

Office of the Minister for Building and Construction

Cabinet Economic Growth and Infrastructure Committee

Fencing of Swimming Pools Act 1987 – Policy proposals

Proposal

- 1 I propose amending the Fencing of Swimming Pools Act 1987 (the Act) to reduce the compliance burden the Act currently imposes on pool owners and Territorial Authorities (councils), while maintaining child safety.

Executive summary

- 2 An effective way to prevent young children from going unnoticed to swimming pools is to restrict access to the pool. Drowning of young children in home swimming pools has reduced from 100 drownings over a 10-year period before the Act was enacted, to 30 drownings over the 10 years to 2012.
- 3 In March 2013, Cabinet agreed to the release of a consultation document with proposals to reduce the compliance costs associated with the Act while not increasing the risk of young children drowning in home swimming pools. There was strong support for most of the proposals.
- 4 I now propose amendments to the Act that would provide more certainty and consistency, and address instances where the Act imposes compliance costs that are out of proportion with the reduction in drowning risk being achieved.
- 5 The key proposals are to:
 - rely on performance-based standards in the Building Code to specify the requirements for restricting access to pools, rather than the currently-duplicated and inconsistent requirements for restricting access to pools;
 - continue to allow doors to open to the pool area if they are child-resistant;
 - clarify that councils should inspect swimming pools at least five-yearly to assure that owners maintain the means of restricting access to their pool; the Act is currently unclear and some councils inspect pools three-yearly while other councils have no periodic inspections;
 - replace the current offence provisions involving court prosecutions with an infringement regime, to provide for more cost-effective enforcement;
 - deem spa pools to be adequate if they are child-resistant, without requiring them to have an additional means of restricting access; the cost of an additional means to restrict access is disproportionate to the additional reduction in risk for spa pools that are already child-resistant;
 - inform buyers about the Act when they buy spa pools and portable pools, relying on voluntary compliance underpinned by the infringement regime rather than requiring councils to locate all spa pools and portable pools and periodically inspect them; and

- exclude garden ponds and other water hazards because they were not intended to be covered by the Act, and restricting access can be expensive for large hazards such as stormwater detention ponds; the risk of drowning in garden ponds is estimated to be less than the risk of drowning in swimming pools.
- 6 The proposals are estimated to reduce compliance costs by \$17 million (net present value – NPV) and avoid six drownings every 10 years (bringing the expected drowning rate down to 24 drownings every 10 years).

Table 1: Estimated effect of the proposals

Proposal	Change in risk – drownings every 10 years	Change in cost \$m (NPV)
Restricting access to pools (paragraphs 15 to 29)	0	0
Monitoring and enforcement (paragraphs 30 to 41)	(6)	(4)
Spa pools (paragraphs 42 to 51)	0	(13)
Portable pools (paragraphs 52 to 57)	(0)	0
Garden ponds (paragraphs 58 to 65)	0	(0)
Total change as a result of the proposals	(6)	(17)

- 7 The proposals would improve clarity and consistency, and remove cumbersome requirements that are expensive for the pool owners concerned. Some owners would face increased compliance costs – in areas where councils do not periodically inspect pools at present.
- 8 The proposals are likely to attract media attention and officials have prepared communications material.

Background

Previous Cabinet consideration

- 9 On 18 March 2013, Cabinet noted that the Act has contributed to reducing the number of drownings by children aged 0-4 years in home swimming pools, but the Act is burdensome for pool owners and councils and is not consistently administered. Cabinet agreed to the release of a consultation document with proposals to reduce compliance costs while maintaining child safety [EGI Min (13) 4/4 refers].

Effectiveness of the Act

- 10 The Act aims to promote the safety of young children by requiring owners to fence certain pools. Officials estimate that over 200,000 pools are subject to the Act. Eighty-two young children have drowned in home pools and ponds in the last 20 years.
- 11 Table 2 shows the home pools subject to the Act and the number of children aged 0-4 years who drowned in the last 20 years.

