



Ministry of Business,
Innovation & Employment

Making pool safety easier

Proposed changes to the Fencing
of Swimming Pools Act 1987

Consultation document \ March 2013





**Ministry of Business,
Innovation & Employment**

Ministry of Business, Innovation and Employment (MBIE)

Hikina – Whakatutuki Lifting to make successful

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

MBIE combines the former Ministries of Economic Development, Science + Innovation, and the Departments of Labour and Building and Housing.

March, 2013

This document is also available at: www.dbh.govt.nz

Cover photo courtesy of WaterSafe Auckland, from the 'Your Pool Your Responsibility' campaign.

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New Zealand Government

Minister's Foreword

The Fencing of Swimming Pools Act 1987 does a crucial job – keeping young children safe from drowning in home swimming pools. After the Act was introduced, the number of children under five years old drowning in home pools reduced from an average of 10 a year in 1987 to an average of three a year more recently.

But for all its success, the Act has long frustrated pool owners, councils and water safety groups alike because its processes and requirements are technical and complex.

In 2008, the public was consulted on the Act, and I have listened to their concerns.

It's time to review it to see if we can still achieve reduced drownings but also reduce some of the dreadful compliance costs. The High Court said bluntly in a judgment that some parts of the Act are vague and other parts are inconsistent. I have heard stories about the difficulties people have had to try and satisfy the absolute letter of the law, being put through hoops that are only remotely connected with the intent of trying to save young lives.

Everyone, no matter what side of the debate they're on, wants to reduce the number of drownings in home pools and make them a rarity if we can. Almost all drownings are in pools that do not comply with the Act.

In this consultation document, the Ministry of Business, Innovation and Employment has set out proposals to reduce compliance costs while keeping children safe. This review is not about exposing young children to more risk of drowning, but is our chance to get more workable rules that are supported by pool owners, councils, and water safety groups.

When you read the consultation document, please ask yourself whether the Ministry's proposals strike an acceptable balance between protecting young children from drowning and the practicality of the rules for pool owners and councils. Remember there will always be a risk of drowning as long as we have swimming pools.

I encourage you to have your say. Your views are important because they will help the Cabinet to make decisions about how the Act should be changed.



Hon Maurice Williamson
Minister for Building and Construction



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Have your say

Why we're consulting

The Fencing of Swimming Pools Act 1987 (the Act) has contributed to reducing the incidence of young children drowning in home swimming pools, but the Act has proved to be cumbersome and costly for pool owners and councils to comply with. For this reason the Ministry of Business, Innovation and Employment (the Ministry) has developed new proposals aimed at making the Act more flexible and less expensive for pool owners and councils to comply with.

The proposals are likely to maintain or improve child safety at the same time as reducing the compliance burden of the Act. The Ministry is keen to hear the community's views about these important issues. The proposals are outlined in this document, and the Ministry invites comment about them before the Government finalises its position. The consultation process runs until **Friday, 10 May 2013**.

How to have your say

Online submissions are strongly preferred, but you can also post your submission.

Make your submission online at: www.dbh.govt.nz/consultingon-pools

or post your submission to:

Making pool safety easier
Ministry of Business, Innovation
and Employment
PO Box 10729
WELLINGTON 6143

Submissions
close
10 May 2013.

Next steps

Once the consultation has ended, on **10 May 2013**, the submissions will be analysed. Views expressed in the submissions will be taken into account when the proposals are considered by Cabinet. Legislation will then be introduced and the public will be able to comment on it during the normal select committee process. There will be a further round of consultation on related changes to the Building Code.

For further information

Website: www.dbh.govt.nz/consultingon-pools

Email: pools@dbh.govt.nz

Phone: **0800 242 243**

Introduction

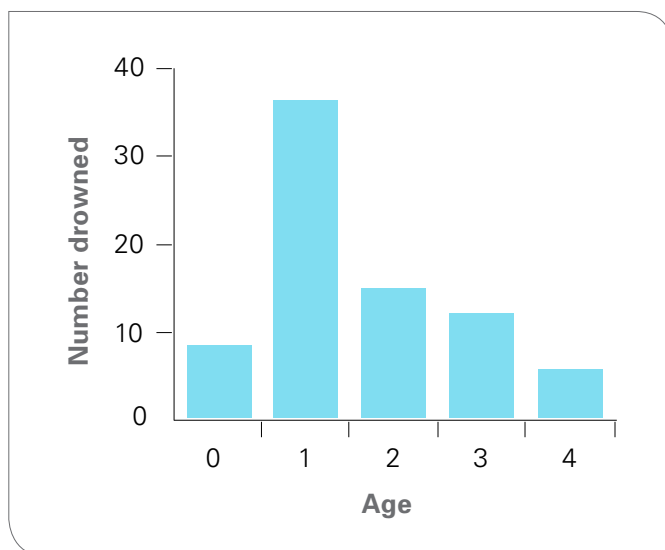
The Act has helped to reduce drowning

The number of young children (0-4 years) drowning in home swimming pools fell substantially following the introduction of the Act in 1987. Previously, an average of 10 young children drowned in home swimming pools each year; the average is now three a year.¹

This is a worthwhile response – but it is still three young lives that have been lost to their families and to their communities.

