

4. CONSIDERATION OF ASPECTS OF THE FENCING OF SWIMMING POOLS ACT

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The purpose of this report is to respond to the Council decision of 26 September 2002 that a review of the current legislation (in relation to the fencing of swimming pools) be sought in view of the inconsistencies within it and that this matter be reported back to the Council via the Regulatory and Consents Committee.

Following this meeting, a letter was received from Water Safety New Zealand asking that some information be passed to Councillors. A copy of this letter is attached as Attachment 1.

BACKGROUND

The Fencing of Swimming Pools Act 1987 (FOSP Act) is 'An Act to promote the safety of young children by requiring the fencing of certain swimming pools'. In essence, it requires any swimming pool (which by definition includes a spa pool) to be fenced in a manner so as to inhibit any child under the age of six years from climbing over or crawling under the fence from the outside. Minor amendments were made to the Schedule to the Act in 1989 and further amendments were made by the Building Act 1991. The latter required that new pool fences, or alterations to existing pool fences, comply with the performance standard of the Building Code.

The Act was introduced after lengthy consultation and consideration by a Select Committee of Parliament relating to the progress being made in the early 1980's by territorial authorities in the introduction of bylaws dealing with the fencing of private swimming pools. The Select Committee concluded that the belief that pre-school drownings were caused by toddlers wandering from adjoining properties, or the road, onto properties which had a pool, was mistaken. It found that about 80% of pre-school drownings in private pools occurred either in a child's home, or when it was visiting as an invited guest. This resulted in a new Standard Model bylaw being produced to replace the 1979 Standard Model bylaw. The new bylaw deleted the option allowing the property only to be fenced. By 1987 however, only about one-third of all territorial authorities had made such a bylaw. It was the desire to see provisions similar to the Standard Model Bylaw in legislation that led to a Private Member's Bill being introduced into Parliament in 1986. This triggered the enactment of the Fencing of Swimming Pools Act the following year.

A summary of the report of the Committee is included as an appendix to the Department of Internal Affairs' 'Guidelines for Territorial Authorities on the Fencing of Swimming Pools Act 1987' and this summary is attached to this report as Attachment 2, as the conclusions reached then are still relevant today.

Since the introduction of the Act there has been a reduction in the number of pre-schoolers drowning in home pools, (refer attached letter from Water Safety New Zealand). Concerns have however been raised in various areas about some perceived inconsistencies and anomalies in the Act.

This Council conducted a postal survey of the 71 District and City Councils in October 2002 to gauge the support for changes to the Act. This resulted in 64 replies being received with 36 stating that they would support submissions to have the definition of 'immediate pool area' changed or clarified in the Act and 35 would support an increase in the maximum level of fines under the Act.

DISCUSSION POINTS

It is considered that the following matters are worthy of consideration in more detail, with possible submissions to have the Act reviewed:

- Building Act and Code – alternative solutions and BIA determinations,
- Definition of 'immediate pool area',
- Exempted pools,
- Portable spas with lockable lids,
- Level of fines for offences,
- Other.

BUILDING ACT AND CODE

Currently there is a Review of the Building Act 1991 in progress. A discussion document released in August 2001 contained the following discussion points and proposal.

7.3: Fencing of Swimming Pools Act 1987

This legislation (the FOSP Act) introduced a code governing the fencing of various kinds of pools. It contains prescriptive requirements about the kind of fence required. It imposes some obligations on owners and occupiers in relation to notifying the existence of pools, and their non-use if not fenced in accordance with the Act. Territorial authorities are given administrative and enforcement roles under the Act. These include a power to exempt pools where the danger to young children would not be significantly increased. Territorial authorities also have the enforcement role under the FOSP Act, and a general duty to take reasonable steps to ensure it is complied with.

When the Building Act was passed provisions were inserted which substituted an obligation to fence in accordance with the code for the previous obligation to fence in accordance with the schedule to the FOSP Act. The schedule from the FOSP Act was converted into a means of compliance with the code.

This introduced the possibility of new means of compliance being developed as an alternative to the schedule, and of alternative solutions being accepted. To date however, no truly performance-based requirements for fencing of swimming pools have been produced.

