



**THE PAEDIATRIC SOCIETY
OF NEW ZEALAND**

Secretariat: Denise Tringham
P O Box 22 234
Wellington 6441
Tel: (04) 938 4827
Fax: (04) 976 4827
Email: psnz@paradise.net.nz

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Secretariat
Local Government & Environment Select Committee
Select Committee Services
Parliament Buildings
Wellington 6160

Submission on the Building (pools) Amendment Bill 2015

This submission is from the Paediatric Society of New Zealand (the Society), a multidisciplinary organisation with membership of more than 500 child health professionals. Its members have wide ranging expertise in clinical practice and research in the child health sector.

In 2010 Paediatric Society Members adopted a Position Statement on the provision of swimming pool fencing. This submission is consistent with recommendations of that Statement.

The Society requests the Local Government and Environment Select Committee reject the Building (Pools) Amendment Bill 2015 (the Bill) in its current form and that Government either abandons the Bill or refers it for major redrafting. Supporting information is provided as attached.

The Society requests the opportunity to make an oral presentation to the Select Committee.

Yours faithfully

Dr David Newman
President

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Submission Summary

This submission from the Paediatric Society of New Zealand requests the Local Government and Environment Select Committee reject the Building (Pools) Amendment Bill 2015 (the Bill) in its current form and that Government either abandons the Bill or refers it for major redrafting.

Small children drown quickly and quietly in home swimming pools. There is a large body of personal testimony; coronial cases; epidemiological records and scientific journal articles confirming how rapidly, silently and frequently toddlers drown in home swimming pools. Considerable care is required when changing legislative provisions in order to prevent this avoidable tragedy.

The Fencing of Swimming Pools Act 1987 (FoSP Act) and subsequent implementation and maintenance of fences that isolate home swimming pools from the house has been an effective strategy for reducing the incidence of these tragedies. The scientific knowledge related to pool fencing has now advanced further to inform us that a fence with a self-closing self-latching gate that isolates the pool from the house is the most effective approach to preventing pool drowning.

The Paediatric Society submits the Bill is unsuited legislation for replacing the FoSP Act because:

- Child safety provisions currently provided are significantly reduced by this Bill – which contravenes New Zealand's obligations under International Treaty;
- There is no acknowledgment or inclusion of current best practice safety measures to further prevent toddler drowning in home pools (i.e. the use of four sided isolation pool fencing);
- The Bill proposes performance based measures for consenting pools without evidence or sector agreement on the efficacy of their performance;
- Economic, cost and policy analyses in the Regulatory Impact Statements are inconsistent and incomplete;
- Clause by clause analyses shows other unaddressed public safety issues and drafting errors.

The inevitable outcome of failure to maintain child safety during the repeal of the FoSP Act and adoption of this Bill as law will not be economic. It will be the death of young children by drowning.

We request the opportunity to make an oral presentation to the Select Committee.

Acknowledgement and thanks to Mr Stuart Robertson (Partner) Kensington Swan for assistance with this submission.

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1. Introduction

- 1.1. The Paediatric Society of New Zealand requests the Local Government and Environment Select Committee reject the Building (Pools) Amendment Bill 2015 (the Bill) in its current form and recommend Government either abandons the Bill or refers it for major redrafting.
- 1.2. The prevention of toddler drowning in swimming pools can be challenging to discuss, with peripheral details being hotly debated while fundamental matters are not discussed. This submission focusses on major issues such as the reduction of measures proven to be effective and the absence of performance testing and evidence for the introduction of new products and requirements.
- 1.3. Members of the Paediatric Society submit that this Bill is an unsuitable replacement for the safety provisions included in the Fencing of Swimming Pools Act 1987 (FoSP Act). This submission provides a brief background for our concerns; identifies how the Bill reduces child safety; discusses the inadequacy of the performance based standards included within the Bill; questions the supporting economic, policy analyses and evidence as flawed and provides a list of concerns with the Bill's drafting.
- 1.4. The *United Nations Convention on the Rights of the Child* (United Nations, 1989) states that signatory parties have the responsibility to ensure the best interests of children are represented in laws and actions by governments. Reducing the water safety measures that have been in place for the protection of New Zealand's children contravenes this duty.
- 1.5. The major outcome of failure to maintain child safety with the repeal of the FoSP Act and adoption of this Bill as replacement law will not be economic, nor will it be failing to meet a Treaty obligation. This attempt at replacing the current pool fencing safety legislation with the flawed measures included in this Building (Pools) Amendment Bill 2015 will result in the death and brain damage of more young children by drowning.