Figure 1 shows the age of the young children who drowned in home pools in the last 20 years – 80 percent of them were two years old or younger.

Figure 1: age of children drowning in home pools ²



Caregivers should closely supervise young children whenever they have access to a swimming pool. If caregivers are briefly distracted or are doing something aside from closely supervising, young children can leave their sight and find their way to the swimming pool. Young children have often drowned when they went unnoticed to the pool from inside the house or some other part of the property. A fence (or other means of restricting access) provides excellent protection from drowning as a result of brief lapses in supervision.

¹ Data from Water Safety New Zealand's DrownBase.

² Drowning fatalities by children under five in home pools in New Zealand between 1993 and 2012, including other water hazards within 25m of a home, but excluding indoor pools. Data from Water Safety New Zealand's DrownBase.

Issues with the Act

Since its enactment over 25 years ago, issues have emerged with the way the Act operates. The former Department of Building and Housing issued a discussion document in 2008 and received 70 submissions. A summary of these submissions can be found at www.dbh.govt.nz/consultingon-pools.

The submissions highlighted that the Act is less effective than it could be, and more costly than necessary for pool owners and councils to comply with.

Issues with the Act include the following:

- The term 'swimming pool' is unclear and councils are required to decide – based on the circumstances – whether it includes a garden pond, irrigation pond or stormwater retention lake.
- The requirements for restricting access to the pool are confusing and inflexible.
- It is difficult to determine where the fence must be located, and the location is sometimes impractical (for example, for properties with very small outdoor areas).
- Children have a higher risk of drowning when a door opens from the house to the pool.
- Many owners are unaware of (or neglect) basic maintenance needed to keep their fence childproof.
- There is no national consistency in the way councils check pools to ensure they continue to comply with the Act.
- Councils have few enforcement options other than prosecuting uncooperative owners.

These issues are exacerbated by social and technological changes since 1987, when the Act was passed: traditional quarter-acre sections are being replaced by denser urban living, technologies for restricting access have evolved, and spa pools and other portable pools have become more affordable.

Examples include:

- Childproof spa pools, which are simple to make childproof to industry standards. Some councils exempt such pools via a costly exemption process, while other councils require the owner to fence them.
- Portable pools deeper than 400mm, such as deep inflatable pools: people often put up such pools without installing a fence, and councils find it difficult to locate them and enforce the fencing requirement.

The proposals

The proposals in this consultation document take into account the issues raised in the 2008 consultation, and the suggested ways of addressing those issues. The proposals are intended to reduce the burden of complying with the Act, while maintaining or improving child safety. Your comment on the proposals will be welcome, and if you have other suggestions please put them forward as well.

This consultation document contains the following proposals and alternative options:

1. Reduce the types of pool that are subject to the Act, by limiting the definition of 'swimming pool' to pools intended for swimming or other human aquatic activity. Additional option: make indoor pools subject to the Act.

Proposals for new pools

2. Clarify the requirements for restricting access to the pool, by relying on performance-based regulations in the Building Code.
3. Relax the requirements about where access must be restricted, requiring that pool owners must restrict access from the house to the pool. Alternative option: restrict access to an area that people would normally only enter when using the pool.
4. Continue to allow childproof doors opening to the pool area. Alternative option: end the practice of doors opening to the pool area.

Proposals for all pools

5. Require owners to do a maintenance check every three years, supported by councils auditing a sample of pools. Alternative option: require councils to inspect all pools every three years.
6. Give councils more cost-effective enforcement tools, by replacing court fines with infringement offences.

Proposals for spa pools and portable pools

7. Exempt childproof spa pools from requiring a building consent or maintenance check, and require retailers to give buyers a checklist setting out their obligations under the Act. Alternative option: as above, but require maintenance checks for spa pools.
8. Add specific provisions for portable pools deeper than 400mm, by requiring retailers of portable pools to give buyers a checklist setting out their obligations under the Act, and giving councils better enforcement tools (an infringement notice, and the power to remove a pool for subsequent offending).

Other proposals

9. Include a purpose statement in the Act.
10. Put the legislative provisions in a new Act. Alternative option: add new sections to the Building Act 2004 concerning child safety in home swimming pools.

These proposals cannot guarantee that no more young children will drown in home swimming pools. Regardless of how good the means of restricting access are, the regime will continue to rely on owners restricting access to pools, and on caregivers supervising young children closely.

Reduce the types of pool that are subject to the Act

Issues with the current definition of 'swimming pool'

The Act currently defines a 'swimming pool' as:

'an excavation, structure, or product that is used, or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product, that is a spa pool.'

