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Building (Pools) Amendment Bill

Local Government New Zealand's submission to Local Government
and Environment Committee

29 October 2015

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DRAFT for feedback

We are. LGNZ.

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This final submission was endorsed under delegated authority by Lawrence Yule, President, Local Government New Zealand.

We would like the opportunity to appear before the Local Government and Environment Committee the matters raised in this submission.

Introduction

Thank you for this opportunity to submit on the Building (Pools) Amendment Bill. This submission has been prepared on behalf of New Zealand's local authorities but it is the territorial authorities who have a role in this area.

We support the Bill, the repeal of the Fencing and of Swimming Pools Act 1987 (FOSPA) and incorporating the pool safety measures into the Building Act 2004 (BA). Councils have previously identified inconsistencies with FOSPA which have created difficulties for those using the legislation.

That the FOSPA has reduced the number of drownings of young children is not in contention. What is important is to ensure the FOSPA regime is transferred across to the BA to ensure the progress that has been made in addressing drownings is not lost.

Specific comments

Acceptable solutions

We note that after the Bill is passed, MBIE will consult on new Acceptable Solutions to support the new Building Code provisions. This will draw on industry best practice as reflected in NZS 8500:2006 (Safety barriers and fences around swimming pools, spas and hot tubs). LGNZ suggests that MBIE should be encouraged to adopt best practice as identified by the Government's Legislation Design Advisory Committee (LDAC) (of which MBIE is a member) and produce at least an exposure draft of the subsidiary legislation while the Bill is before the Committee. LDAC has identified in the September PCO Quarterly:

"...the general importance of departments developing regulations in tandem with a Bill so that the public is aware of their detailed requirements and can make informed submissions"

It seems that this will not be occurring here, but LGNZ believes it should. The reasons for this view are twofold:

First, the prospect that there is a code that includes some but not all of NZS8500:2006 creates confusion and uncertainty. Sections 48 to 57 of the Interpretation Act 1988 set out a regime by which the NZS could be incorporated in the Code by reference. LGNZ does not know whether this may occur in whole or in part and is concerned that there should not be confusion created by codes and standards.

Secondly, the detail affects many New Zealanders, and their homes. The Code in this area is not like some industry code of practice, affecting only participants in a specific defined sector for whom education and compliance is a cost of doing business. It affects ordinary people and their relationship with the local government and therefore clarity is important. The relationship between NZS 8500:2006 and the new provisions of the BA and Code need to be clarified through the acceptable solution, given there are no references to NZS 8500:2006 in the Act. If it is not there is the potential for further duplication of regulation and lack of clarity for councils and the public.

Such an approach is not common but there is an appropriate precedent. As long ago as the 1980's the Minister of Transport (Hon George Gair) made draft regulations for seat belts and child restraints available to a Select Committee (and the public) considering the empowering legislation.

Recommendation:

The Bill should stay at the Select Committee until the "Acceptable Solution" is available to be considered by the Committee and allow the public to comment on it.

Definitions

LGNZ considers that a number of definitions used in the Bill need to be reviewed. This will provide clarity for local authorities, pool owners and other users of the Act.

Definition of "immediate pool area"

Immediate pool area is defined in clause 5 of the Bill as follows:

immediate pool area means the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool

The High Court in *Waitakere City Council v Hickman* [2005] NZRMA 204 considered the proper interpretation of the term *immediate pool area* in the FOSPA. Waitakere City Council sought declarations that the fencing of some swimming pools did not comply with the requirement under the FOSPA that the pool itself, or area around the pool described in the Act as the "immediate pool area" be fenced.

The Council contended that the immediate pool area could only include activities or purposes carried on exclusively in conjunction with the use of the pool. The residents submitted that the immediate pool area could include areas for activities or purposes carried on in conjunction with the use of the pool, whether or not they may also be carried on independently.

As to the proper interpretation of immediate pool area, Randerson J held that:

- In the first instance, the scope of the immediate pool area is determined "by the extent to which that area is actually used for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing."¹
- Activities in conjunction with the use of the pool are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool.²
- However, to qualify as an activity or purpose in conjunction with the use of the pool, the activity or purpose must be "closely connected, associated, or combined with the use of the pool"³

Randerson J commented that the vaguely worded definition of "immediate pool area" was unsatisfactory in that it creates uncertainty for both territorial authorities and pool owners, and that early attention should

¹ At paragraph [52].

² At paragraph [53].