2. Small children drown quickly and quietly in home swimming pools, spa pools and garden ponds. Properties that have doors opening directly onto the immediate pool area from inside the house (3 sided fencing) have greater risk of toddler drowning than when the pool is separately fenced (4 sided fencing).

- 2.1. There is a large body of personal testimony; coronial cases; epidemiological records and scientific journal articles published for over thirty years, confirming how rapidly, silently and frequently toddlers drown in home swimming pools

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(Bugeja & Franklin, 2012; Gardiner, Smeeton, Koelmeyer, & Cairns, 1985; Hassall, 1989; Mc Donald G, Taylor B, Carter M, & Ward B, 2004; Royal Life Saving Society of Australia, 2015; Thompson & Rivara, 1998; Water Safety New Zealand, 2004).

2.2. In 1985 child drowning happened much more frequently in New Zealand. An examination of the circumstances of sixty Auckland children under the age of six who drowned showed twenty four of the sixty children (40%) drowned in home swimming pools, one of these in a spa pool. One of the children was swimming unsupervised; the remaining 23 were fully clothed when they were found drowned. This suggested these children probably fell into the pool while playing. Nine of the sixty children drowned in other unfenced water hazards around the home; the sea, creeks, ponds and one in a drainage ditch (Gardiner et al., 1985).

2.5 FoSP Act (1987) requirements have been shown to be effective for reducing the incidence of these toddler drowning tragedies. This is in the face of a huge increase in the number of pools (Mc Donald G et al., 2004; Ministry of Business Innovation and Employment (MBIE), 2015; Water Safety New Zealand, 2004).

2.6 Garden ponds and dangerous water around homes present a drowning risk for small children, as do portable pools and spa pools (Mc Donald G et al., 2004; Ministry of Business Innovation and Employment (MBIE), 2013). See Figure One below:

Figure One: The following table shows the circumstances where young children have drowned outside at home in New Zealand in the last twenty years. Two thirds of the children drowned in swimming pools, with 13% drowning in garden ponds. The others drowned in spa pools, portable pools and other hazards (Ministry of Business Innovation and Employment (MBIE), 2013).

Pool type	Estimated number	Young children drowned over 20 years		Risk of drowning relative to unfenced swimming pool
		Number	Percentage	
Swimming pools	60,000	56	68%	15%
Spa pools	100,000	9	11%	< 1%
Portable pools	200,000	4	5%	< 1%
Garden ponds	10,000 – 30,000	11	13%	10% – 20%
Other water hazards	Not estimated	2	2%	Not estimated
Total*	370,000 – 390,000	82	100%	NA

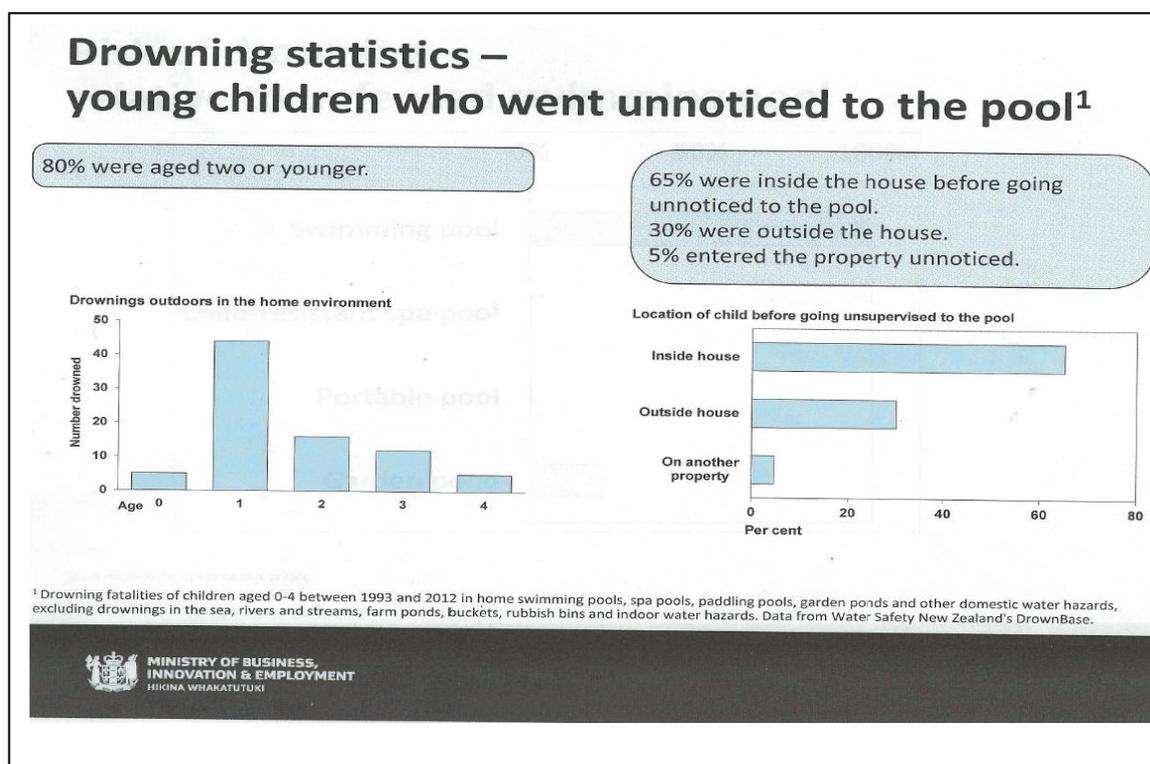
* Totals may not add due to rounding.

