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## **SUBMISSION ON MAKING POOL SAFETY EASIER**

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### **1. Purpose of report**

This report seeks the Committee's approval of the submission to the Ministry of Business, Innovation and Employment on Making Pool Safety Easier.

The submission is due by Friday 10 May 2013.

### **2. Executive summary**

We acknowledge that the current regulations for pool safety are often debated. We need to ensure that any changes improve the interpretation and understanding of these regulations and continue to improve the safety record that has been established since the Fencing of Swimming Pools Act was introduced in 1987.

Officers support the proposals to;

- Include infringement fees for non compliance and for retailers to provide information on compliance requirements when spa pool and portable pools are purchased.
- Add a new purpose statement to the Act.

While officers support a consistent regime of pool inspections, the proposal is not clear on how a regime for pool owners to complete and submit a simple maintenance check is planned to be administered. There may be little difference in cost between this and the alternative of councils completing a three yearly inspection of all pools which is similar to the Council's current practice. We would expect the second option of Council inspections to be more effective combined with the additional powers of notices and infringement fees.

Officers do not support;

- Revising the definition of swimming pool to restrict this to *an excavation or structure deeper than 400mm, and intended for swimming or other human aquatic activity.*
- Continuing to allow child proof doors opening to the pool area.

### **3. Recommendations**

Officers recommend that the Strategy and Policy Committee:

1. *Receive the information.*
2. *Agree to the attached submission to the Ministry of Business, Innovation and Employment attached as Appendix 1.*

3. *Agree to delegate to the Chief Executive and the Built Environment Portfolio Leader, the authority to amend the proposed submission from Wellington City Council to the Ministry of Business, Innovation and Employment to include any amendments agreed by the Committee and any associated minor consequential edits.*

#### **4. Background**

The Fencing of Swimming Pools Act 1987 (the Act) is being reviewed. The Ministry of Business, Innovation and Employment (MBIE) has issued a consultation document titled 'Making Pool Safety Easier'.

'Swimming pools' covered by the Act refers to:

*'an excavation, structure, or product that 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.'*

MBIE is seeking feedback about how the Act might be further improved to build on the safety already made under the Act. It states that although the Act has been successful, it frustrates *pool owners, councils and water safety groups because its processes and requirements are technical and complex*. Previously the public was consulted on the Act in 2008 and the Council made a submission at that time on the points raised by the Government.

The Act appears to be working. The number of children under five who drowned in swimming pools has reduced since the Act came into force, reducing from an average of ten per year in 1987 to an average of three per year more recently. MBIE is seeking to reduce compliance costs while keeping children safe. The consultation document seeks comment on ten proposals which aim to simplify and clarify administration of the Act:

- Define 'swimming pool' to mean an excavation or structure deeper than 400mm, and intended for swimming or other human aquatic activity
- Clarifying the requirements for restricting access to the pool by removing the schedule in the Act and amending the Building Code to include a performance standard for pools and developing acceptable solutions
- 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
- Continue to allow childproof doors opening to the pool area
- Require owners to complete a simple maintenance check every 3 years, and require Councils to randomly audit pools
- Replace court fines with the power to issue notices to remedy maintenance issues and infringement fees
- Exempt childproof spa pools from building consent and maintenance checks, and require spa pool retailers to give buyers a checklist setting out their obligations
- Require retailers of portable pools to give a checklist to buyers setting out their obligations under the Act. Also 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

- Add a purpose statement to the legislation saying, 'to prevent children aged under five years from drowning as a result of unrestricted access to a home swimming pool'
- Repeal the current Act and create a stand-alone Act called the Home Pools Act

A proposed submission is attached as Appendix 1.

Should changes to the legislation be proposed, there will be further opportunity to comment during the draft legislation and select committee process.

## **5. Discussion**

### **5.1 The Act as it stands**

The underlying purpose of the Act is to prevent children from drowning in swimming pools. The Act places responsibilities on pool owners to fence swimming pools that are not exempted.