Table 2 – Pools subject to the Act, and young children drowned

Type of pool	Estimated number of pools subject to the Act ¹	Young children drowned over 20-years ²	
		Number	Percentage
Swimming pools	60,000	56	68%
Spa pools	100,000	9	11%
Portable pools	60,000	4	5%
Garden ponds	1,500 to 4,000	11	13%
Other water hazards	–	2	2%
Total	Over 200,000	82	100%

- 12 Two-thirds of swimming pools are in the northern half of the North Island, and over 40% are in Auckland.
- 13 There is strong scientific evidence that fencing is effective at reducing the risk of young children drowning in home pools.³ The number of young children drowning in home pools has reduced from 100 drownings over a 10-year period before the Act was introduced,⁴ to 30 drownings in the 10 years to 2012. Most of the children who drowned were aged one and two years.

Outcome of public consultation

- 14 In March 2013, the Ministry of Business, Innovation and Employment (MBIE) published a consultation document, *Making pool safety easier*. MBIE received 392 submissions from pool owners, the pool industry, safety groups, councils, professionals involved in pool safety, and non-pool owners. Submitters strongly supported most of the proposals, although for some proposals safety groups supported an alternative.

Comment

Restricting access to the pool

Using performance-based requirements

Existing requirements

- 15 The requirements for restricting access to a pool are currently set out in two places – the Fencing of Swimming Pools Act 1987 and the Building Code (because pool fences are buildings under the Building Act 2004).

¹ Based on information from the pool industry and councils. The estimates uncertain, in particular for spa pools, portable pools and garden ponds, because they are based on limited information.

² Drowning statistics in this Cabinet paper relate to fatalities of children aged 0-4 years who went unnoticed to a pool or outdoor water hazard at home between 1993 and 2012. Data from Water Safety New Zealand's *DrownBase*.

³ Thompson DC, Rivara F (2010) [Pool fencing for preventing drowning of children](#) (Review), The Cochrane Collaboration, Wiley.

⁴ Drownings of children under five years in private swimming pools 1973-1982. Source: Local Bills Committee (1983) Report on the Fencing of Private Swimming Pools, AJHR I(10A).

16 The requirements are inconsistent. For example:

- the pool barrier must comply with the Building Code, but the Act limits the choice of barrier to a fence; and
- the Act has an exemption process that is cumbersome compared to the Building Act 2004 waiver process.

17 In addition:

- the courts have commented that the requirement in the Act for isolating the pool is vague;⁵ and
- some councils have required owners to upgrade their fence to comply with subsequent interpretations of the Act.

Proposal

18 I propose repealing the specific requirements in the Act for restricting access to pools, and relying on the Building Code, as proposed in Table 3.

Table 3 – Proposed amendments to the requirements to restrict access

Remove	Replace with
Pools must have a fence. Detailed specifications for a fence in the Schedule to the Act. Detailed performance standards for pool barriers in the Building Code.	A performance standard in the Building Code to the effect that pools shall have a means to restrict access by children aged 0-4 years.
The term 'immediate pool area'.	Ensure the performance standard in the Building Code continues to require the pool to be isolated while facilitating normal pool and poolside activities.
The power for councils to grant exemptions to the fencing requirements under section 6 of the Act or clause 11 of the Schedule to the Act.	Rely on the existing waiver provisions in the Building Act 2004.

19 These proposals were supported by 86 per cent of submitters, and would:

- bring the Act into line with the performance-based approach to other building requirements in the Building Act 2004;
- remove the duplication and inconsistencies of the current requirements; and
- increase flexibility for pool owners, reducing the need for exemptions or waivers.

20 These proposals would not adversely affect the risk of drowning because access to the pool would continue to be restricted. While a fence is effective for restricting access, owners could use other solutions if they could demonstrate that they were effective.

⁵ [Waitakere City Council v Hickman CIV 2003-404-7266](#), at [55].

Other proposals

- 21 I propose additional amendments related to restricting access to pools, as described in Table 4.

Table 4 – Additional proposed amendments to requirements to restrict access

Remove	Replace with
The scope for councils to require owners to upgrade their pool fence to comply with subsequent interpretations of the Act.	Rely on an approach similar to the Building Act 2004, where owners do not need to upgrade their pool after councils have approved the pool as being compliant.
Obligations on the pool owner.	Obligations are on both the landowner and occupier. This amendment would avoid councils having to interact with owners over breaches created by occupiers.
Obligation in section 7 of the Act for owners to notify councils of the existence of pools.	This requirement is superfluous because the Building Act requires owners to seek building consents for swimming pools.