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2.7 Figure two shows the number of children drowning after accessing the pool from inside the house (MBIE presentation 2013). This data supports other research that shows there is an increased risk of a small child drowning if the house has doors opening directly from the interior of the house into the immediate pool area (Bugeja & Franklin, 2012; Stevenson, Rimajova, Edgecombe, & Vickery, 2003; Thompson & Rivara, 1998).

2.8 Automatic doors that slide open and closed (with or without alarms) to allow access to the immediate pool area have not been studied or tested to demonstrate whether they have any effect on this increased risk (Ministry of Business Innovation and Employment (MBIE), 2013).

Figure Two: Circumstances of drowning: Ministry of Business Innovation and Employment workshop presentation 2013:



3 Child safety provisions are reduced by this Bill

3.1 The Bill abandons basic and essential protections for children that currently exist under the FoSP Act. There is little or no reference in the Bill's supporting documents to knowledge and experience painstakingly acquired over forty years of trying to keep children safe from drowning in home swimming pools, such as the Schedule to the FoSP Act or the New Zealand Standard, NZS8500:2006.

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- 3.2 A key success factor of the Fencing of Swimming Pools (FoSP) Act has been its simplicity. The FoSP Act was a stand-alone piece of legislation that required home swimming pools to be secured from access by small children. It is a simple piece of public health legislation that sends a powerful message to the New Zealand public and pool-building industry. Toddlers have to be prevented from drowning in home swimming pools; the only scientifically proven prevention method is to fence the danger (New Zealand Government, 1987).
- 3.3 This Bill removes the current mandatory requirement for pools to be fenced, replacing this with potentially multiple, duplicated and untested measures permitted within Acceptable Solutions, Alternative Solutions, Determinations and Waivers (New Zealand Government, 2015).
- 3.4 An Acceptable Solution for isolating a home swimming pool is included in the Bill and was written and tabled without sector agreement or testing. This is a proposed new F9 section of the New Zealand Building Code (New Zealand Government, 2015).
- 3.5 There is no amendment in the Bill to require child safety to be taken into account in the Purposes of the Building Act 2004. This means that there is no requirement for a Territorial Authority or the CEO of MBIE to ensure the prevention of children drowning when permitting any further Acceptable or Alternative Solutions, Determinations or to issue Waivers. This contrasts with the provision in the FoSP Act which requires that any Exemption to the Schedule issued to a home owner for a site 'would not significantly increase the danger to young children' FoSP Act; Section 6 Clause One (New Zealand Government, 1987).
- 3.6 Scientific knowledge related to pool fencing has now advanced further to inform us that a fence that isolates the pool from the house (4 sided) and has a self-closing self-latching gate is the most effective approach to preventing pool drowning. The 'Acceptable Solution' included in the Bill does not require the scientifically proven safest option for swimming pool fencing, instead offering alternative recommendations.
- 3.7 One clause of the proposed Acceptable Standard, Clause F9.3.3 reduces the existing safety of pool fence gates. This section does not require gates to be self latching, as currently required in the FoSP Act. See below for the proposed clause:
- F9.3.3** A barrier surrounding an *immediate pool area* must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.
- Any gates must—
- (a) open away from the *pool*; and
 - (b) not be able to be readily opened by children; and
 - (c) automatically return to the closed position after use.

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3.8 Children who access the pool from inside the house are at greater risk of drowning. There is acknowledgement of this increased danger in the Bill's Regulatory Impact Statement (RIS 2013) "*Prohibiting doors opening directly into new pools is likely to be safer than requiring doors to be self-closing*" (RIS 2013 p13). There is no evidence that an alarm on a door will prevent the drowning of toddlers.