The Act exempts some pools under section 5 including:

- Pools with a maximum depth of water that does not exceed 400mm
- Pools that are enclosed within a building
- Pools administered by a local authority, or otherwise supervised with restricted access when not supervised
- Pools with side walls that effectively form a fence (sides minimum 1.2 m and ladder readily removed).

Special exemptions are also possible under section 6 which provides for the territorial authority to grant exemptions that will not increase the danger to young children.

Section 12 allows delegation of this power to a committee of members, but specifically bars delegation to officers of the authority. The Council's Regulatory Processes Committee considers such applications on a case by case basis.

The compliance regime for swimming pool fences is contained in a schedule to the Act. A building consent is required under the Building Act 2004 to construct these fences. A building consent is also required for pool structures. The term structure is not defined but is not interpreted as including ready-made pools.

The Council has a role in ensuring that pool owners comply with the fencing requirements of the Act through a general duty under section 10. The Council also approves and inspects the construction of pools and fences through the building consent process.

### **5.2 The issues with the current Act**

Issues that have been identified by MBIE with the Act include the following:

- The term 'swimming pool' is unclear and councils are required to decide if a "pool" is covered by the Act based on the circumstances.

- The requirements for restricting access to the pool can be confusing and inflexible. The Act, the Building Act and the Building code contain some inconsistencies.
- It is difficult to determine where the fence must be located, and the location is sometimes impractical (e.g. 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.
- The way that councils check pools to ensure they continue to comply with the Act is not nationally consistent.
- Councils have few enforcement options other than prosecuting uncooperative owners.

### 5.3 The Council's current position

The Council currently has a process where it authorises pools within the building consent process and then checks these pools approximately every three years to ensure they continue to comply with regulations. If any other pools are discovered in the process of completing other building consent work, the pools are then added to this compliance check schedule. Approximately 1,000 pools within Wellington city are reviewed in this way by the Council's building inspection staff.

### 5.4 The proposed changes

Officers have reviewed the changes proposed by MBIE and consider that a submission should be provided to MBIE based on the following advice.

<b>Proposed Change</b>	<b>Officer Comment</b>
Restricting the definition of swimming pools to only those intended for swimming or other human aquatic activity.	Officers do not support this change. While this would clarify the definition, limiting the definition poses some risk. For example, there are child safety risks from ornamental pools and other bodies of water not <i>intended for swimming or other human aquatic activity</i> but which are still accessible to children.
Inclusion of indoor pools within the definition	Officers support this change as indoor pools are common and pose a risk to young children.
Clarifying the requirements for restricting access by removing these from the Act and amending the Building Code to address this.	Officers do not support this. The requirements must be clear and not open to interpretation. Officers consider that legislation should be clear that all new pools should be covered in the access restrictions. Building code compliance could apply to all existing pools.

Removing the term “immediate pool area” from the Act and Building Code	Officers do not support this proposal as it makes the definition more open to interpretation. Officers support the alternative wording “to restrict access to an area people would normally only enter when using the pool”.
Allow childproof doors opening to the pool area	Officers do not support this. Doors will inevitably be left open at some point and continuing to allow this maintains this risk. Officers support a change to no longer allow doors opening to the pool area to address this risk.
<b>Proposals for all pools</b>	
Maintenance Checks: require owners to complete a simple maintenance check every three years and require councils to randomly audit pools, especially high risk pools. An alternative is to require Councils to inspect all pools every 3 years.	The consultation document refers to a “simple” maintenance check however the Council’s experience is that achieving compliance sometimes requires more complex solutions and referring to a simple maintenance check may possibly be misleading. It is not clear what would happen following an owners maintenance check and what processes Councils would follow receipt of the information from owners to ensure compliance. If random Council auditing and issuing infringement notices for noncompliant pools is required, the audit process would need to be sufficiently comprehensive to ensure owners comply rather than take the chance of not being inspected. The alternative of a three yearly Council inspection would be more rigorous and may achieve higher compliance but will be at a cost to local authorities or pool owners. A three yearly inspection regime is very similar to what the Council’s current practice but a legislated timeframe would ensure a more consistent approach across the country.
Infringement Fees	Officers support the addition of notices and infringement fees but propose that court fines are retained, which although costly, would allow the process to be escalated if required.
<b>Proposals for spa pools and portable pools</b>	
Child proof spa pools	Officers do not support exempting child proof spa pools from building consent and maintenance checks. However, we do support retailers to provide information on the owner’s obligations.
Retailers of portable pools to provide information	Officers support this. However, it should be noted that this does not take into account of pools sold second hand.
<b>Legislative change</b>	Officers agree with the proposal to add a purpose statement to the Act.