- 22 I propose that the Building Code being amended to provide that the specifications in the Schedule to the Act (without clause 11) provides “acceptable solutions” until replacement acceptable solutions are developed.⁶ The New Zealand Standard NZS 8500:2006 *Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs* could potentially inform the development of acceptable solutions.

Continuing to allow child-resistant doors opening to the pool area

- 23 The Act currently allows doors from houses to open directly to the pool area. The requirements for doors are set out in both the Act and the Building Code. Doors must be self-closing or similarly restrict access, although councils may grant exemptions.
- 24 Doors that were left open accounted for 20 per cent of pool drownings in New Zealand. Australian research found that pools with direct door access have three times more drownings than pools without direct door access.⁷

Proposal

- 25 I propose to continue to allow doors to open directly to the pool area, as long as they restrict access to the pool. In the public consultation, this proposal was supported by 81 per cent of submitters, although safety groups strongly supported the alternative option of prohibiting direct access from the house to the pool.
- 26 The proposal in paragraph 18 above would ensure that doors restrict access to the pool. Technology for making doors child-resistant has improved.⁸ Allowing doors is consistent with the performance-based approach of the Building Code, where any solution must be approved if it meets the performance standard. Continuing to allow doors gives pool owners flexibility about how to restrict access.

⁶ An “acceptable solution” sets out one way to comply with the Building Code, alongside any alternative solutions that owners may propose.

⁷ Barker R, Spinks D, Hockey R and Pitt R (2003) [Pool Fencing Legislation in Australia in 2003: The Way Forward](#), Queensland Injury Surveillance Unit. National Water Safety Conference 2003, 107-110.

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.

⁸ For example, see www.swishautomation.com/pool-safety-doors

- 27 International standards allow doors to open directly to the pool area if they are self-closing or have an alarm that sounds if people do not close doors after opening them. In Australia, regulations were changed following the research mentioned in paragraph 24, and doors are now prohibited from opening directly to the pool area.
- 28 The proposal would not affect existing pools that councils have already approved. Councils would have considered the risk of drowning when approving those pools. Retrofitting self-closers on existing doors could cost \$19 million while avoiding an estimated 2 drownings every 10 years.
- 29 The approach advocated by safety groups – of prohibiting doors from opening to the pool area – is estimated to cost \$105 million and avoid 2 drownings every 10 years. Prohibiting doors is likely to be safer than having self-closing doors, but the incremental benefit is difficult to estimate because self-closing doors already address the problem of doors being left open.

Better monitoring and enforcement of the Act

Inspecting pools

- 30 The Act currently requires councils to take all reasonable steps to ensure owners comply with the Act, but provides no further guidance about what steps are reasonable. The absence of further guidance in the Act has resulted in uncertainty about how much monitoring is prudent, and councils have taken different approaches. At one extreme, an estimated 17 councils (covering 60 per cent of pools) inspect pools every three years; at the other extreme, an estimated 30 councils (covering 20 per cent of pools) do not periodically inspect pools in their area.

Proposal

- 31 I propose that owners continue to be required to maintain their means of restricting access to their pools, and that councils be required to inspect pools at least five-yearly to ensure they continue to comply with the Act.
- 32 In the public consultation, 64 per cent of submitters supported an option where owners self-check their pool, underpinned by council audits. A minority of submitters – 28 per cent – wanted councils to inspect pools three-yearly.
- 33 The proposal will rely on owners maintaining their pool between five-yearly inspections. This approach aims to minimise the administrative burden on councils, while ensuring a nationally-consistent approach.
- 34 The proposal would improve compliance for the 20 per cent of pools that are not currently inspected, and is estimated to avoid six drownings every 10 years (on average) while costing \$7 million (NPV) for councils that do not inspect pools periodically at present (or inspect less frequently than five-yearly). The proposal would provide certainty for councils and could achieve savings of up to \$11 million (NPV) where councils are currently inspecting pools three-yearly. These savings are uncertain because the proposal includes the flexibility for councils to inspect more actively than five-yearly where necessary. The costs and savings of this proposal would be passed on to pool owners through inspection fees.
- 35 The proposal in paragraph 31 takes into account issues raised by submitters, in particular:
- the proposal does not require owners to submit self-checks to councils because councils questioned the value of the information they would receive; and

- the proposal does not require risk-based audits because councils have found in every inspection cycle a significant minority of non-compliant pools, but councils have limited information to decide which pools are likely to be non-compliant.