Some pools are exempt from the requirements of the Act, including:¹

- pools shallower than 400mm
- pools that are not associated with a house nor used for swimming
- indoor pools.²

In practice it has been difficult to determine what pools are subject to the Act, and there is a lack of consistency in the way councils interpret the Act. Some councils consider ornamental pools to be 'capable of being used for swimming' and therefore require fencing, while other councils do not. Some councils have needed to decide whether to require fencing of irrigation ponds on rural properties where the pond is near the house but serves the wider property, or whether to require fencing of stormwater retention lakes (an environmentally-friendly feature of new residential subdivisions).

The 2008 discussion document asked which option was best to clarify the meaning of swimming pool. Respondents were divided between whether to simplify the definition, or to ensure that there are no exemptions.

Proposal 1

Define 'swimming pool' to mean: an excavation or structure deeper than 400mm intended for swimming or other human aquatic activity.

The question of whether to include or exclude indoor pools is considered in the additional option (over page).

¹ The full list of exemptions is set out in section 5 of the Act.

² Indoor pools are not exempt if the main purpose of the building is to house the pool.

Advantages of proposal 1

This proposal would remove the current uncertainty about which pools require a fence (or other means to restrict access). It would clarify that the following man-made water hazards are excluded from the Act, even if they are near a house: tanks, dams, water courses, ponds and lakes (including ornamental ponds, irrigation ponds, and stormwater retention lakes) – unless their main purpose is for swimming. Many of these water hazards would be relatively costly to fence.

The proposal would not create a significantly greater danger for young children because relatively few of these water hazards are currently fenced.

Additional option – Make indoor pools subject to the Act

A possible additional option would be to include indoor pools in the definition of a swimming pool. Indoor pools would require self-closing doors or other means of restricting young children from accessing the pool. The proposal would exclude baths used for personal hygiene and emptied after each use.

This additional option would protect young children from wandering unsupervised to indoor pools.

Questions

Do you agree with proposal 1: Define 'swimming pool' to mean an excavation or structure deeper than 400mm, and intended for swimming or other human aquatic activity?

Do you agree with the additional option: include indoor pools in the definition of 'swimming pool' (excluding baths, used for personal hygiene and emptied after each use)?

Clarify the requirements for restricting access to the pool

Issues with the current requirements for restricting access

When people install a pool, they must also install a means to restrict the access of young children. Pools and pool fences are 'buildings' under the Building Act 2004, and pool owners must comply with the Building Code. They can either:

- meet the specifications of the Schedule to the Act (which is an 'acceptable solution' and provides one way of complying with the Building Code), or
- propose an alternative solution that meets the performance standards in the Building Code.¹

The Schedule to the Act is prescriptive and relates to the fencing technology that was available in 1987. More recently, in 2006, Standards New Zealand developed a new standard for pool safety – NZS 8500:2006 – although the standard is not mandatory.²

The Building Code and the Act are inconsistent. The courts have commented on 'a most unsatisfactory inconsistency' between the two provisions.³ For example:

- the Building Code would allow any solution that meets the performance standards – but the only solution allowed by the Act is a fence
- the Building Code and the Act are unclear about the requirements for doors in buildings that open to the pool area – effectively, doors must be self-closing unless there is an alternative means to restrict access.⁴

The Act requires pool owners to comply with the Building Code at all times. This ongoing obligation has sometimes led to councils requiring pool owners to change their fence to comply with a new interpretation of the Act, even though the council had earlier said the pool was compliant. In contrast, under the Building Act 2004, once a pool has received a code compliance certificate councils cannot normally require the fence to be changed.

The Act empowers councils to grant exemptions to the requirements for fencing. The exemption process is cumbersome and results in a lack of national consistency. Some councils routinely grant exemptions; other councils grant few (if any).

¹ The Building Code includes performance standards for pool barriers in Clause F4 Safety from Falling.

² New Zealand Standard NZS 8500:2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs.

³ Waitakere City Council v Hickman CIV 2003-404-7266, at [50].

⁴ Under the Building Code, doors must be self-closing except for sliding doors, but if sliding doors are not self-closing there must be another means of restricting access. Under the Schedule to the Act, doors must be self-closing unless a council grants an exemption.

Although the Building Code is largely performance-based, it requires swimming pools to have a barrier, and has detailed specifications for gates and doors.⁵ These specifications reduce flexibility because they limit the scope for pool owners to propose alternative means of restricting the unsupervised access of young children.

Respondents to the 2008 discussion document highlighted the confusing and inconsistent requirements for fencing, and the burden of the exemption process. Some respondents suggested using NZS 8500:2006 rather than the Schedule to the Act.