### **5.5 Consultation and Engagement**

Consultation has not taken place due to the short timeframe to submit on these changes. Other interested parties are able to submit their views to MBIE.

### **5.6 Financial considerations**

No financial implications have been identified at this point.

### **5.7 Climate change impacts and considerations**

No climate change implications are associated with this paper

### **5.8 Long-term plan considerations**

No long term or annual plan considerations have been identified at this point.

## **6. Conclusion**

Child safety around pools is an issue that needs to be treated with care. MBIE is seeking to clarify some issues around administering the current legislation. Officers are only recommending support for some of the proposed changes as the current regime, although it has some issues, does appear to have had a positive effect on child safety.

Contact Officer: Richard Toner, Chief Building Officer; Geoff Lawson, Principal Advisor Policy.

## SUPPORTING INFORMATION

### 1) Strategic fit / Strategic outcome

*This is an existing work programme required under legislation.*

### 2) LTP/Annual Plan reference and long term financial impact

*Na*

### 3) Treaty of Waitangi considerations

*No Treaty issues arise in this submission*

### 4) Decision-making

*This is not a significant decision.*

### 5) Consultation

#### a) General consultation

*Na.*

#### b) Consultation with Maori

*Na.*

### 6) Legal implications

*Example: Council's lawyers have been consulted during the development of this report.*

### 7) Consistency with existing policy

*This submission represents the Council's view on MBIE's proposals.*





## Draft Submission to the Ministry of Business, Innovation and Employment on Making Pool Safety Easier.

10 May 2013

### **Making Pool Safety Easier**

Ministry of Business, Innovation and Employment

PO Box 10 729

WELLINGTON 6143

### **The Wellington City Council Submission on Making Pool Safety Easier**

Thank you for the opportunity to make a submission on the consultation document 'Making Pool Safety Easier'. We have attached our responses to the questions that the Ministry raised in its review of how swimming pool safety is regulated.

We understand the desire to make the regulations more workable for both pool owners and local authorities.

The current regulations and processes have been successful at improving child safety. While we acknowledge that there are areas which are often debated, we need to ensure that any changes continue to improve, clarify compliance and do not compromise the safety record that has been established since the Fencing of Swimming Pools Act was introduced in 1987.

We support the proposals to:

- include infringement fees for non compliance and for retailers to provide information on compliance requirements when spa pool and portable pools are purchased
- add a new purpose statement proposed for the Act.

We support a consistent regime of pool inspections we are unsure of how a regime for pool owners to complete and submit a simple maintenance check is planned to be administered. There may be little difference in cost between this and the alternative of Council's completing a three yearly inspection of all pools. We would expect the second option of Council inspections to be more effective combined with the additional powers of notices and infringement fees.

We do not support the following proposed changes. We consider that while these proposals may remove some debate, they may increase the risk for children:

- revising the definition of swimming pool to restrict this to *an excavation or structure deeper than 400mm, and intended for swimming or other human aquatic activity*
- continuing to allow child proof doors opening to the pool area.

We would like the Ministry to also consider if education is more likely to increase the understanding of the fencing requirements and compliance and if this would address some of the issues raised by these proposals.

**Celia Wade-Brown**

**MAYOR**

**Wellington City Council**

# APPENDIX 1

**Proposal 1** – Define ‘swimming pool’ to mean an excavation or structure deeper than 400mm, and intended for swimming or other human aquatic activity.

