to the tabling and disallowance provisions of the *Statutory Instruments Act 1992* and therefore subject to Parliamentary scrutiny. Given this, they are justified on the basis that they strike an acceptable balance between the need for the legislation to have operational flexibility and the need to give sufficient regard to the institution of Parliament.

• **Introduction of new offences**

Clause 4 of the Bill creates a number of new offence provisions and associated penalties ranging from 200-1000 penalty units. These may be considered to breach section 4(3) of the Legislative Standards Act which requires legislation to have sufficient regard to the rights and liberties of individuals. The offence provisions are necessary to encourage compliance with the requirements relating to water risk management plans, mandatory notification and periodic reporting requirements. The proposed penalties are designed to reflect the significant responsibility hospitals and residential aged care facilities have for proactively managing and controlling the health risks to their patients and residents.

The proposed offences are necessary to manage the potential risks to vulnerable Queenslanders associated with the use of water, and the security of water supply, in Queensland hospitals and residential aged care facilities. Given this, they are justified on the basis that they strike an acceptable balance between the need to adequately protect and promote the health of the public, and the rights and liberties of an individual.

- **Reversal of onus of proof for offences**

Some new offence provisions inserted by clause 4 may breach section 4(3)(d) of the Legislative Standards Act. This depends on whether the legislation reverses the onus of proof on criminal proceedings without adequate justification. The offences are:

- failure to ensure that a compliant water risk management plan is in place
- failure to ensure that a facility operates in compliance with its water risk management plan
- failure to take all reasonable steps to ensure that a person who is required to comply with a water risk management plan does so
- failure to provide a copy of a water risk management plan to the chief executive on request
- failure to amend a water risk management plan as required
- failure to notify the chief executive of a confirmed *Legionella* bacteria detection within one business day after being notified of the result, and
- failure to prepare a periodic report and provide it to the chief executive within a specified timeframe.

All of these offences have a defence of reasonable excuse, to ensure that strict liability for the offences does not arise. The offences will be summary offences due to the operation of section 441 of the Public Health Act. For such offences, section 76 of the *Justices Act 1886* places the legal onus of proving the existence of a 'reasonable excuse' on the defendant, effectively reversing the onus of proof.

This reversal is justified on the grounds that the facts giving rise to a reasonable excuse would be within the particular knowledge of the defendant. The new notification and reporting obligations, and related offences, will apply only to either a 'responsible person' for a prescribed facility or the person in charge of a prescribed facility. These defendants will have ready access to personal and documentary evidence to prove they had a reasonable excuse for not complying with the requirements of the relevant provisions. In contrast, it would be impracticable and unduly expensive for the prosecution to disprove the existence of a reasonable excuse.

- **Powers of authorised persons**

Clause 6 of the Bill provides powers for authorised persons to enter a prescribed facility for the purpose of monitoring compliance with water risk management plans. These powers may breach section 4(3)(e) of the Legislative Standards Act which provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for documents or other property, only with a warrant issued by a judicial officer.

The proposed new power under section 389A to enter a prescribed facility (except any part of an aged care facility that is a resident's private dwelling) is modelled on the existing power for authorised persons to enter a health care facility to monitor chapter 4 of the Public Health Act (Infection control for health care facilities). The proposed power may be exercised only if the prescribed facility (a hospital, private health facility, or residential aged care facility) is open for carrying on a business or otherwise open for entry. Also, the authorised person is expressly prohibited from entering a part of the facility where a person is undergoing a health procedure or consulting a health practitioner. Accordingly, the risk of infringement of individual rights and liberties under this power is low.

The proposed new power under section 389B enables an authorised person to enter a part of a residential aged care facility that is a resident's private dwelling. This power may only be exercised if the department has been notified under new section 61H that *Legionella* bacteria have been confirmed at the facility, or that someone at the facility has, or had, a notifiable condition resulting from *Legionella* bacteria. The Bill also provides that before entering the occupant's private dwelling, the authorised person must identify himself or herself to the occupant, explain that he or she is permitted to enter and give the occupant an opportunity to allow entry. The authorised person must also be accompanied by a person employed by the facility to provide residential aged care, such as a nurse or carer.