Proposal 2

Clarify the requirements for restricting access to the pool by:

- removing the following from the Act:
 - the Schedule
 - the power to grant exemptions
 - the requirement for a fence, and
 - the obligation to comply with the Building Code at all times (although there will still be a maintenance obligation – see proposal 5).
- amending the Building Code so that the performance standard for home swimming pools is: pools shall have a means to restrict unsupervised access by young children, and
- developing acceptable solutions.

Advantages of proposal 2

This proposal would increase flexibility, while still restricting the access of young children. The proposal would remove confusion and inconsistencies between the provisions, and would improve national consistency in the way councils administer the requirements. There would be no need for exemptions under the Act given the flexibility under the Building Act 2004 for alternative solutions and waivers.⁶

Pool owners would not need to upgrade existing pools for any new requirements for restricting access to the pool – but they would still need to maintain the fence that the council had previously approved.

The proposal is likely to maintain or improve protection for young children because the requirements for restricting access would be clearer and easier to implement.

⁵ Clause 4.3.5(a) of the Building Code states, 'all gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch when released from any stationary position 150 mm or more from the closed and secured position, but excluding sliding and sliding- folding doors that give access to the immediate pool surround from a building that forms part of the barrier.'

⁶ Any waiver would need to protect children at least as well as the performance standard in the Building Code.

Question

Do you agree with proposal 2: Clarify the requirements for restricting access to the pool by:

- removing the following from the Act: the Schedule, exemptions, the requirement for a fence, and the obligation to comply with the Building Code at all times
- amending the Building Code so that the performance standard for home swimming pools is, 'pools shall have a means to restrict unsupervised access by young children,' and
- developing acceptable solutions.

Relax the requirements about where access must be restricted

Issues with the current 'immediate pool area'

Currently, the Act requires owners to fence the immediate pool area, which is:

'the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool.'

Case law has found that the immediate pool area can include activities such as a barbecue and entertaining guests.

The requirement to fence the immediate pool area is onerous for some pool owners. Modern urban living has moved away from the traditional quarter-acre section, to properties with very small outdoor areas where it is less practicable to isolate the pool from other parts of an already small outdoor area.

The term 'immediate pool area' is vague, leading to confusion and inconsistency. The courts have commented that the term:

'... leaves both territorial authorities and pool owners in a situation of most undesirable uncertainty which is the inevitable consequence of well intentioned but vaguely worded legislation.'¹

Councils have found it difficult and time-consuming to determine whether the area proposed by a pool owner meets the requirements of the immediate pool area. Respondents to the 2008 discussion document agreed that the term 'immediate pool area' is unclear. Respondents were divided as to how to better define the pool area.

Proposal 3

Remove the term 'immediate pool area' and include in the Building Code a requirement to restrict access to the pool from the house and from other properties.

The restricted area could be the whole outdoor area (see the diagram over page), or it could be any smaller area that the pool owner chooses.

¹ Waitakere City Council v Hickman CIV 2003-404-7266, at [55].

Advantages of proposal 3

Proposal 3 would remove a confusing and inflexible requirement from the Act, and replace it with a simple and flexible requirement. Children would be protected from the pool when they are inside the house.

Alternative option – Restrict access to an area people normally only enter to use the pool

One disadvantage of proposal 3 is that children are sometimes outside the house when their caregiver is distracted – in 30 percent of drownings, children had been somewhere outside the house before they went unnoticed to the pool and drowned.²

An alternative option is to restrict access to an area that people would normally only enter when using the pool. This would mean (for example) that the restricted area would not include a children’s play area, a thoroughfare, or an area that is part of the everyday indoor/outdoor flow from the house. This option would protect children when they are outside the house.

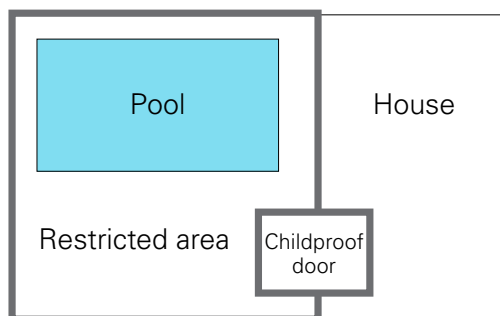
The option seeks to provide more clarity than the current definition of the immediate pool area, but might be impractical for properties with very small outdoor areas.

This option would apply to new pools, not pools a council had previously approved.

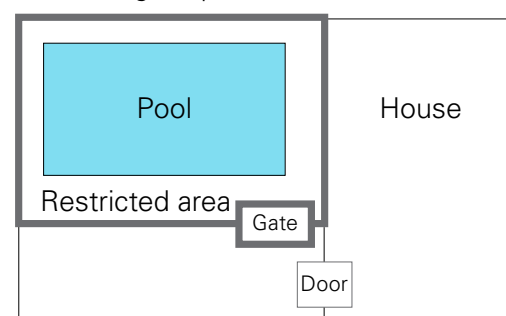
Diagrams of possible options

The diagrams show access restricted to the entire area outside the house for proposal 3, and more closely surrounding the pool for the alternative option. The diagrams are illustrative only, and other configurations are also possible.