Other proposals related to inspecting pools

36 I propose amendments related to this proposal, to:

- continue to allow councils to inspect properties they have reasonable grounds to believe contain non-compliant pools; and
- clarify that councils continue to have the power to recover the cost of monitoring compliance from pool owners through targeted rates and/or inspection fees (recovering costs enables councils to carry out their obligations, and many councils currently recover these costs).

Cost-effective enforcement tools

37 Currently, if owners breach the Act, councils can prosecute owners and the courts can impose fines and order owners to empty pools.

Proposal

38 I propose removing court fines and orders, and creating powers for councils to issue owners and/or occupiers with:

- notices requiring the owner or occupier to remedy a breach of the Act; and
- an infringement notice with an infringement fee of \$500 for not complying with a notice to remedy a breach.

39 Submitters strongly supported moving from court fines to an infringement regime – it had 87 per cent support.

40 This proposal would support councils' approach of educating owners and encouraging them to voluntarily comply with the Act, by providing a timely and efficient option to use with uncooperative owners. The infringement regime is likely to improve the cost-effectiveness of councils in dealing with breaches of the Act. Few councils currently take prosecutions under the Act.

41 Councils would have discretion to decide who to issue notices to, for example issuing notices to occupiers in relation to portable pools rather than the landowner. Councils could also use their powers under the Building Act 2004 in cases where owners have not installed any means to restrict access, because the owners would also be breaching the Building Act 2004.

Proposals for specific types of pool

Exempting child-resistant spa pools

42 Under the Act, spa pools must be fenced unless the relevant council has granted an exemption. There are an estimated 100,000 spa pools in New Zealand. Councils know the location of an estimated 20,000 spa pools, of which 4,000 are in council areas that require all spa pools to be fenced.

Proposal

43 I propose that:

- in addition to amending the Building Code as proposed in paragraph 18, the Building Code provide for child-resistant spa pools to be able to meet the standard in the Building Code for restricting access; and
- spa pools be exempt from periodic inspections by councils (proposed in paragraph 31).

44 Overall, 88 per cent of submitters in the public consultation supported a proposal to deem child-resistant spa pools to be adequate, and half supported exempting spa pools from periodic inspections by councils.

45 Safety groups did not support the proposal:

- Water Safety New Zealand (the peak body for safety groups) supported deeming child-resistant spa pools to be adequate but wanted them to be periodically inspected by councils; and
- some safety groups wanted spa pools to be treated the same as other pools, including the Office of the Children's Commissioner, Safekids New Zealand, the Royal New Zealand Plunket Society, the Paediatrics Society, and Starship Trauma Service.

46 The proposal is not expected to increase the risk of drowning. Spa pools accounted for 11 per cent of drownings in the past twenty years. There have been almost no spa pool drownings in recent years and there is no record of a young child drowning in a spa with a childproof cover. These statistics should be treated with caution however, because of the small numbers involved and because the type of cover was not always recorded. Currently, councils have required an estimated four per cent of spa pools to have a means to restrict access other than a child-resistant cover.

47 The proposal would result in no change for most spa pool owners because most are currently sold with child-resistant covers. Owners tend to keep the cover latched to retain heat, although some councils and pool safety professionals submitted that this is not always the case.

48 The proposal aligns with the best-practice specifications for pool safety barriers in NZS 8500:2006, where child-resistant spa pools comply with the Standard. The proposal also aligns with international standards for pool safety (although not Australian standards).

49 The approaches advocated by safety groups would have little effect on the risk of drowning because child-resistant spa pools pose much lower risk than swimming pools. At the same time, it is estimated to cost \$55 million (NPV) to periodically inspect spa pools, and \$300 million (NPV) to fence them.