3.9 Despite the evidence of increased danger, the Bill's Acceptable performance criteria (F9.3.4) permit the use of automatically opening sliding doors to give access directly from the house into the pool area. The RIS justifications for allowing automated sliding doors or door alarms are boldly inadequate. These justifications are paraphrased as;

- there currently aren't many doors opening directly from houses on immediate pool areas at the moment... (RIS 2013 p13)
- one automatic opening door company says 'technology has improved' (RIS 2013 p10)
- five yearly inspections will be sufficient to keep door alarms from being turned off and sliding doors propped open by home owners... (RIS 2013 p13)

3.10 The Bill's Acceptable performance criteria (F9.3.4) for doors between the inside of the house and immediate pool area are less stringent than the requirements for gates. These criteria do not require the doors to open inward, away from the pool (as for gates), or be self-latching (as currently for gates). See below for the proposed clause:

F9.3.4 Where a *building* forms part of an *immediate pool area* barrier,—

- (a) doors between the *building* and the *immediate pool area* must not be able to be readily opened by children, and must either—
- emit an audible warning when the door is open; or
 - close automatically after use:
- (b) windows opening from a building into the *immediate pool area* must be constructed or positioned to restrict the passage of children.

This clause relies on a door alarm to keep small children from entering the pool area and falling into the pool. There is no evidence door alarms prevent drowning. There is no requirement for the performance of the door alarm, that it should be effective for its purpose, or of its duration or volume. There is no consideration of how the door alarm would be monitored, or responded to.

There are no performance requirements for how automatic sliding doors might be opened or be prevented from being kept open and no requirement for automatic sliding doors opening into a pool area to close promptly. It is possible such a requirement could conflict with Clause D2.3.5 (c) (iii) of the Building Code, which requires automatic doors remain open sufficiently long to enable people with disabilities to pass through. This potentially conflicts

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with the purpose of having automated doors that will close in sufficiently prompt manner to prevent small children passing unobserved though into the pool area. There is no discussion with the Disability Sector of this conflict in any supporting documents.

Windows are only required to 'restrict' but not prevent the passage of children through them. A door must be able to be used for ingress and egress from the building to be functional. There is no reason windows opening on a pool area should not be secured in a way that prevents the passage of small children through them. Windows on tall buildings are secured in this way.

3.11 The Bill relies on the failed strategy of telling people to voluntarily fence their pools, both at point of sale and between the proposed 5 yearly inspections (Gulliver P, Chalmers D, & Cousins K, 2009).

3.12 The Bill removes the existing requirement to ensure dangerous deep water around homes is made safe (FoSP Act Part 2 - Definitions). The Bill's definition of a swimming pool significantly narrows scope of this protection to only being for water 'normally for swimming' (see the Bill Section 7). This removes the need to protect small children from water (such as a muddy duck pond beside a house) that might fully submerge them when they enter and immediately hide their bodies from a frantic searcher.

This is despite data included in the 2013 RIS (page 5) that shows 13% of children who drowned outside at home in New Zealand drowned in garden ponds (see also figure one).

3.13 Under this Bill there will be fewer pool compliance inspections for pools currently being inspected three yearly. Inspection regimes are vital for maintaining the integrity of the pool fence and proper operation of the self-closing and latching gate. It is difficult to resolve this information with the proposed reduction of the frequency of inspections being announced as a safety measure. Toddler home pool drowning today occurs almost exclusively in pools that were non-compliant with the FoSP Act (CYMRC Report 2009). The contemporary danger has become compliance failure, rather than the absence of a fence.

Improperly fenced pools provide a particular danger that they may convey a false sense of security. Researchers in 1985 noted that family members and searchers may consider the noncompliant pool safe and exclude it from the immediate search (Gardiner et al., 1985) consequently children accessing inadequately fenced pools, they suggest, may spend more time under water before being found. It was suggested this could be just one of the consequences of adults falsely assuming a pool was safe when it was not.

3.14 Under this Bill Councils will no longer need to be aware of home swimming pools in their jurisdiction and there would be no need or

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requirement for Councils to look for pools (Build (Pools) Amendment Bill Clause 12 Section 222A). This makes the task of tracking the numbers of pools, and planning future inspection regimes more complex, inconsistent between Local Authorities and unreliable.

3.15 Home owners will no longer have to notify Council of their pools (FoSP Act Section 7 Clause 2 is repealed) which was previously section 7(1) of the Act and which will be repealed and not replaced (Building Pools Amendment Act Section 162E Bylaws).

3.16 There would also no longer be any positive obligation on territorial authorities to take all reasonable steps to ensure that the Act (to be within the Building Act 2004) is complied with within its district (refer section 10). The obligation removed includes searching for pools that were not known to the council via the building consent process or notification by an owner under section 7 of the Act. There are several ways such searches could be performed at little or no additional expense to councils.