1. **Do you agree with proposal 1?**

	Yes
<b>X</b>	<b>No</b>
	Not sure

*Note: This question does not relate to indoor pools. Indoor pools are addressed in the question below.*

2. Do you agree with the additional option: Include indoor pools in the definition of ‘swimming pool’? (This excludes baths, used for personal hygiene and emptied after each use).

<b>X</b>	<b>Yes</b>
	No
	Not sure

3. Please give your reasons, or alternative suggestions, below.

The Council does not support the change in definition.

This restricts the definition. There can be danger from ornamental ponds and other similar bodies of water. These are often in secluded parts of the property and they can be an attraction to young children.

The Council supports indoor pools being included as they are common and a significant danger to young children. Note the last drowning of a young child in Wellington was in an indoor spa pool.

## Proposals for new pools

**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, and
- 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.

# APPENDIX 1

4. Do you agree with proposal 2?

	Yes
<b>X</b>	<b>No</b>
	Not sure

5. Please give your reasons, or alternative suggestions, below.

This is an area that needs to be clear on what is required and not leave it to interpretation. Currently there are inconsistencies between the Act, the Building Act and the Building Code.

If the legislation is changed then it should require all new pools to be fenced. Existing pools then could then be dealt with by requiring compliance with the Building Code to restrict unsupervised access by young children to no lesser degree than required now.

This could be done by either changing the schedule to the fencing of swimming pool act or making this a requirement of the building code however what ever option is chosen there is a need to ensure existing pools and ongoing compliance is captured by the legislation.

The development of an acceptable solution document would be beneficial to Local Authorities, owners, designers and retailers.

**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.

6. Do you agree with proposal 3?

	Yes
<b>X</b>	<b>No</b>
	Not sure

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

<b>X</b>	<b>Yes</b>
	No
	Not sure

8. Please give your reasons, or alternative suggestions, below.

# APPENDIX 1

The Council does not support removal of the term immediate pool area from the Act as this more clearly defines the area that must have restricted access.

The Council supports the alternative option to ensure that it is clear that access to the pool area must be restricted. If the pool area is not restricted then there is a high likelihood that at some point unsupervised young children will have access to the pool. This will then defeat the purpose of the fencing the pool.

**Proposal 4** – Continue to allow childproof doors opening to the pool area.

9. Do you agree with proposal 4?

	Yes
<b>X</b>	<b>No</b>
	Not sure

10. Do you agree with the alternative option: Don't allow doors opening to the pool area?

<b>X</b>	<b>Yes</b>
	No
	Not sure

11. Please give your reasons, or alternative suggestions, below.

While there may be a childproof door opening into the pool area this will not always be shut due to human error when using the pool or on a hot day. At some point unsupervised young children will have access to the pool. This will then defeat the purpose of the fencing the pool.

The Council agrees with the alternative option that doors should not be allowed to open to the pool area. Convenience should not be a relevant consideration in this case.

## Proposals for all pools

**Proposal 5** – Require owners to complete a simple maintenance check every 3 years, and require councils to randomly audit pools, especially high-risk pools.

12. Do you agree with proposal 5?

	Yes
	No
<b>x</b>	<b>Not sure</b>

# APPENDIX 1

13. Do you agree with the alternative option: No requirement for owners to do a check, but require councils to inspect all pools every 3 years?

	Yes
	No
<b>x</b>	<b>Not sure</b>

14. Please give your reasons, or alternative suggestions, below.

If owners were to complete a simple maintenance check every 3 years then it is not clear what they would do with that. If they were required to forward to council then the council would need to set up like a BWoF process to ensure they were received. The administrative cost could be quite high, which combined with the random audit process may result in a similar cost to a 3 yearly inspection process which would not have the maintenance check obligations for pool owners.

Suggest that swimming pools could become an item for a BWoF. The advantage is that in the future a person who is suitably qualified could carry out the audits independently and forward the documentation to councils similar to the current BWoF process for domestic cable cars. They could work across council boundaries increasing consistency and should make the requirements more transparent during ownership changes.

The term "simple maintenance check" is misleading as under the current requirements achieving compliance and maintaining that compliance can be complex and difficult. In the Council's experience, staff require training to understand the compliance requirements in this area and ensure that this is done consistently. Having each owner complete a check for compliance leaves this open to considerable interpretation.