³ At paragraph [54].

be given to defining the phrase with greater precision by Parliament .⁴

Recommendation:

In light of the High Court decision LGNZ considers that it is unhelpful that the definition proposed is almost the same as that used in FOSPA.

An amended definition is proposed that links back to the Hickman decision:

immediate pool area means the land in or on which the pool is situated and ~~so much of the surrounding area as surrounding as the pool that is used for activities that are closely connected or combined with the use of the pool carried out in relation to or involving the pool, whether or not those activities are capable of occurring independently of the use of the pool.~~

Guidance on this matter will support consistent interpretation and application.

Definition of "pool", "spa pool" and "hot tub"

The Bill defines each of these terms, but does not clearly recognise that they overlap. If a hot tub includes an aeration system, does it become a spa pool? So long as all the rules for hot tubs and spa pools are the same, that would not matter.

"Pool" is so widely defined in the Bill that it can include a spa pool, and probably a hot tub as well. Complicating matters is that in some situations, typical pools may have a spa pool or hot tub alongside and contained within the same fencing protections as the pool. Additional measures for the spa pool or hot tub may not always be appropriate in such cases.

The Bill defines *spa pool* and *hot tub* separately. Because spa pools and hot tubs are so similar, councils are concerned the creation of separate definitions will add complexity to the operation of the Act.

Of note:

- FOSPA makes no distinction between hot tubs and spa pools
- The relevant New Zealand Standard *NZS 8500:2006 – Safety Barriers and Fences around Swimming Pools* makes no distinction between spa pools and hot tubs
- The definition of *spa pool* is broad enough to cover both above-ground and in-ground spa pools. Clause 12 of the bill provides that the council's powers of inspection are expressly limited in relation to spa pools, despite in-ground spa pools (that will have side walls less than 760mm above the ground) requiring barriers that surround the immediate pool area.
- Where hot tubs have sidewalls that are over 400mm above ground but less than 760mm above ground they will not fit within the definition of *hot tub* in the bill and will therefore be considered *residential pools*. When undertaking inspections in relation to these pools local authorities will be likely to encounter disagreements as to the appropriate description of the pool.

The separate definitions will create complexity and lead to disagreement with pool owners, particularly where the council wants to inspect pools that are not considered to be exempt from the periodic inspection regime as a result of definitions used in the Bill.

Recommendation:

That the definitions be clarified and reconciled. It may be that paragraph (c) of the definition of "hot tubs" should not be in the definition itself, but should be in a provision describing what tubs/ pools do not need inspection. LGNZ would be happy to work with officials on this issue.

⁴ At paragraphs [55] and [56].

Definition of "portable pool"⁵

The Bill defines *portable pool* as any soft sided pool (whether inflatable or not) that is designed to be installed on a temporary basis.

Councils are concerned that this definition does not provide sufficient protection from portable pools becoming permanent fixtures. The fact that a portable pool is designed to be installed on a temporary basis does not prevent it from being installed on a more permanent basis, especially if the "soft sides" are not inflatable.

Similar issues arise with supposedly moveable structures such as caravans or small sheds on wheels that in fact become permanent fixtures and are not actually ever moved.

Recommendation:

The definition of portable pool should be amended to read:

means any soft sided pool (whether inflatable or not) that is designed to be installed and removed on a temporary basis, and is in fact removed.

Exempt pools

Section 5 of the FOSPA contains a list of pools which were exempt from the operation of the Act. Section 6 of the FOSPA makes provision for special exemptions to be granted by resolution of a territorial authority where that authority is satisfied, having regard to the particular characteristics of the property, the pool and any other relevant circumstances, that an exemption would not significantly increase danger to young children.

Although the Bill carries over some of the exemptions listed in section 5 of the FOSPA in section 450B(3)(a)-(c), it does not contain exemptions for pools under the administration of a local authority or public or private swimming pools where persons are employed to provide supervision.

Recommendation:

Section 450B(3) of the Bill should be amended to include:

- (a) any pool intended to be used for wading or paddling that is in any place that is under the administration of a local authority;
- (b) 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; or
- (c) any pool where persons are employed and present to provide supervision of the pool whenever the pool is available for use and access to the pool is effectively prevented by a fence, or by locked gates or doors whenever the pool is not intended to be available for use.

Subparagraph (e) above is taken from section 5(e) of the FOSPA but needs to be considered in light of whatever is to be done in respect of pools within homes.