3.17 There has been no consideration of the likely reduction in safety of not inspecting or fencing spa pools and hot tubs and no evidence, beyond citing the reduction in drowning under present measures, for the effectiveness of, or performance specifications for spa pool covers.

4 Lack of evidence for measures presented as ‘improving or maintaining child safety’ included in the Bill

4.1 The reduced inspection regime is claimed to increase safety without any basis. There is considerable uncertainty how many pools and spa pools exist. The General Manger, Construction and Housing Markets stated *“Given the uncertainty surrounding the estimates in this RIS, the estimates should be generally treated with caution”* (Regulatory Impact Statement page one 2013).

4.2 This caution and uncertain statistics did not prevent a reduced inspection regime. The supporting papers state that seventeen councils (approx. 20%) cover 60% of all pools, and inspect them every three years. An estimated 30 councils covering 20% of all pools do not periodically inspect them at all. Therefore, approximately 30 councils with the remaining 20% of all pools periodically inspect those pools. The government provides no details as to the periods the latter inspect the pools in their areas.

4.3 Moving to five yearly inspections, as the Bill proposes, is a detrimental step for 60% of pools, enlarging the period by two years. It is unclear whether a move to five-yearly inspections extends or shortens the inspections periods for the middle 20%. Therefore the assertion that the remaining 20% of pools with no periodic inspection will result in an estimated avoidance of six drownings per 10 years seems without any basis whatsoever.

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4.4 Auckland Council currently inspect pools three yearly and report a 50% failure rate on first inspection. Most failures are for gates and are fixed promptly at the time of inspection (personal Communication Auckland Council 2015). This suggests three yearly inspections are both critical for safety and cost effective.

4.5 Voluntary pool fencing compliance failed in the past. The Bill's supporting documents claim the provision of leaflets during the interim period between inspections will prompt pool owners to maintain safety of their pool fences. This claim is included without any evidence of effectiveness, attempt at evaluation or cost estimates.

4.6 The Bill also requires retailers to distribute warning notices at point of sale about pool fences, without any evidence this will prevent toddler drowning. Public health messaging is a well-developed science, to be effective it must be executed and delivered to a high level of expertise with well-considered evaluation ensuring messaging is on target and effective. There is no evidence that in the absence of effectively enforced compliance measures, including a leaflet advising people to fence their pool has any value for reducing the incidence of toddler drowning (MacKay M, Vincenten J, Brussoni M, & Towner L, 2006)

5. The Bill proposes performance measures for consenting pools as safe, without evidence for their performance

5.1 The effectiveness of the FoSP Act (1989) and its Schedule have been demonstrated through reductions in drowning over years of data collection and monitoring. As a now rare but still catastrophic event, toddler pool drowning does not lend itself to testing or surveillance over a small sample.

5.2 Prior to the introduction of the Fencing of Swimming Pools Act Schedule, methods of preventing children accessing pools were ergonomically tested (Nixon, Pearn, & Petrie, 1979). Subsequently these strategies have been refined using information from large population based studies of drowning. This research indicates the numbers of toddlers drowning could be further reduced with increased compliance inspections and the requirement for pools to be installed with fencing that isolates the pool from the interior of the house (Gulliver P et al., 2009; Queensland Government, 2010; Thompson & Rivara, 1998).

5.3 In contrast, the performance criteria in the proposed Acceptable Solution Clause F9 have not undergone any performance testing, nor are subject to any agreement as to their effectiveness by experts or sector consensus. Neither is there any funding nor process specified that would provide for independent testing. The Bill also permits multiple Acceptable Solutions to be developed and because the Bill makes no changes to the Purpose of the Building Act, child

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safety does not have to be taken into account when developing any other Acceptable Solutions, nor for the development of Alternative Solutions, issuing of Determinations nor for the granting of Waivers.