**Proposal 6** – Replace court fines with the power to issue a notice (requiring an owner to remedy a maintenance issue), and infringement fees.

15. Do you agree with proposal 6?

<b>X</b>	<b>Yes</b>
	No
	Not sure

16. Please give your reasons, or alternative suggestions, below

The Council supports the introduction of powers to issue notices and impose infringement fees. The legal process is costly and time consuming however needs to be an option of last resort and allows the process to be escalated if required.

## Proposals for spa pools and portable pools

**Proposal 7** – Exempt childproof spa pools from building consent and maintenance checks, and require spa pool retailers to give buyers a checklist setting out their obligations.

17. Do you agree with proposal 7?

	Yes
<b>X</b>	No
	Not sure

18. Do you agree with the alternative option: Same as proposal 7, except owners must notify the council when they acquire a spa pool, and would complete maintenance checks every three years?

	Yes
<b>X</b>	No
	Not sure

19. Please give your reasons, or alternative suggestions, below.

Currently the Council does not exempt these pools from the requirements under the Act and does not support an exemption. The Council can audit compliance with the Act but not, for instance, whether an owner keeps the cover on a pool when it is not in use.

There should be a statutory requirement for retailers to advise buyers of their obligations and this should be kept as part of the sale purchase record. The last drowning of a child in Wellington was in a spa pool with a cover that was left partly open.

The current act requires that owners notify council when they purchase a pool and supplying the purchase record could be a good way to do this. There would be a cost to customers to create, update and keep the records.

Experience shows;

- Retailers often do not inform prospective purchasers of fencing obligations as the cost may impact on the sale.
- Owners often do not notify councils when they purchase pools.
- That there could be an obligation on the retailers to gather and supply initial information to councils.

**Proposal 8** – Require retailers of portable pools to give a checklist to buyers setting out their obligations under the Act. Also 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.

20. Do you agree with proposal 8?

<b>X</b>	<b>Yes</b>
	No
	Not sure

21. Please give your reasons, or alternative suggestions, below.

The Council supports this proposal as many people buy pools with little idea of what is required for fencing or restricting access to a pool.

It still leaves an information gap where pools are purchased second hand.

## Other changes to the legislation

**Proposal 9** – Add a purpose statement to the legislation saying, ‘to prevent children aged under five years from drowning as a result of unrestricted access to a home swimming pool.’

22. Do you agree with proposal 9?

<b>X</b>	<b>Yes</b>
	No
	Not sure

23. Please give your reasons, or alternative suggestions, below.

While children aged under five years are likely to be the primary risk group, the purpose statement could be widened to include other vulnerable groups.

**Proposal 10** – Repeal the current Act and create a stand-alone Act called the Home Pools Act.

24. Do you agree with proposal 10?

	Yes
	No
<b>X</b>	<b>Not sure</b>

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

# APPENDIX 1

	Yes
	No
<b>X</b>	<b>Not sure</b>

26. Please give your reasons, or alternative suggestions, below.

The Council does not have a view on this. Either option would be acceptable as long as the legislation is clear and easily enforced.

## Other comments

27. Do you have any other comments about the proposals?

The consultation document does not comment on the use of boundary fences as part of the pool fence. Boundary fences used as pool fences/ barriers has traditionally created significant difficulty for pool owners to continue to meet the requirements of the Acts and Building code, as they have no or limited control over what the neighbour does on their side of the fence. This includes structures, garden furniture, firewood piles and vegetation. Council would support a review of the use of boundary fences as pool fences.

## Information about you

28. Which best describes you?

	Private individual who owns a pool
	Private individual who doesn't own a pool
	Home pool industry (e.g. retailer or supplier involved with pools or pool safety)
	Non-commercial organisation with an interest in child safety
<b>X</b>	<b>Territorial authority</b>
	Other (please explain below)

29. Please provide your contact details

Your name	Celia Wade Brown; Mayor
Organisation	Wellington City Council
Postal address	P O Box 2199, Wellington 6140
Email	