Proposal 3 – restrict access from the house and from other properties



Alternative option – restrict access to an area that people would normally only enter when using the pool



² Drowning fatalities of children under five in home swimming and spa pools between 1993 and 2012, where the child gained unsupervised access to the pool. Data from WaterSafety New Zealand’s DrownBase.

Questions

Do you agree with proposal 3: Remove the term 'immediate pool area' from the Act and the Building Code. Replace it with the requirement to restrict access to the pool from the house and from other properties?

Do you agree with the alternative option: Restrict access to an area that people would normally only enter when using the pool?

Continue to allow childproof doors opening to the pool area

Issues with doors

Currently, the Act allows childproof doors in a house to open to the pool area. The doors must be self-closing or have another means to restrict access. These requirements would be made clearer as part of proposal 2 (above).

One issue is that children have a higher risk of drowning when a door opens directly from the house to the pool. Doors can be left open, giving young children access to the pool. Twenty percent of home pool drownings have involved doors that were left open.¹ International evidence shows that children are at three times greater risk of drowning if doors open from a house to the pool.²

Some respondents to the discussion document in 2008 suggested ending the practice of allowing doors that open to the pool. Currently, the Ministry does not support this suggestion, so it has been included below as an alternative option.

Proposal 4

Continue to allow childproof doors opening to the pool area.

Advantages of proposal 4

The Ministry considers that a door should be allowed if it adequately restricts access. Mechanisms for closing doors have evolved and are now more readily available, providing more options for pool owners.

Alternative option – No door opening to the pool area

The alternative option is to end the practice of allowing doors that open to the pool area. This option would apply to new pools, not pools that council had previously approved.

The alternative option would reduce the risk to young children. The challenge is that it could involve additional costs for some pool owners as they would need to use a gate or other means of restricting access (other than a door).

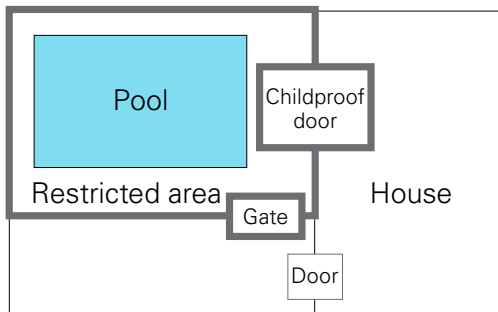
1 Drowning fatalities of children under five in home swimming and spa pools between 1993 and 2012, where the child gained unsupervised access to the pool. Data from WaterSafety New Zealand's DrownBase.

2 Barker R, Heiring C, Spinks D and Pitt R (2008) Domestic Pool Immersion in Queensland Children under 5 years of age. Queensland Injury Surveillance Unit, No. 104 December 2008. Available at: www.qisu.org.au/ModCoreFilesUploaded/Bulletin_10486.pdf.

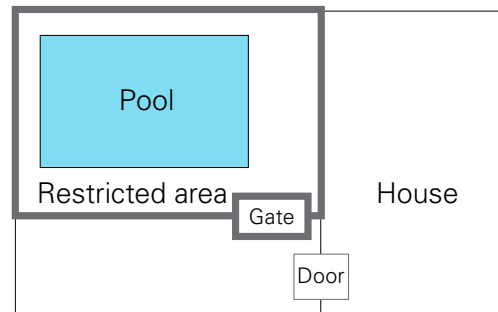
Diagrams of possible options

The diagrams below are illustrative only. Other configurations are also possible.

Proposal 4 – childproof door opening to the pool area



Alternative option – no door opening to the pool area



Questions

Do you agree with proposal 4: Continue to allow childproof doors opening to the pool area?

Do you agree with the alternative option: Do not allow doors opening to the pool area?

Require owners to do a maintenance check

Issues with the Act

The Act currently requires pool owners to ensure that their fence is compliant at all times, and requires councils to take reasonable steps to ensure that owners comply with the Act. For example, pool owners must ensure gates and doors close properly, and keep trees cut back.

Councils often find that owners are unaware of – or have neglected – ongoing maintenance and their fence is no longer childproof. Some pool owners unwittingly do things that make a fence ineffective, such as placing pot-plants beside a fence that children can use to climb over, or propping a gate open. Lack of maintenance is also a common feature of the swimming pools where young children drown; 95 percent of drownings occur in a pool that is not compliant with the Act.¹

There is a lack of national consistency in the way councils ensure compliance with the Act. Some councils inspect all pools every three years; other councils only inspect a pool when they are aware of an issue. The level of compliance is mixed: some councils have achieved high levels of compliance; other councils have found over half of the pools are non-compliant when first visited.