Where *Legionella* bacteria have been confirmed in a residential aged care facility, or there is a confirmed case of Legionellosis, it is imperative that the department can act quickly to investigate and mitigate the risk of an outbreak of Legionellosis in a vulnerable resident population, for example by taking water samples from private rooms. Given this, the powers are justified on the basis that they strike an acceptable balance between the need to adequately protect and promote the health of the public, and the rights and liberties of the individual.

Consultation

Due to the urgency of this matter, consultation with stakeholders has been limited to advising them of the proposed amendments. The Chief Health Officer has met with key private health care providers and the Private Hospitals Association of Queensland which represents the smaller providers. The Director-General of Queensland Health has written to all Hospital and Health Service chief executives to provide an outline of the proposed legislation. Stakeholders consulted have indicated support for the legislation.

In March 2016, the Department of Health will present an overview of the proposed legislation at a seminar aimed at clients of a private *Legionella* analytical laboratory. The Department will also present an overview of the proposed legislation to Queensland infectious disease physicians and building, engineering and maintenance staff of Hospital and Health Services.

Implementation of the legislation in the private residential aged care sector will be undertaken at a later date through a phased implementation process. Consultation with the private residential aged care sector will be undertaken during this process.

Consistency with legislation of other jurisdictions

Legislative approaches differ considerably between jurisdictions. The most common approach is to require facilities to install, operate and maintain cooling towers and warm water systems (a heated water system that distributes warm water at approximately 45°C throughout the majority or all of the system to prevent scalding), in line with Australian Standards. This is not a sufficient approach for Queensland as it does not address the risk associated with notionally 'cold' water supplies which, due to high source water temperatures in some locations, and warmer ambient temperatures, are often conducive to the proliferation of *Legionella* bacteria, and also other bacteria.

Legislative approaches in other jurisdictions also focus solely on risks from *Legionella* bacteria and do not take into account risks associated with other water-related hazards or hazardous events, or water supply security. Some jurisdictions require reporting of *Legionella* bacteria detections over certain limits or where consecutive samples are positive. However, no jurisdictions undertake public reporting on *Legionella* bacteria detections in water distribution systems or cooling towers.

The proposed amendments contained in the Bill are the most stringent in Australia with regard to water risk management in hospitals and residential aged care facilities. They build on current international best practice in *Legionella* bacteria risk management in hospitals and residential aged care facilities and align closely with the new national *Guidelines for Legionella control in the operation and maintenance of water distribution systems in health and aged care facilities*, approved by the Australian Health Protection Principal Committee in December 2015.

Notes on provisions

Short title

Clause 1 provides that, when enacted, the short title of the Act will be the *Public Health (Water Risk Management) Amendment Act 2016*.

Commencement

Clause 2 provides for the Act to commence on a date to be proclaimed. It is intended that commencement be proclaimed for a date at least six months from assent. This will allow a period of time for prescribed facilities to put in place water risk management plans, as required by new section 61C, prior to the commencement of the Bill.

Act amended

Clause 3 provides that this Act amends the *Public Health Act 2005*.

Insertion of new ch 2A

Clause 4 inserts new chapter 2A into the Public Health Act comprising new sections 61A-61K.

New section 61A defines the following key terms in new chapter 2A: *approved provider, cooling tower, hazard, hazardous event, hazard source, health service chief executive, Legionella, prescribed facility, prescribed test, residential aged care facility, residential care, responsible person, State aged care facility, water distribution system and water risk management plan*.

New section 61B clarifies that nothing in new chapter 2A is intended to affect the operation of existing chapter 2 (Environmental Health) of the Public Health Act.

New section 61C provides that a responsible person of a prescribed facility must ensure that there is a water risk management plan for the prescribed facility that complies with section 61D, unless the person has a reasonable excuse. A maximum penalty of 500 penalty units applies for non-compliance with this provision.

New section 61D specifies what a water risk management plan must contain and provides for additional requirements to be prescribed by regulation.

New section 61E provides that the chief executive of the department may give the responsible person for a prescribed facility a notice requiring the person to amend a water risk management plan for the prescribed facility, if the chief executive considers that the plan does not comply with the requirements outlined in section 61D. New section 61E(4) provides that the responsible person must comply with the notice, unless the person has a reasonable excuse. A maximum penalty of 500 penalty units applies for non-compliance with this provision.