Clause 4.3.3 of the code merely refers to a need for a barrier for pools, and the relevant part of the approved documents (F4/AS1 3.1.1) in turn specifies a standard 'no less than is required by the Fencing of Swimming Pools Act'.

This arrangement does not encourage solutions other than that set out in the schedule to the FOSP Act. It is proposed that:

- A performance-based requirement, designed specifically around restricting the access of young children to pools, be developed for the code. An illustration of such a provision prepared by the BIA appears below.
- A new means of compliance document be developed over time by the BIA, perhaps incorporating parts of the Australian pool fencing standard.

Both those changes would be designed to provide at least the same level of safety as at present, but offer greater flexibility about how it is achieved.

Illustration of possible new code provision:

PROPOSED CLAUSE F9 PROTECTION OF SWIMMING POOLS

F9.1 Objective

The objective of this provision is to safeguard young children from certain pools used for swimming and bathing.

F9.2 Functional Requirement

Swimming pools shall be constructed and located to limit the possibility of young children gaining unsupervised access to the pool.

[Swimming pool is a defined term in the Building Act].

F9.3.1 Suitable construction methods shall be used that will restrict the access of children under 6 years of age to swimming pools.

F9.3.2 Barriers provided to protect swimming pools shall:

- Extend for the full extent of the hazard.*
- Be constructed with adequate rigidity.*
- Be of adequate strength.*
- Have no permanent objects on the outside that could provide a climbing step.*
- Be of appropriate height.*

F9.3.3 Gates and doors through which access is provided to a swimming pool shall be 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.

F9.3.4 Opening windows giving access to a swimming pool with a sill height of less than 1 m shall be fitted with opening restrictors to restrict the passage of children.

It would also be possible to make some changes to the statutory framework about fencing of pools. In particular the whole of the administrative and enforcement regime currently in the FOSP Act could without substantive change be included in the Building Act.

If this was done the legislation would provide a more complete one-stop-shop for building related controls.

Responses are also sought on possible substantive changes to the legislation which are consistent with the level of protection currently offered by the FOSP Act, but would add further flexibility on how it is achieved. One possibility is removing the concept of 'immediate pool area' from the statute. The term has proved hard to interpret and requirements based on it are hard to apply in practice. The alternative approach would be to allow the issue of the area which must be fenced, to be addressed in an approved document or be dealt with in alternative solutions.

This Council responded to the request for comments on the proposal through the Building Technical Committee. The response was primarily related to the definition of 'immediate pool area'.

The proposed new code provision would simplify the requirements in terms of what it applies to, and may assist in achieving compliance. However it is still only a discussion document and implementation is likely to be some time off.

ALTERNATIVE SOLUTIONS

As mentioned above, the Building Act provides that new swimming pools must be fenced in accordance with the code and the schedule to the FOSP Act is a means of compliance with the code. This allows for alternative means of compliance to be offered, providing the alternative meets the Building Code Performance Standard, which in the case of swimming pools is similar to the F9 above. To date, this council has not received any application proposing an alternative solution.

For more information regarding determinations issued by the BIA, view:

<http://www.bia.co.nz/determin/register.php?order=num>

Some territorial authorities have used this provision to approve the use of lockable covers as an acceptable solution for the fencing of spa pools (subject to conditions). This is discussed further later in this report when considering portable spas with lockable lids.

EXEMPTED POOLS

Section 5 of the FOSP Act exempts some pools from the requirements of the Act.

5. Exempted pools

Nothing in this Act shall apply in respect of:—

- (a) Any pool that has no part of the top of its side walls less than 1.2 metres above the adjacent ground level or any permanent projection from or object standing on the ground outside and within 1.2 metres of the walls, where the outside surface of the side walls is constructed so as to inhibit climbing and any ladder or other means of access to the interior of the swimming pool can be readily removed or rendered inoperable and is removed or rendered inoperable whenever it is intended that the pool not be used.*
- (b) Any excavation, structure, or product, in which the maximum depth of water does not exceed 400 mm.*