- 5.4 The Bill changes the Swimming Pool consent process in a significant way without discussion or analyses. Under the Bill, if a Council declines to consent an application for a pool and the owner wishes to proceed, the pool owner will no longer be offered a re-inspection by the Council (Special Exemption). They will be required to apply to MBIE for a Determination (New Zealand Government, 2015). There has been no analysis or discussion of Special Exemptions and the reasons they have been granted, or declined, nor any explanation as to why the Special Exemption process has been removed.
- 5.5 The replacement process enables the Chief Executive of MBIE to issue a Waiver for the Consent when there is no explicit requirement in the Building Act 2004 for MBIE to take child safety into account.
- 5.6 The Alternative Solution process is also of concern. Alternative solutions can be applied for and multiple performance-based Standards for pool safety can be developed by any interested party and approved for use by Councils and MBIE.
- 5.7 This places a burden on Councils to assess whether such Alternative Solutions will, once built, comply with the Building Code and will effectively restrict access to pools by children. The Bill provides no requirement that any Alternative methods agreed by Councils ensures the safety of swimming pools or that the effectiveness of barriers are tested by experts in child health, water safety or experienced in swimming pool fencing enforcement. This process has the potential to allow inadequately tested products and multiple variations of 'pool barriers' to be accepted by different Councils in different locations. Compliance and compliance monitoring will be much more complex, difficult to enforce consistently and expensive to conduct adequately.
- 5.8 An 'Alternative Solution', once accepted by an individual Council as the 'solution' for making the pool safe at that site can be used in other locations. There has been no consideration of the cumulative impact on child safety of multiple Alternative solutions being granted. There is no consideration in the Bill for an appropriate response when a particular product or combination of products might be suitable for one site, as an exceptional circumstance, but not for another.
- 5.9 There has been no costing or economic impact assessment included in either of the Regulatory Impact Statements for independent performance testing of different types of pool barriers and the sites they are located within; or the cost of the applications for Determinations, Acceptable or Alternative solutions; or for Waivers. It is not stated whether the cost of testing for Determinations will be met by home owners, industry, ratepayers or MBIE.
- 5.10 A complaint arising from the leaky building crisis, and a justification for the recent reforms to the Building Act 2004, is the inability and undesirability of

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individual Councils assessing and agreeing Alternative solutions. This is not accounted for in the Bill.

5.11 The Government is repeating the same mistakes deregulating this statute and moving to a performance-based standard as occurred with the changes to the Building Act 1991. In addition to the Hunn Report¹, there have been many academic articles² and court decisions laying blame, in part or whole, to the move away from prescriptive requirements to performance-based standards that cannot be, or have been inadequately tested.

5.12 While there have been no deaths directly attributable to the leaky building crisis, the economic effects have been significant (predicted in 2009 at \$11.3 billion).³ Lessons learnt from the leaky building crisis have not solved the problems with performance-based standards. It is not uncommon for new homes⁴, old homes that are second time leaky homes⁵, and a few examples of third time leaky homes, being dealt with by the courts and Weathertight Homes Tribunal (HT). This is despite the previous remediation being consented, inspected and certified under the 'improved' Building Code and Building Act 2004. By way of example, the following cases relate to second time leaky homes/buildings:

- Zagorski, Auckland: [2014] NZHC 475, being an unsuccessful appeal from the WHT.
- Fleetwood Apartments, Auckland: [2015] NZHC 1803.
- Cutters Cove, Tauranga: CIV 2013-470-488.
- Devany v Wellington City Council [2015] NZHC 1087

5.13 Anecdotally, given that up to 90% of such claims are resolved in mediation, recognised experts in this field have confirmed numerous incidents of new, second time, and to a lesser extent, third time leaky homes notwithstanding improvements to the Building Code.⁶ The abject failure of performance-based Standards in the New Zealand Building sector cannot be overemphasised.

¹ 'Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority', 31 August 2002, D Hunn, I Bond and D Kernohan. <http://www.building.govt.nz/ws-reports#landmark>

² For example 'Regulatory Lessons from the Leaky Home Experience', B Easton, Policy Quarterly, Vol 6, Issue 2, May 2010, page 42; 'Best Practice Regulation: Setting Targets and Detecting Vulnerabilities', Dr P Mumford, Policy Quarterly, Vol 7, Issue 3, August 2011, page 36; 'Weathertight Homes: What lessons can be drawn?' J Zucollo & M Hensen, NZIER, Paper for NZAE Conference, Palmerston North, June 2012, and 'Regulatory Reform Toolkit: Chapter 12 – Regulating the Building Industry – A Case of Regulatory Failure', B Layton, Victoria University (www.regulatorytoolkit.ac.nz/resources/papers/book-1/)

³ PricewaterhouseCoopers 'Weathertightness – Estimating the Cost' (prepared for the Department of Building and Housing, 2009).

⁴ Residential homes or buildings consented under the Building Act 2004.

⁵ Refer http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11435690

⁶ The experts canvassed included Dr Kelvin Walls, Building Code Consultants Limited; William Hursthouse, Building Consultants Limited; Thomas Wutzler, Helfen Ltd; Phillip Grigg, expert; Stuart Robertson, Partner, Kensington Swan. In providing this information, these experts are neither supporting nor opposing this submissions.