Other proposals relating to spa pools

50 I propose other amendments relating to spa pools, to:

- require manufacturers and/or retailers to notify buyers of their obligations, to help manufacturers, retailers and buyers understand the requirement for spa pools to be child-resistant, and in particular:
 - require the chief executive of MBIE to set out the details of a disclosure notice to be provided to buyers, which would be flexible while clearly notifying buyers;

- give the chief executive of MBIE powers to require manufacturers and/or retailers to declare whether they are complying;
- create an infringement offence with an infringement fee of \$500 for manufacturers and/or retailers who do not notify a buyer or do not make a declaration required by the chief executive of MBIE;
- not require councils to search for child-resistant spa pools and undertake the periodic inspections proposed in paragraph 30;
- continue to allow councils to inspect properties they have reasonable grounds to believe contain spa pools that are not child-resistant;
- remove the obligation that owners must seek building consents for spa pools simply for the reason that they fall within the definition of 'swimming pool'; and
- include hot tubs in the proposals for spa pools – hot tubs are child-resistant when owners keep the covers on to retain the heat.⁹

Educating buyers of portable pools, and clarifying council obligations

- 51 The Act currently makes no distinction between portable pools and other swimming pools – portable pools must be fenced if they contain water deeper 400mm (unless they have non-climbable sides greater than 1.2m high). The Act is ineffective in relation to portable pools because:
- portable pools are temporary while the means of restricting access is usually permanent (such as a fence);
 - portable pools with sides higher than 400mm can cost from \$100 while a fence could cost around \$3,000; and
 - the Act is difficult to enforce – councils cannot easily locate portable pools.
- 52 Portable pools accounted for five per cent of drownings in the last 20 years, although there have been no drownings in portable pools in the last 10 years. These statistics are based on very small numbers of drownings, however, and do not mean the risk of drowning has reduced. Overseas, portable pools accounted for 11 per cent of drownings in the United States,¹⁰ and 25 per cent of drownings in New South Wales.¹¹ Drowning has occurred where people leave portable pools unattended without restricting access to the pool.

Proposal

- 53 I propose amending the Act in relation to portable pools to:
- require manufacturers and/or retailers to notify buyers of their obligations under the Act in the same way as is proposed for spa pools in paragraph 50;
 - not require councils to search for portable pools and undertake the periodic inspections proposed in paragraph 30;
 - continue to allow councils to inspect properties they have reasonable grounds to believe contain portable pools in breach of the Act;

⁹ Examples of hot tubs can be found at www.kiwitub.co.nz

¹⁰ Shields BJ, Pollack-Nelson C, Smith GA (2011), [Submersion Events in Portable Above-Ground Pools in the United States](#), 2001–2009, *Pediatrics*. 2011 Jul;128(1):45-52

¹¹ New South Wales Child Death Review Team (2012), [Child deaths: drowning deaths in private swimming pools in NSW](#), NSW Ombudsman, Sydney.

- remove the obligation that owners must seek building consents for portable pools simply for the reason that they fall within the definition of 'swimming pool'; and
 - exempt portable pools with less than 300mm water (rather than 400mm as currently).
- 54 This proposal would provide more certainty to councils about the steps they should take to enforce the Act in relation to portable pools, by clarifying that councils are not required to undertake the difficult task of locating and inspecting portable pools. Although the risk of drowning in portable pools is estimated to be much lower than in permanent swimming pools, they still pose a risk and the enforcement tools proposed in paragraph 38 would enable councils to cost-efficiently address persistent offending that councils become aware of. The success of the proposal will depend on voluntary compliance, with people being informed of the danger and how to manage it when they buy a portable pool.
- 55 In the public consultation, 88 per cent of submitters supported a retailer notice to buyers and more effective enforcement tools relating to portable pools.
- 56 The proposal would apply the Act to portable pools deeper than 300mm because pools shallower than 300mm are more practical to empty after each use while deeper pools tend to be left filled. This change is supported by safety groups and retailers because it aligns with Australian regulations.