- (c) *Any excavation, structure, or product-*
 - (i) *That is not used in association with any house, home unit, apartment building, school, hospital, hotel, motel, camping ground, or other similar premises; and*
 - (ii) *That is not modified for use, or intended to be used, for swimming, wading, paddling, or bathing.*
- (d) *Any pool intended to be used for wading or paddling in any place that is under the administration of a local authority.*
- (e) *Any pool that is wholly enclosed within a building that is used principally for a purpose or purposes not related to the use of the pool.*
- (f) *Any pool where—*
 - (i) *Persons are employed and present to provide supervision of the pool whenever the pool is available for use; and*
 - (ii) *Access to the pool is effectively prevented by a fence that complies with this Act or by locked gates or doors whenever the pool is not intended to be available for use.*

These are generally common sense exemptions, but do cause some confusion to the public, with the common question being asked as to why a pool has to be fenced but not a river or other waterway. It is considered that 5(e) introduces an anomaly in that a door leading into a pool contained in a dwelling does not have to comply with the requirements to be self-closing and self-latching, but a door leading out from a dwelling to an outdoor pool must comply unless an exemption has been granted.

A further anomaly is that section 5(a) provides that if the outside walls of the pool are 1.2 metres or more above the ground and any ladder can be readily removed or rendered inoperable, then a fence is not required. This exemption assumes that the pool owner is responsible enough to always remove or block the ladder when the pool is not in use. However, a pool owner of a heated spa pool is not considered responsible enough to replace the cover when it is not in use.

IMMEDIATE POOL AREA

This is defined in the Act as *'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'*.

This definition, which on the surface appears to be quite clear, causes concerns to 25% of the Councils that replied to our survey, and 60% would support submissions to have the definition changed or clarified in the Act. It is considered that part of the difficulties encountered arise from the belief of many pool owners that a boundary fence around the property is sufficient. This belief, that it is only necessary to fence in order to prevent children gaining access to the property, is still widespread. The fact that 85-90% of children who drown in home pools are residents or legitimate visitors to the property, not children who wander onto the property, is still not widely understood or accepted.

It is suggested that the definition could be clearer if the following was added:

'and must not include any land or buildings that is not associated with the use of the pool.'

PORTABLE SPAS AND LOCKABLE LIDS

Lockable Covers

This matter was reported to the Council on 26 September 2002 and the Council confirmed its policy of not accepting lockable covers on spa pools as an alternative to a complying fence. Deputations were also received on this topic at the 4 October 2002 meeting of the Committee. A copy of the written submissions from Mr. Murray Wright and Mrs Judie Barbour are attached as Attachment 3.

In summary, the oral submissions made to the October 2002 meeting were that portable spa pools should be treated differently to permanent spas and swimming pools, because they might be moved at some time in the future, the cover is always replaced in order to reduce heat loss, covers are accepted overseas and in some parts of New Zealand, there have been no drownings in spa pools with covers since 1994 and the covers are too heavy for a child to remove.

It is accepted that the cover is much more likely to be replaced to reduce heat loss and that the usage of a spa pool is different to that of a swimming pool. However, replacing the cover to reduce heat loss **after** using the spa does not prevent the spa being left uncovered whilst the user has left temporarily (to answer the telephone or door or other reasons). It is for this type of situation that a fully complying fence is the only fail-safe safeguard. Children do drown in spa pools (the most recent being January 2001, although it must be stated that this was one of the older permanent types) for the same reason they drown in swimming pools – they are accessible to children because there is not a complying fence. A lockable cover to a spa provides an additional protection but does not replace a complying fence.

A brochure produced by the Department of Internal Affairs for Kidsafe Week contains the following information about lockable spa pool covers:

*“Lockable spa pool covers **do not** self lock and therefore don’t always protect children. Covers are to keep spa pools warm and fences are to keep children out. **Exemptions should not be given for spa pools with lockable covers.**”*

If this is the official view of the Department of Internal Affairs, then it is suggested that the Act should be amended to make this plain.

ALTERNATIVE SOLUTIONS

As mentioned above, the Building Act allows for alternative means of compliance with the requirements of the Building Code for new pools. Some Councils use this provision to approve lockable covers on spas as a means of compliance with the code.