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6 Inconsistent and incomplete economic analyses in the Bill's supporting documents

- 6.1 In 2013 the Minister announced this Bill was being drafted to “strike a balance between child safety and compliance cost” (Hon Maurice Williamson, 2013). This suggests the Minister considered the FoSP Act legislation that might protect children, but only with unacceptable compliance cost. It was anticipated economic analyses would be carefully presented in the RIS (2013 and 2015) and Bill's explanatory notes. This is not the case.
- 6.2 Recent industry advocacy has recruited support for the Bill on the basis it is an opportunity for increasing sales of pools and associated products, *“As an industry, we are formulating a submission to the Select Committee to ensure the stated objective of the new legislation, being to “make pool safety compliance easier” is achieved, ensuring the NZ market downturn since 2007, is reversed”* (email correspondence to Pool Building Industry Members 2015). If a purpose of the Bill was to promote economic activity, there is no comment about any positive economic impact or assessment of its economic significance for business in the Bill's Regulatory Impact Statements or Explanatory Notes (New Zealand Government, 2015)
- 6.3 The first and second Regulatory Impact Statements (RIS 2013 and RIS 2015) contain confusing notations of Council administrative costs. These range from saying there is no cost, because “Council generally recover the cost of inspections from pool owners” (page 18); to saying “by moving to a five year inspection regime, Councils will save an estimated \$4 million a year” (page 21). Contradicting this, notes for the same Option later in the document suggest Councils will save \$11 million on reduced inspections (page 22).
- 6.4 Costs and benefits to home owners are similarly unclear in the RIS (2013). Costs estimated for monitoring and ensuring pool safety on behalf of both Council and private homes owners are confused. The 2013 RIS suggests fencing spa pools could collectively cost home owners between \$1 million to fence (which is saved if they do not have to fence) to an eye watering \$300 million if they do (RIS page 28). Given there are no reliable indications of how many spa pools exist, or of fencing costs for these pools, it is unclear how these estimations can have been calculated.
- 6.5 There is no costing for the testing and administration of Acceptable or Alternative solution approvals or applications for Determinations included in either of the Regulatory Impact Statements or documents accompanying the Bill. The Bill's Explanatory Notes (2015) make no direct mention of these figures but introduces a new figure of an estimated \$17 million a year of savings due to private property owners not needing to fence spa pools and councils not requiring the same levels of compliance. It is unclear how this \$17million was estimated and it is not stated whether these savings apply to industry, home owners or Councils.

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- 6.6 The Bill's Regulatory Impact statements and explanatory notes exclude any acknowledgment of the incidence and impact of non-fatal drowning incidents, which can result in the child experiencing devastating and lifelong brain damage.
- 6.7 When death has been avoided due to the prompt rescue of a submerged toddler, there is still a significant incidence of morbidity. For every death by drowning in a home swimming pool, an estimated seven children are hospitalised because of an accidental submersion incident. Furthermore, for those hospitalised following such an event, one in five suffer significant lifelong neurological impairment due to lack of oxygen (Queensland Government, 2010). None of these costs have been mentioned in either RIS or the Bill's explanatory notes (Ministry of Business Innovation and Employment (MBIE) Construction Market Policy team, 2013; New Zealand Government, 2015) .
- 6.8 The Bill introduces revenue collection through fines as a replacement for Councils being able to prosecute for failure to comply. There are no meaningful cost analyses, explanations or adjustments for this new provision.
- 6.9 Another example of incomplete economic analyses is the impact of fines on pool owners and their capacity to make their pool compliant. Fines are only a deterrent if owners are aware the fine might be incurred and as long as the cost of the fine is greater than the benefit of ignoring the penalty. In some instances, for financially struggling home owners in difficult circumstances, the financial penalty may inhibit or prevent the funding of a remedy. There is no assessment of this in either Regulatory Impact Statement.

7 Unclear justification for changes

- 7.1 The Bill was presented as improving child safety (Hon Williamson 2013 media release) yet child safety would be demonstrably reduced with its enactment.
- 7.2 The current FoSP Act requirements are well understood and applied despite claims of confusion, cost and duplication little evidence is provided of this. There has been widespread agreement about implementing the FoSP Act, increasing public acceptance and a striking reduction of child drowning.
- 7.3 Industry representatives, Councils, architects, consumers and child safety advocates have successfully worked together to create better pool fencing guidance. In 2006 this group produced the Pool Fencing Standard NZS8500 2006. This document includes guidance notes and diagrams (Standards New Zealand, 2006). Auckland Council has produced a Pool Fencing Code which clarifies the interaction between the Act, the Schedule, the Building Code and the Building Act 2004. This also provides guidance to owners as to their ongoing obligations. All this collaborative activity will become redundant under the proposed Bill.