Excluding garden ponds and other water hazards

- 57 Officials understand that the Act was intended to apply to swimming pools and spa pools, but the Act has been interpreted to cover garden ponds and other water hazards that are:
- manmade;
 - deeper than 400mm;
 - capable of being used for swimming, wading, paddling or bathing; and
 - associated with a home.¹²
- 58 In 2004, a coroner found that the Act applied to a garden pond, and departmental guidance was changed to note that the Act applies to garden ponds. Ponds that the Act applies to must have a fence (or grill if councils grant an exemption). Farm ponds and other hazards not associated with homes are not covered by the Act.
- 59 Data from councils indicates that eight councils have applied the Act to 659 ponds and other water hazards, of which only two councils have applied the Act to any significant number. Auckland Council has applied the Act to 453 garden ponds deeper than 400mm, and Kapiti Coast District Council has applied the Act to 122 properties with stormwater detention lakes
- 60 Although there is limited data, officials estimate there could be between 10,000 and 30,000 garden ponds in New Zealand, of which between 1500 and 4000 are subject to the Act (most ponds being exempt because they are shallower than 400mm). Garden ponds accounted for four drownings every 10 years (on average). The risk of drowning in garden ponds is estimated to be less than the risk of drowning in swimming pools.

¹² See sections 2 and 5 of the Act for the definition of swimming pool and exemptions.

Proposal

- 61 I propose clarifying that the Act does not apply to garden ponds and other water hazards not intended for swimming, wading, paddling or bathing. This proposal was supported by 85 per cent of submitters in the public consultation, although safety groups were split on the issue.
- 62 The proposal would better ensure the Act focuses on swimming pools. This focus is pragmatic because swimming pools pose the greatest risk of drowning and councils are successful at enforcing the requirement to restrict access to swimming pools.
- 63 The proposal would result in little change for owners because only two councils have applied the Act to any significant number of garden ponds or other water hazards. The proposal ends uncertainty, in particular for owners whose water hazards would be particularly expensive to restrict access to.
- 64 The proposal would have little overall effect on the risk of drowning because few water hazards are currently fenced. Owners should still be encouraged to restrict access where possible, including to hazards that the Act does not apply to.
- 65 Some safety groups – Plunket, Paediatrics Society and Starship Trauma Service – advocated restricting access to all water hazards outside at home that are dangerous to young children. While this approach could avoid an estimated four drownings every 10 years, it could cost \$40 million (NPV) to apply the Act to all garden ponds.

Including indoor swimming pools

- 66 Indoor swimming pools inside homes are currently exempt from the Act. I propose that any new indoor swimming pools built be subject to the Act (excluding baths used for hygiene purposes and emptied after each use). This proposal was supported by 82 per cent of submitters.
- 67 Indoor pools pose a drowning risk to young children in the house. The risk can be mitigated by restricting access, for example with a child-resistant door. Very few indoor pools are built each year.

Excluding non-residential pools

- 68 Currently, the Act seldom applies to non-residential pools because the Act does not apply to pools with paid supervisors, Crown-owned pools, or council pools intended for wading or paddling.
- 69 I propose to clarify that the Act does not apply to public pools, commercial pools, school pools or hospital pools, but continues to apply to pools in homes, apartments, hotels, motels and camping grounds.
- 70 This proposal is to avoid doubt and ensure consistency for these types of pool. Few pools would be affected by this proposal because of the current exemptions, and because any affected pools would normally be subject to other safety requirements. For example, the Ministry of Education directly sets requirements for school pools. In the public consultation, 85 per cent of submitters agreed that the Act should focus on home pools.

Other proposed amendments to the Act

- 71 I propose other amendments to the Act, to:
- include a purpose statement in the Act that reflects the proposals in this paper – of seeking to prevent drowning of children aged 0-4 years by restricting their

access to home swimming pools. A purpose statement along these lines was supported by 86 per cent of submitters;

- modernise the inspection provisions of the Act by aligning them with those in the Building Act 2004; and
- clarify that councils may not create bylaws that restrict access of young children to water hazards that are not covered by the Act.

Consultation

- 72 MBIE published a consultation document in March 2013 and received 392 submissions. As part of the consultation, officials met with water safety groups convened by Water Safety New Zealand, and industry and water safety representatives convened by Auckland Council.
- 73 The following agencies have been consulted on this paper: The Treasury, Ministry of Justice, Accident Compensation Corporation, Ministry of Health, Ministry of Education, Ministry of Social Development and the Department of Internal Affairs. The Department of the Prime Minister and Cabinet has been informed.

Financial implications

- 74 Any cost implications for MBIE in its administration of the Act would be minimal and would be met from existing operating baselines of Vote Housing.