New section 61F provides that the chief executive of the department may ask, by notice, the responsible person for a prescribed facility to give the chief executive a copy of the facility's water risk management plan by a stated date. New section 61F(2) provides that the

responsible person must comply with this request, unless the person has a reasonable excuse. A maximum penalty of 200 penalty units applies for non-compliance with this provision.

New section 61G(1) provides that a responsible person for a prescribed facility must ensure that a facility operates in a way that complies with the facility's water risk management plan, unless the person has a reasonable excuse. A maximum penalty of 500 penalty units applies for a contravention of this provision. New section 61G(2) further provides that the responsible person must take all reasonable steps to ensure that each person who has an obligation to comply with the plan while the facility is operating does so, unless the responsible person has a reasonable excuse. A maximum penalty of 200 penalty units applies for non-compliance with this provision.

New section 61H applies if the result of a prescribed test confirms the presence of *Legionella* bacteria in water used by a prescribed facility. New section 61H(2) provides that the person in charge of the prescribed facility must notify the chief executive of the department within one (1) business day after being notified of the test result, unless the person has a reasonable excuse. If the contravention is intentional, a maximum penalty of 1000 penalty units applies. Otherwise, a maximum penalty of 200 penalty units applies for non-compliance with this provision.

New section 61I provides that a person in charge of a prescribed facility must give the chief executive a report, for each reporting period, about the results of prescribed tests carried out under the facility's water risk management plan, unless the person has a reasonable excuse. A maximum penalty of 200 penalty units applies for non-compliance with this provision. New section 61I also provides that the report must be provided within 30 days after the end of the reporting period. The reporting period will be prescribed in regulation.

New section 61J provides that a person must not give the chief executive of the department a report under new section 61I containing information that the person knows is false or misleading. The maximum penalty for this offence is 1000 penalty units. However, the offence will not apply if, when giving the report, the person tells the chief executive (to the best of the person's ability) how it is false or misleading; and if the person has, or can reasonably obtain, the correct information, the person gives the chief executive the correct information.

New section 61K provides that the chief executive of the department may publish in a report notices about the presence of *Legionella* given to the chief executive under new section 61H or reports about prescribed tests given to the chief executive under new section 61I. New section 61K(2) provides that the report may also include any other information that the chief executive considers relevant to the notices or reports.

New section 61K(3) provides that if the information in subsection (2) is adverse to a person the information may not be included in the report unless the chief executive gives the person an opportunity to make submissions about the information before the report is prepared, and any submissions made by the person are fairly stated in the report. Information provided by a facility about positive *Legionella* test results would not constitute information adverse to a person under this provision. However the provision would apply if, for example, the chief executive elected to include in the report additional commentary regarding the performance over time of a facility and that commentary was adverse to the facility.

Amendment of s 385 (Power to enter places)

Clause 5 amends section 385 to provide that the general power of authorised persons to enter places includes entry undertaken under new sections 389A and 389B. *Clause 5* also clarifies that section 385(3) does not apply to new section 389B. The effect of this is that entry may be made under section 389B to a dwelling without the occupier's consent, an enforcement order or a warrant.

Insertion of new ss 389A and 389B

Clause 6 inserts new section 389A which details the powers of authorised persons to enter a prescribed facility (except any part of an aged care facility that is a resident's private dwelling). New section 389A provides that the authorised person may enter the facility if the facility is open for carrying on business or otherwise open for entry. However, the authorised person may not enter a part of the facility where a person is undergoing a procedure conducted by a health practitioner or where a person is consulting a health practitioner.

Clause 6 also inserts new section 389B which details the powers of authorised persons to enter a part of a residential aged care facility that is a resident's private dwelling. New section 389B only applies if a person in charge of a residential aged care facility has either notified the chief executive under new section 61H that a prescribed test has confirmed the presence of *Legionella* bacteria in water used by the facility, or notified the chief executive that a person at the facility has, or had, a notifiable condition resulting from *Legionella* bacteria.

Under new section 389B an authorised person may enter a resident's private dwelling, without consent, for the purpose of monitoring compliance with a water risk management plan. Entry is conditional on the authorised person being accompanied by a person who employed at the residential aged care facility to provide residential care to the resident. New section 389B(3) clarifies the steps an authorised person must do, or make a reasonable attempt to do, before entering the dwelling.

Amendment of sch 2 (Dictionary)

Clause 7 amends the dictionary in schedule 2 to insert definitions for those key terms introduced in new section 61A.