LGNZ is also concerned that the absence of a discretion for councils to make special exemptions in certain circumstances where the danger to young children is not significantly increased may result in the harsh outcomes. Further, the saving provisions of the Bill are not clear in relation to the issue of exemptions granted under section 6 of FOSPA. Section 6(3) of FOSPA currently provides for the amendment or revocation of any exemption granted by a territorial authority. The Bill provides no ability to do the same.

⁵ See also proposed amendment to definition of portable pool at page 9 in relation to exempt pools.

An obvious example might be the situation mentioned above, where a spa pool or hot tub is alongside a swimming pool and contained within the same fencing. The specific spa pool or hot tub restricting access requirements would not be needed.

Recommendation:

Section 6 of the FOSPA should be carried over into the Bill to give local authorities discretion to grant special exemptions and provide for amendments or revocations of exemptions that have been granted by a territorial authority

- (1) A territorial authority may grant a written exemption from some or all of the requirements of this Act in the case of any particular pool where the territorial authority is satisfied, having regard to the particular characteristics of the property and the pool, any other relevant circumstances, and any conditions it imposes under subsection (2), that such an exemption would not significantly increase danger to children under the age of 5 years.
- (2) In granting an exemption under subsection (1), the territorial authority may impose such other conditions relating to the property or the pool as are reasonable in the circumstances.
- (3) Any exemption granted or condition imposed under this section may be amended or revoked by a territorial authority.

The owner of the pool could possibly be required to keep a copy of the exemption of the property.

Periodic inspections of residential pools (proposed new section 222A)

Councils have a number of concerns with the periodic inspection regime created by the Bill.

5-yearly periodic inspection timeframe

1. The Bill places a mandatory obligation on every territorial authority to inspect “every residential pool within its jurisdiction, other than a spa pool, hot tub, or a portable pool...once every 5 years, within 3 months before or after the pool’s anniversary date.”
2. The FOSPA currently requires the territorial authority to “take all reasonable steps to ensure that this Act is complied with within its district”. Councils have taken different approaches to monitoring and enforcement obligations. Some councils, such as Auckland Council consider a three yearly inspection is necessary to discharge its obligation. Other councils inspect less frequently, or not at all.

Recommendations:

1. Adopt an approach that gives councils discretion to inspect at intervals not more frequently than 3 years or less frequently than 5 years to give councils sufficient flexibility to inspect efficiently. Those who choose more frequent inspections will have to justify that to their constituents.
2. Consider requiring councils to report nationally on their inspections of pools. [This would give some hard data about the appropriate inspection period] We particularly seek feedback on this matter

Anniversary date

At present, all swimming pools, spa pools and swimming pool fences constructed after 1 July 1992 must comply with the FOSPA and the BA2004 and are required to have a building consent/ code compliance certificate (CCC)/ certificate of acceptance as appropriate.

The Bill uses “the date of issue of the code compliance certificate” as a starting point. Although there is a requirement to obtain a building consent, there is no legal obligation to obtain a code compliance certificate. For this reason, using the date that a CCC is issued as the commencement date for the inspection regime will not be workable. Councils report that owners are often unaware of the requirement to obtain a CCC following completion of the building work.

A better alternative is that the inspection period commences at the date when the pool is first filled, or partly filled, with water. Until this point the risks are different and do not fall within the scope of the Bill. The Bill would need to be amended to require property owners to notify the council of the commencement or construction or installation of the swimming pool. Councils can then follow up with the owners regarding inspections. It should also be clear that the first inspection is to occur before the pool is first filled with water, not three to five years after the date of construction or installation, or first filling.

Such an approach is consistent with the obligations placed on pool owners under section 7 of the FOSPA and would provide certainty to the council that a swimming pool has been constructed or installed.

Recommendation:

Amend the Bill to require every owner of a swimming pool to notify the council of the commencement or construction or installation of the swimming pool.

Notification of existence of pool to territorial authority

- (1) Every owner of a pool to which this Act applies when the pool is filled or partly filled with water shall comply with any reasonable requirement of the territorial authority to advise the territorial authority of the existence of the pool.
- (2) Every person who proposes to construct or install a pool to which this Act will apply when the pool is filled or partly filled with water shall notify the territorial authority of the intention to construct or install the pool before the construction or installation commences.
- (3) An application for a building consent under the Building Act 2004 in respect of the construction or installation of a pool shall be deemed to be notification under this section.