Human rights

- 75 There are no implications for the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.
- 76 Given that the Act aims to reduce child mortality, any amendments could have implications for New Zealand's compliance with the UN Convention on the Rights of the Child. Under the Convention, states must act with the best interest of children as a primary consideration, and must take appropriate measures to diminish infant and child mortality.
- 77 The Act has helped to reduce child mortality from 100 drownings in the 10 years to 1982, to 30 drownings in the 10 years to 2012 – and the proposals in this paper are estimated to avoid a further six drownings every 10 years (on average). The individual proposals seek to strike an acceptable balance between protecting young children from drowning and the cost and practicality of the rules for pool owners and councils.

Legislative implications

- 78 A Bill is required to implement the proposals. A Fencing of Swimming Pools Amendment Bill was included in Category 6 of the 2013 Legislation Programme (instructions to the Parliamentary Counsel Office in 2013).

Regulatory impact analysis

- 79 A Regulatory Impact Statement (RIS) has been prepared and is attached.
- 80 The General Manager, Strategic Policy Branch and the MBIE Regulatory Impact Analysis Review Panel have reviewed the attached RIS prepared by MBIE, and consider that the information and analysis summarised in the RIS meets the criteria necessary for ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.

Publicity

- 81 I will issue a press statement following Cabinet's decision on the policy proposals. I also propose to release this Cabinet paper and the Cabinet Minute. The proposals are likely to attract media attention, and a communications strategy is being developed.
- 82 MBIE will release the RIS and a summary of the submissions on its website.

Recommendations

- 83 The Minister for Building and Construction recommends that the Committee:

Outcome of public consultation

- 1 **note** that on 18 March 2013, Cabinet agreed to the release of a consultation document, *Making pool safety easier*, with proposed amendments to the Fencing of Swimming Pools Act 1987 (the Act) to reduce compliance costs and maintain child safety [CAB Min (13) 4/4 refers];
- 2 **note** that 392 groups and individuals made submissions on the consultation document, and submitters strongly supported most of the proposals, although for some proposals safety groups supported an alternative proposal;

Requirements for restricting access to pools

- 3 **agree** to rely on the Building Code to set the requirements for restricting access to pools and to repeal the duplicated requirements currently in the Act;
- 4 **agree** to the following amendments to implement the decision in recommendation 3:
 - 4.1 the Building Code be amended and acceptable solutions be developed as follows:
 - 4.1.1 the existing provisions in the Building Code for swimming pool barriers are removed;
 - 4.1.2 provide that the performance standard for swimming pools is to the effect that pools shall have a means to restrict access by children aged 0-4 years;
 - 4.1.3 provide for the Building Code to continue to require pools to be isolated while facilitating normal pool and poolside activities;
 - 4.1.4 provide that the specifications in the Schedule to the Act (without clause 11) provides acceptable solutions for meeting the performance standard until replacement acceptable solutions are developed;
 - 4.1.5 new acceptable solutions will be developed after the legislative amendments are made, and will involve public consultation;
 - 4.2 the following being removed from the Act:
 - 4.2.1 the requirement that pools must have a fence;
 - 4.2.2 the Schedule to the Act;
 - 4.2.3 the term 'immediate pool area';
 - 4.2.4 the power to grant exemptions under section 6 of the Act or clause 11 of the Schedule;

- 4.2.5 the scope for councils to require owners to upgrade council-approved pools to comply with subsequent interpretations of the Act;
- 4.3 remove the obligations in the Act on the pool owner, and place those obligations on landowners and occupiers;
- 4.4 remove the requirement in section 7 of the Act for owners to notify councils of the existence of pools;
- 5 **note** that, if recommendation 4 was agreed, the Building Code would continue to allow doors that restrict access to open directly to the pool area;