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7.4 The definition of the immediate pool area has historically been a subject of discussion. However the case of *Waitakere City Council v Hickman* now provides sufficient guidance for interpretation. It is unclear why this definition has been changed in the Bill as there is no substantive difference between the definitions in the FoSP Act and the Bill.

The FoSP Act defines the immediate pool area as *“the 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 or purposes carried on in conjunction with the use of the pool”*.

The Bill defines the immediate pool area as the *“the 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”*.

7.5 The FoSP Act applies to children aged 6 years and younger. The Bill changes this to be children 5 years of age and younger. This may be a typographical error, or intentional. There is no explanation or justification for this change.

8 Further ‘clause by clause’ concerns

This section considers other short comings in the Bill noted in our analyses.

8.1 Purposes of the Building Act 2004: there is no clause in the Bill that seeks to amend Section 3 Purposes of the Building Act 2004. Currently this is focussed solely on buildings and building work. This Section needs be changed to include child safety and the prevention of drowning as a purpose for the Building Act. Without such change the Bill reduces child safety provisions.

8.2 Building (Pools) Amendment Bill definitions: “Definition of a Spa pool”— Clause 5 the definition used for a Spa pool differs from that of ‘hot tub’. Other than the obvious difference of the Spa Pool incorporating a water jet or an aeration system, there is no reason as to why the same requirement as to sidewalls does not apply to both hot tubs and spa pools. .

8.3 Building (Pools) Amendment Bill: Section 162C(3): Listing the persons in this section has created confusion and difficulties. Primarily this arises from the definition of ‘abode or place of abode’ in clause 5(b) of the Bill, which is circular. The effect of section 165C(3) is that for a rest home ‘the occupier of the property...’ would include the elderly resident. Indeed, where the rest home operates under a freehold or leasehold title arrangement with its residents (albeit with exclusive first right of refusal to repurchase) that resident will find him or herself liable under the section 162C. The same can be said for guests at a hotel or a motel, or patients convalescing at a home or nursing home. In fact a patient may have a physical or mental impairment and be unable to comply with the requirements of section 162C, but still be liable.

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8.4 Building (Pools) Amendment Bill: New section 162A Purpose: the proposed wording does not cover the situation of preventing injury from a fall into an empty or partially empty pool.

8.5 Building (Pools) Amendment Bill: Section 162B: The Bill provides the opportunity to expand the focus beyond a fatality from drowning in minimum depth of water (400 mm). An empty in-ground concrete swimming pool of any depth poses a health and safety hazard to both adults and children. Currently the application of the subpart (and restricting of access) only applies to 'pools with a maximum depth of water of 400 mm or more'. In the Schedule to the Bill it is proposed to delete from clause F4 of the Building Code (dealing with safety from falling) clause **F4.3.3** 'Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.' thereby further eroding the prevention of harm from falling.

8.6 Building (Pools) Amendment Bill: Clause 9, section 165: as with new section 162C(1) above, the proposed new subsection (g) does not address the health and safety issues. If, as will presumably be the case in every occasion, the restricted access physical barriers are substandard or missing, then draining an in-ground concrete swimming pool of water will only create a new hazard. The existing subsection (f) includes the phrase 'it may direct that the site be made safe immediately'. A similar provision should be added to the proposed subsection (g) otherwise without it there could be a defective barrier, an empty pool and a young child (or adult) could die from a fall

8.7 Building (Pools) Amendment Bill: Clause 12, section 222A: The issues with this section are the absence of any requirement for the council to look for pools of which it currently has no knowledge and the reference to building consent in subsection (b). As to subsection (b), it appears unnecessary to restrict existing pools to ones 'that did not require a building consent'.

9. Conclusion

9.1 This submission requests the Local Government and Environment Select Committee reject the Building (Pool) Amendment Bill 2015 (the Bill) in its current form and that Government either abandons the Bill or refers it for major redrafting.

Members of the Paediatric Society submit the Bill is poorly suited as replacement legislation for the FoSP Act as it would result in a significant reduction in swimming pool safety, thus resulting in increased toddler death and permanent brain injury.

Specific issues are;

- Child safety provisions currently provided are significantly reduced by this Bill – which contravenes New Zealand's obligations under international Treaty;

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- There is no acknowledgment or inclusion of current science for best practice safety measure to prevent toddler drowning in home pools (the use of four sided isolation pool fencing);
- The Bill proposes performance based measures for consenting pools without any evidence of performance tests or sector agreement on the efficacy of their performance;
- Economic, cost and policy analyses in the Regulatory Impact Statements are inconsistent and incomplete;
- Clause by clause analyses show other unaddressed public safety issues and drafting errors.

We request this Bill is withdrawn or sent for major redrafting and request the opportunity to make an oral submission to the Select Committee.

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