Inspection window

The Bill provides for a 6 month inspection window within section 222A(1). Councils experience seasonal peaks and troughs in relation to processing building consent applications for swimming pools, with the majority occurring in the summer months. A twelve month window (6 months before or after the pool's anniversary date) would give councils the flexibility they need to manage the workload.

Recommendation:

Amend the section 222A(1) to read Every territorial authority must ensure that every residential pool.....is inspected by an authorised officer under section 222.....within 6 months before or after the pool's anniversary date.

Exclusion of spa pools, hot tubs and portable pools

The Bill (section 222A (1)) exempts spa pools, hot tubs and portable pools from the inspection regime.

The intent of the Bill is to encourage voluntary compliance but we are concerned that the proposed exclusion will be to the detriment of safety for young children.

Councils have had experience of young children drowning in these types of pools and LGNZ supports the retention of the ability to inspect these types of pools. This is particularly in the case of spa pools and hot tubs which are less than 760mm above the ground and require barriers which surround the immediate pool area.

In relation to portable pools, the preference is to define a portable pool as a pool with a depth no greater than 400mm. This would ensure that portable pools deeper than 400mm would continue to be subject to a council's inspection and compliance regime.

Recommendations:

Amend the Bill so that spa pools and hot tubs are not exempt from the periodic inspection of pools (section 222A).

Amend the definition of **portable pool** as follows: portable pool means any soft-sided pool with a depth less than 400mm (whether inflatable or not) that is designed to be installed and removed on a temporary basis., and is in fact removed.

Indoor pools and pool houses

It is not sufficiently clear whether pools that are inside a home are now intentionally included in the Bill as a pool requiring a barrier. It is reasonably clear that new indoor pools are covered in the definition of 'residential pool.' However, the position is not as clear when it comes to existing pools and this reflected in discussion on MBIE's website. The comments suggest that indoor pools will no longer be exempt, and must comply with the new provisions.

The Bill (section 222) proposes to provide the power to inspect "any residential pool (or the immediate pool area)" and the power to enter premises for "the purpose of determining whether section 162C is being complied with".

The power of inspection in section 222 is limited by section 226 of the Act, which does not authorise entry into a "household unit that is being used as a household unit" without the "consent of the occupier" or an "order of a District Court".

The amendments to section 222 will provide a council with the power to inspect pool houses and other indoor pools which do not form part of a household unit. For indoor pools located within a household unit however, a council will have no ability to inspect for compliance with the requirements of Clause F9.3.4 of the Building Regulations 1992 (i.e. whether doors cannot be readily opened or windows restrict the passage of children).

This is an issue that will impact on the Council's ability to discharge its inspection obligations under section 222A, and its ability to issue a notice to fix under section 163, in the event that an indoor pool located within a household is non-compliant.

Some exterior pools will be in enclosed courtyards that can only be inspected by going through a household unit.

Recommendation:

Parliament needs to address the appropriate balance between privacy and child safety in respect of pools within household units or that can only be accessed through household units (e.g. in enclosed courtyards).

Notes:

- Define as "not wholly permanently enclosed" because of roofs, pergolas etc. issues regarding the definition of open spaces for smoking should not be repeated here in reverse.
- If spas, tubs and pools are inside household units: does Parliament want them to be able to be inspected without notice, or consent, or only after notice? Whatever Parliament wants, having balanced child safety and privacy concerns, local government wants clarity .

Obligation on manufacturers and retailers

LGNZ supports the new obligation on manufacturers and retailers in proposed new section 162D of the Act, but believes the provision should also require manufacturers and retailers to provide notice of any pool purchase and the place of intended installation to the relevant council (noting internet sales and that people may buy from outside their locality). This would allow councils to maintain a register of pools with some accuracy and ensure that inspections take into account as many pools in the district as possible. The solution is not perfect because there will be second hand private sales (eg through Trademe) and homemade products, but it is an improvement.⁶

LGNZ also notes that the use of the term "product" in section 162D is incorrect. It extends the application of the section to potentially include swimwear or flippers and the like which are designed to be used for swimming, wading, paddling or bathing. Further, the reference to pool should also list "portable pool, hot tub, or spa pool" unless the definitions are being adjusted generally.

Recommendation:

Amend new section 162D to also require manufacturers and retailers to provide notice of any pool purchase to the council:

162D Manufacturers and retailers must supply notice

- (1) Every person who manufactures, sells, or offers for sale in New Zealand any new ~~product pool, portable pool, hot tub or spa pool~~ that is designed to be used for swimming, wading, paddling, or bathing, other than an ordinary home bath designed to be emptied after each use, must ensure that there is supplied with the pool, portable pool, hot tub, or spa pool, a notice approved by the chief executive setting out or summarising the responsibilities of owners and occupiers under section 162C(3).