Better monitoring and enforcement

- 6 **agree** that the Act continues to require owners to maintain their means of restricting access to the pool;
- 7 **agree** to amend the Act to:
 - 7.1 require councils to inspect, at least five-yearly, pools that the Act requires to have a means of restricting access, to verify that the means of restricting access has been maintained;
 - 7.2 continue to allow councils to inspect properties they have reasonable grounds to believe contain non-compliant pools;
 - 7.3 continue to enable councils to recover the cost of monitoring compliance from pool owners through targeted rates and/or inspection fees;
- 8 **agree** to amend the Act to create an infringement regime as follows:
 - 8.1 repeal the current enforcement provisions that provide for a court to impose fines and make orders to drain pools;
 - 8.2 create powers for councils to issue:
 - 8.2.1 notices requiring the owner or occupier to remedy a breach of the Act;
 - 8.2.2 an infringement notice with an infringement fee of \$500 for a person not complying with a notice to remedy a breach of the Act;

Spa pools

- 9 **agree**, in addition to amending the Building Code as proposed in recommendation 4.1, to amend the Building Code to provide for child-resistant spa pools to be able to meet the standard in the Building Code for restricting access;
- 10 **agree** to the following amendments to the Act and the Building Code relating to child-resistant spa pools and hot tubs:
 - 10.1 not require councils to search for child-resistant spa pools and undertake the periodic inspections proposed in recommendation 7;
 - 10.2 continue to allow councils to inspect properties they have reasonable grounds to believe contain a spa pool or hot tub that is not child resistant;
 - 10.3 remove the obligation that owners must seek building consents for spa pools and hot tubs simply for the reason that they fall within the definition of 'swimming pool' in the Act;

- 11 **agree** that manufacturers and/or retailers of new spa pools must notify buyers of their obligations under the Act, and:
- 11.1 provide for the chief executive of MBIE to set out the details of a disclosure notice to be provided to buyers;
 - 11.2 give the chief executive of MBIE powers to require manufacturers and/or retailers to declare whether they are complying;
 - 11.3 create an infringement offence with an infringement fee of \$500 for manufacturers and/or retailers that do not notify buyers and/or do not make a declaration required by the chief executive of MBIE;

Portable pools

- 12 **agree** to amendments relating to portable pools:
- 12.1 require manufacturers and/or retailers to notify buyers of their obligations under the Act in the same way as is proposed for spa pools in recommendation 11 above;
 - 12.2 not require councils to search for portable pools and undertake the periodic inspections proposed in recommendation 7;
 - 12.3 continue to allow councils to inspect properties they have reasonable grounds to believe contain non-compliant portable pools;
 - 12.4 exempt portable pools with less than 300mm water (rather than 400mm as currently) from the requirements of the Act;
 - 12.5 remove the obligation that owners must seek building consents for portable pools simply for the reason that they fall within the definition of 'swimming pool' in the Act;

Garden ponds and other water hazards

- 13 **agree** that the Act excludes garden ponds and other water hazards not intended for swimming, wading, paddling or bathing;

Other types of pool

- 14 **agree** that the Act excludes public pools, commercial pools, school pools and hospital pools, but continues to include pools in homes, apartments, hotels, motels and camping grounds;
- 15 **agree** that indoor swimming pools in homes be subject to the Act (excluding baths used for personal hygiene and emptied after each use);

Other amendments


- 16 **agree** to amend the Act to:
- 16.1 include a purpose statement in the Act that reflects the proposals in this paper, of seeking to prevent drowning of children aged 0-4 years by restricting their access to home swimming pools;
 - 16.2 align the inspection provisions of the Act with those in the Building Act 2004;
 - 16.3 clarify that councils may not create bylaws that restrict access of young children to water hazards that are not covered by the Act;

Drafting instructions

- 17 **note** that on 25 February 2013, Cabinet approved the 2013 Legislative Programme, with a Fencing of Swimming Pools Amendment bill as Category 6 (instructions to the Parliamentary Counsel Office in 2013) [CAB Min (13) 5/7 refers];
- 18 **invite** the Minister for Building and Construction to issue drafting instructions to the Parliamentary Counsel Office to give effect to the recommendations in this Cabinet paper;
- 19 **authorise** the Minister for Building and Construction to approve changes, consistent with the policy proposals in this paper, on any issues that arise during the drafting process; and

Communications

- 20 **invite** the Minister for Building and Construction to announce Cabinet's decision and release a copy of the Cabinet paper and decision.



Hon Maurice Williamson
Minister for Building and Construction

12 / 11 / 2013

PROACTIVELY RELEASED BY THE MINISTER FOR BUILDING AND CONSTRUCTION