Recently a territorial authority refused to accept a lockable cover as an alternative to complying fencing and the matter was referred to the Building Industry Authority (BIA) for a determination. This determination (No. 2002/10) has now been received.

The Authority considered the matter as a dispute about whether a spa pool with a proprietary lockable cover, without a safety barrier around it, complies with the provisions of the Building Code for safety barriers, specifically fences and gates to swimming pools.

The Authority took the view that it was being asked to determine:

- (a) Whether the pool concerned, with the cover but with no safety barrier around it, complies with clause F4 of the building code, and if not;
- (b) Whether a waiver or modification of the building code should be granted to permit its use in the building concerned.

The Authority recognised that there appear to be discrepancies between the Fencing of Swimming Pools Act and the Building Act. The Authority also recognised that there is significant uncertainty over the use of lockable covers instead of fences to safeguard children under six. However, the Authority rejected any suggestion that the Authority must approve lockable covers instead of fences simply because a significant number of territorial authorities have already done so.

The Authority also recognised the value of ‘clear and consistent regulatory requirements’. It also recognised the value of flexibility so that the particular circumstances of particular buildings can be taken into account. The proper legislative balance between those values is a matter for Parliament and not something the Authority can address in a determination. The Authority’s decision must apply the legislation as it stands.

The Authority received written and oral submissions from the parties and commissioned a report from a consultant with particular experience in the application of the Fencing of Swimming Pools Act and of the building code in respect of swimming pools.

The determination by the Authority is very detailed and it considered a number of points before reaching its decision which was:

- (a) The Authority determined that the use of the proprietary lockable cover to the spa pool did not comply with clause F4 of the building code.
- (b) The Authority confirmed the territorial authority's decision not to grant a waiver or modification of those provisions.

It should be noted that although, strictly speaking, the determination only applies to this particular case, it is a very comprehensive decision which covers all relevant aspects and it would be difficult to ignore it when considering any similar application.

(A full copy of the Authority's considerations and ruling is available should anyone wish to see the Determination in full.)

Other Alternatives

There is a relatively simple alternative available of course to the whole issue of spas and fencing. If a spa was provided with a stand or base that would lift the spa so the top of the side walls is 1.2 metres or more above ground level and any ladder or steps were capable of being readily removed or rendered inoperable when the spa is not in use, then it would be exempt from the requirements of the FOSP Act, in accordance with Section 5 of the Act, as detailed above under Exempted Pools.

LEVEL OF FINES

The maximum fine for an offence under the Fencing of Swimming Pools Act 1987 is \$500 and \$50 per day for a continuing offence. This is not considered to be a deterrent to pool owners wishing to ignore their obligations under the Act. The Local Government Act proposes that the maximum fine for bylaw offences should be increased from \$500 to \$10,000 and it is considered that FOSP Act penalties should, at the very least, be increased to this level.

(The Building Act provides that the maximum fine for using any building for a use for which the building is not safe, is \$200,000. In some circumstances, it is possible to use this section of the Building Act instead of the FOSP Act, but it is still considered desirable that the penalties of the latter act be increased.)

Thirty-five (or 54%) of the territorial authorities contacted by this Council, stated that they would support submissions to increase the maximum level of fines and four would like to see some provision for instant fine or infringement offence system.

- Recommendation:**
- 1. That a submission be made to the Department of Internal Affairs to have the Fencing of Swimming Pools Act 1987 reviewed as follows:
 - (a) A review of the exemptions under Section 5.
 - (b) An amendment to the definition of 'immediate pool area' by adding the words '*and must not include any land or buildings that is not associated with the use of the pool*'.
 - (c) Clarification of the position in relation to portable spas with lockable lids.
 - (d) An increase in the maximum level of fines under Section 9 to a minimum of \$10,000.
 - (e) The inconsistent application of the Act throughout New Zealand.

- (f) High levels of non-compliance in relation to spa pools and the high level of risk and possible liability for the Council.
 - (g) That there should be some onus on the sellers of spa pools to advise purchasers of the need to comply with the Act.
2. That the Chairman of the Regulatory and Consents Committee be authorised to review the final submission before being forwarded to the Department of Internal Affairs.