(1A) Where a new pool, portable pool, hot tub or spa pool of the type described in subsection (1) is sold in New Zealand, the seller must provide notice of that purchase to the territorial authority for the place where it is intended to be installed.

Restricting access

LGNZ supports the requirements in section 162C but is concerned that the obligation on certain persons listed in subsection (3) may unintentionally capture persons who should not be covered by the Bill. For example an owner of land where there is a ground lease may have no idea there is a pool, and no right to control anything but nevertheless be bound to comply with the section. Further, an "occupier" of the property in or on which a pool is situated may be the person renting a motel, in which case compliance with

⁶ A search on Trademe on the 29 October 2015 for hot tubs or spa pools for sale yielded over 300 results.

section 162C(3) is not to be expected of them. Tenants cannot generally be subjected to random inspections by landlords.

Recommendation:

Amend section 162C(3) to read:(3) The following persons must ensure compliance with this section to the extent compatible with their rights and obligations and the rights and obligations of others:

Other matters

Compliance of older pools

Consideration should be given to obliging owners of older pools to comply with restricting access for young children. This could be achieved by adding a new transitional provision that provides a specific timeframe for compliance.

Charging fees for inspections

The ability to charge a fee should be set in the Building Act similar to Section 111, which states that “a territorial authority may charge a fee for an inspection under this section”.

Notice to fix

Failure to comply with a “notice to fix a means of restricting access to a residential pool” is an offence under the Bill. The maximum fine on conviction is \$5,000.

In comparison, a failure to comply with other notices to fix under section 168 of the Act can result in a conviction and fine not exceeding \$200,000. LGNZ is concerned that the reduced fine that can be imposed following a conviction under proposed section 168(1AA) gives the wrong message about swimming pool safety, particularly given the serious risks posed for young children. Further, major penalties need to be greater than the cost of compliance.

Consistency in use of the term "children"

Section 162A of the Bill sets out the purpose of the subpart – to prevent unsupervised access to residential pools by young children. However, in the Schedule to the Bill, reference is made to young children (page 9), children under 5 years of age (page 9) and children (page 10). This inconsistency is undesirable and creates uncertainty. LGNZ considers that a uniform term should be adopted and defined (i.e. "children" means persons under 6 years of age) and applied consistently throughout the Bill and the Regulations that it amends.

Bill Schedule, page 10 F9.3.5

- "restrict" in clause (a) should be amended to "prevent".

Recommendations:

Introduce a transitional provision to require older pools to comply with the access provisions for pools; and continue existing exemptions, with power to amend them.

Provide the ability to charge a fee for inspections in the Building Act (similar to Section 111).

Reconsider the offence provisions (clause and the maximum fine of \$5,000).

Define the term "children" and apply it consistently throughout the Bill.

Amend the term "restrict" in F9.3.5(a) to "prevent". Children under 5 need to be prevented from falling into spa pools and hot tubs, not just slowed down.

NOTES

300mm/400mm distinction

- See Cabinet paper by Hon Nick Smith (not dated) seeking to rescind the decision that would require pools with more than 300mm of water depth to be fenced and agreeing to retain the current depth threshold of 400mm in the Act.
- Focus of the Act should be on restricting unsupervised access to pools that are going to be filled for longer periods of time and are therefore an increased safety risk
- Retaining the current depth threshold of 400mm avoids imposing requirements on a class of pools (temporary paddling pools containing between 300mm and 400mm of water) where the requirements are unlikely to be supported, complied with or enforced, while having no significant effect on pool safety (p.17)
- If rules change will bigger pools be sold? No – maintains current depth threshold

Drainage of pools

- Provision limiting Council's liability for empty pools being damaged from ground pressure
- If the greatest risk is for children up to 2 years old, and likely to be crawling or unsteady on their feet, councils are likely to be wary anyway, because falling into an empty pool is arguably as dangerous as falling into a full one.
- Might be useful for commercial pools.

Goldfish ponds deeper than 400mm

- See discussion in Nov 2013 RIS, in particular table on pg 40. Note requiring owners to restrict access to garden ponds deeper than 400mm is not expected to significantly affect current risk.

DRAFT for feedback