Hastings District Council is an example of a council that has achieved a high level of compliance – it reports that 98 percent of pools in Hastings district comply with the Act.² Its active compliance strategy involves targeted community awareness, identifying pools, and checking the compliance of each pool every three years.³ In 2002, the Council asked owners to complete a self-assessment, which the Council used to prioritise its inspections. The Council funds its inspection programme from an annual \$40 incl GST targeted rate that pool owners pay.

Respondents to the 2008 discussion document agreed that ongoing maintenance of fences was an issue, and that pool owners should take more responsibility for maintaining their pools. Many respondents agreed with the idea of requiring owners to conduct periodic maintenance checks.

¹ Drowning fatalities of children under five in home swimming and spa pools between 1993 and 2012, where the child gained unsupervised access to the pool. Data from WaterSafety New Zealand's DrownBase.

² Hastings District Council. Annual Report 2011/12.

³ Hastings District Council (2003) Pool Fencing Strategy, Hastings District Council. Available at: www.hastingsdc.govt.nz/files/all/property/swimmingpools/strategy.pdf.

Proposal 5

Require pool owners to complete a simple maintenance check and submit it to their council every three years.

Require councils to support the maintenance check regime by:

- undertaking risk-based audits: the council may randomly audit any pool, but pools the council assesses as high risk must have a higher chance of being audited
- publicly reporting the estimated level of compliance annually.

This proposal would not relate to childproof spa pools (see proposal 7). The Ministry would develop the proposed check, which would be simple for pool owners to complete themselves – pool owners would not be expected to obtain a professional inspection.

Advantages of proposal 5

The proposal addresses the issues of owner awareness by actively involving them in simple checks that they are well-placed to undertake. Owners of low-risk pools who submit a check are less likely to be audited (councils would only audit a fraction of the low risk pools).

The proposals would lead to a more efficient, nationally-consistent regime where councils target their resources at high-risk pools. Alongside risk-based audits, the Ministry anticipates that councils would continue with current pragmatic approaches such as checking the pool when visiting a property for another purpose. The proposal would also complement councils' existing strategies to locate pools.

Young children would be better protected because more pools are likely to be compliant.

Alternative option – Councils to inspect all pools every three years

An alternative option is to require councils to inspect every pool every three years. This alternative would be more expensive because it is less targeted to the high-risk pools.

Questions

Do you agree with proposal 5: Require owners to complete a simple maintenance check every three years, and require councils to carry out random audits of pools, especially high-risk pools?

Do you agree with the alternative option: No requirement for owners to do a check, but require councils to inspect all pools every three years?

Give councils more cost-effective enforcement tools

Issues with the Act

If a pool breaches the Act – for example, if the fence is not maintained in a childproof condition – a council can prosecute the owner. The courts can:

- require the owner to empty the pool
- order a fine of up to \$500, plus \$50 per day that the pool remains non-compliant.

Councils advise that prosecution is not very cost-effective for addressing breaches of the Act. Most owners comply with the Act when they are asked to, but some councils find the current enforcement tools inadequate when owners are less cooperative.

Councils raised this issue in their responses to the 2008 consultation process, and proposed introducing infringement fees.

Councils have powers under the Building Act 2004 to ensure that new pools are installed with childproof fences. Pools require a building consent. Owners who install a pool without a fence could receive a notice to fix and infringement notices.

Proposal 6

Replace the power to impose court fines with:

- a notice requiring an owner to remedy a maintenance issue
- infringement offences up to a maximum of \$500 for:
 - a gate or door being left open
 - not submitting the maintenance check
 - a notice not being complied with.

Advantages of proposal 6

The proposal would enable councils to achieve compliance more efficiently. Councils would continue to educate and persuade non-compliant owners, and the chance of an infringement fee is likely to encourage owners to cooperate.

Question

Do you agree with proposal 6: Replace court fines with the power to issue a notice (requiring an owner to remedy a maintenance issue), and infringement fees?

Exempt childproof spa pools

Issues with the Act

The Act currently makes no distinction between spa pools and other pools. Owners of spa pools must obtain a building consent and install a fence that complies with the Act (unless the council grants a special exemption).

There is no national consistency in the way councils apply the Act in relation to spa pools. Some councils routinely grant special exemptions, informed by the specifications in NZS 8500:2006 for making a spa pool childproof. The key requirement is for spa pools to have a childproof cover. Other councils do not grant such exemptions.

Councils are unaware of the existence of many spa pools. Spa pools are simple to install, and owners might not realise that unless they obtain a building consent and install a fence (or seek an exemption) they are unwittingly breaching the law. As a result, many spa pools are unfenced, although some would have childproof covers. Twelve percent of home pool drownings were in spa pools.¹

Some respondents to the 2008 discussion document suggested that fencing should not be required if spa pools were childproof.

Proposal 7

Exempt childproof spa pools from requiring a building consent and maintenance checks (see proposal 5).

Create an infringement offence for any spa pool that is not kept childproof (unless the owner has restricted access as required for other pools).

Require spa pool retailers to give buyers a checklist setting out their obligations.

Create an infringement offence for retailers who fail to give a checklist to a buyer.

The Ministry would develop the proposed checklist.

¹ Drowning fatalities by children under five in a home pool in New Zealand between 1993 and 2012. Data from Water Safety New Zealand's DrownBase.

Advantages of proposal 7

The proposal would simplify the obligations for owners of spa pools, and is a pragmatic response, given that councils find it difficult to locate spa pools. Childproof covers for spa pools are readily available, and using one would be a simple way for spa pool owners to comply with the law.

The Ministry expects the proposal would increase child safety as a result of more owners being aware of their obligations and having incentives to use childproof covers. A fence might be safer than a childproof cover, but a childproof cover would be safer than a cover that is not childproof. A disadvantage of the proposal is that it relies on owners to always put the cover back on the spa pool, and lock it.

Alternative option – Maintenance checks for spas

An alternative option would add in an obligation for owners to notify their council when they acquire a spa pool, with the owner required to complete the maintenance checks in proposal 5.

This alternative option would give councils more information to monitor spa pools. Although owners would be required to submit a check, they would be unlikely to be audited if the council assesses their spa pool to be low-risk.

The disadvantage of the alternative option is that the additional requirements might not greatly increase child safety, especially if spa pools generally remain childproof throughout their lifetime. The option might not be fully effective in practice because it is difficult to locate spa pools.

Questions

Do you agree with proposal 7:

- exempt childproof spa pools from building consent and maintenance checks,
- require spa pool retailers to give buyers a checklist setting out their obligations, and
- create an infringement offence for retailers who fail to give a checklist to a buyer?

Do you agree with the alternative option: Same as proposal 7, except:

- owners must notify the council when they acquire a spa pool, and
- owners must complete maintenance checks every three years?

Add specific provisions for portable pools deeper than 400mm

Issues with the Act

The Act exempts pools containing less than 400mm water, and pools with childproof walls greater than 1.2m. The Act currently makes no distinction between portable pools and other pools. Owners of portable pools between 400mm and 1.2m must obtain a building consent and install a fence that complies with the Act.

Portable pools between 400mm and 1.2m pose a high risk to young children when they are left filled and children have unrestricted access to them. It is often not practical to restrict access to portable pools because they are mobile and affordable:

- portable pools are moved from place to place, while fences are usually fixed in one place
- fences (or other means to restrict access) are typically many times the cost of portable pools.

Some portable pools are sold with filters that enable the owner to leave the pool filled for days or weeks.

Pools deeper than 1.2m can be left filled without posing a water hazard, if people remove any ladder or steps that they use to get into the pool (so that young children cannot climb them).

Paddling pools shallower than 400mm can be a drowning hazard – the recommended practice is to empty the pool immediately after using it.

It is difficult for councils to locate portable pools. The pools are generally simple for a member of the public to erect or put in place, and owners do not usually seek a building consent to erect a portable pool.

Councils find it difficult to take cost-effective enforcement action against owners who have put up portable pools but have not restricted the access of young children. Councils have reported that prosecution is not cost-effective in these situations. Councils can require owners to reduce the water level to 400mm, but this would require councils to repeatedly monitor the water level.

Respondents to the 2008 discussion document agreed that portable pools presented a compliance issue.

Proposal 8

Require retailers of portable pools deeper than 400mm to give a checklist to buyers setting out their obligations under the Act.

Create an infringement offence for failing to give a checklist to a buyer.

Create an infringement offence with a maximum fee of \$500 for having a portable pool left filled with more than 400mm water without restricting the access of young children, and the power for the council to remove the pool if there is subsequent offending (after the council has given the owner an opportunity to remedy the situation).

This proposal does not relate to pools shallower than 400mm and childproof pools deeper than 1.2m. The Ministry would develop the proposed checklist.

Advantages of proposal 8

Proposal 8 would address some of the issues concerning portable pools between 400mm and 1.2m. People who buy these pools would be more aware that they must obtain a building consent and install a fence or other means of restricting access to the pool. This would provide an incentive to people to buy a portable pool higher than 1.2m or less than 400mm if they want to avoid having to install a means to restrict the access of young children.

The proposal would make it difficult for people to use a portable pool without restricting the access of young children, once a council became aware of the pool. The proposal would enable councils to issue an infringement notice, and ultimately to remove pools for the purpose of removing the risk of danger – if the owner does not remedy the situation. In practice, it is likely that some people might continue to use portable pools between 400mm and 1.2m deep in ways that breach the Act, and councils could not easily detect them.

This proposal would improve child safety by informing buyers of their obligations, and the consequences if they use them in ways that breach the Act.

Question

Do you agree with proposal 8:

- require retailers of portable pools deeper than 400mm to give a checklist to buyers setting out their obligations under the Act, and
- create powers for councils to issue an infringement notice if a portable pool is left filled with more than 400mm water without restricting the access of young children, and to remove the pool if there is subsequent offending?

Include a purpose statement in the Act

Issues with the Act

The Act currently has no purpose statement, although it is clear that it aims to promote the safety of young children by requiring the fencing of certain water hazards, particularly near the house. The Act requires that fencing must restrict the access of children less than six years old.

Proposal 9

Add a purpose statement to the Act saying, 'to prevent children aged under five years from drowning as a result of unrestricted access to a home swimming pool'.

Advantages of proposal 9

A purpose statement makes the intent of the legislation more explicit, which aids interpretation by owners, councils and the courts. Although the Act extends to pools beyond the home, most public pools are exempt. The proposals in this paper are targeted to home swimming pools.

The inclusion of an age group (under five years) better targets the children who drown – 80 percent are two years old or younger, and few are five years old. Older children are more capable of overcoming access restrictions; a better-targeted age range makes it clearer what the standard must be to adequately restrict access. Changing the age range aligns with international practice, which aims to protect children under five years old.

Question

Do you agree with proposal 9: Add a purpose statement to the Act saying, 'to prevent children aged under five years from drowning as a result of unrestricted access to a home swimming pool?'

Put the legislative provisions in a new Act

Issues with the Act

The Act is currently a stand-alone Act. The proposals would require so many drafting changes to the Act that it would be substantially rewritten.

Proposal 10

Repeal the current Act and create a stand-alone Act called the Home Pools Act.

Alternative option – Add to Building Act 2004

An alternative option would be to add new sections to the Building Act 2004 concerning child safety around home pools. The Building Act 2004 is concerned with the safety of people in respect of all buildings, including swimming pools. Adding new sections to the Building Act 2004 would help to ensure that the provisions for home pools are aligned with the provisions that apply to all buildings. However, note that some respondents to the 2008 discussion document preferred the clarity of having a separate Act.

Questions

Do you agree with proposal 10: Repeal the current Act and create a stand-alone Act called the Home Pools Act?

Do you agree with the alternative option: Add new sections to the Building Act 2004 concerning child safety in home pools?

Potential impact of the proposals

The proposals in this document will affect young children, pool owners, the pool industry and councils. In some cases, the proposals seek to strike a balance between child safety and the burden of compliance on pool owners and councils. For example, the proposed definition of 'swimming pool' involves a balance between child safety and the practicality of restricting access to other water hazards near homes (Proposal 1). Your responses to this consultation document will help to inform the government's decisions about where to strike the balance.

The Ministry's assessment is that the proposals are likely overall to maintain or improve child safety at the same time as reducing the burden of compliance. Table 1 shows the Ministry's assessment of the impact for pool owners, councils, and young children.

Table 1: Potential impact of the proposals

Type of pool	Impact on pool owners	Impact on councils	Impact on young children
Permanent pools (eg in-ground pools)	<p>Clear, flexible requirements about what to install.</p> <p>Regular reminders to check that access continues to be restricted.</p> <p>Effective consequences for uncooperative pool owners.</p>	<p>Simple to verify, nationally consistent.</p> <p>Nationally consistent auditing of pools.</p> <p>Better able to target the high-risk pools.</p>	<p>Less likely to be able to access permanent pools from the house.</p>
Childproof spa pools	<p>No obligation to install an additional means of restricting access.</p>	<p>Nationally consistent regime for spa pools.</p>	<p>Less likely to be able to access spa pools.</p>
Portable pools between 400mm and 1.2m	<p>Increased awareness of the need to purchase a childproof portable pool, or install a means to restrict access.</p>	<p>Better tools to take action if portable pools have unrestricted access.</p>	<p>Less likely to be able to access portable pools.</p>
Other water hazards near homes (eg ponds, dams etc not principally intended for swimming)	<p>No obligation to restrict access.</p>	<p>No obligation to check.</p>	<p>Little change (because many other water hazards are currently unfenced).</p>

Regulatory impact statement

The findings from this consultation will be used to develop regulatory impact statements on any legislative changes proposed. This consultation document includes elements of regulatory impact analysis. You are encouraged to provide information that could be useful for the regulatory impact analysis such as evidence about the costs, benefits and risks associated with the proposals or alternative options.

Official Information Act

Responses to this consultation document will be public information and can be requested under the Official Information Act 1982. The Ministry of Business, Innovation and Employment must release information unless there are sufficient grounds to withhold it. For example, there may be grounds to withhold some information that is personal or commercially-sensitive.

Have your say

The public consultation on the Fencing of Swimming Pools Act 1987 runs until
Friday 10 May 2013

Make your submission online at: www.dbh.govt.nz/consultingon-pools

or post your submission to:

Making pool safety easier

Ministry of Business, Innovation
and Employment

PO Box 10729

WELLINGTON 6143

Submissions
close
10 May 2013.