



Department of  
Building and Housing  
*Te Tari Kaupapa Whare*

Discussion document

# Evaluation of the Fencing of Swimming Pools Act 1987

March 2008





# Foreword

The Fencing of Swimming Pools Act 1987 ('the Act') is a small but important piece of legislation intended to promote the safety of New Zealand's young children around swimming pools and spa pools.

Every year in New Zealand, an average of four children under six fall into a swimming pool and drown. Often these tragedies could have been prevented had the pool been properly fenced.

Since the Act came into force 20 years ago there has been a significant reduction in the number of drownings. The Government recognises the importance of this legislation operating as effectively as possible and has committed to an evaluation of the Act.

This legislation links directly to the Building Act 2004 as performance standards for fencing are laid out in the Building Regulations 1992. For this reason, responsibility for the administration of the Act moved to the Department of Building and Housing ('the Department') from the Department of Internal Affairs on 20 October 2006.

The evaluation of the Act will not question the existence of the Act. The statistics clearly show that, while numbers of swimming pools have increased, drownings have continued to fall. In doing this evaluation, the Department wants to take proper account of lessons learned in the past 20 years and ensure the legislation continues to serve its purpose in the future.

This discussion document is the first of two papers seeking your feedback to assist the Department with the evaluation of the Fencing of Swimming Pools Act 1987. Your views on these issues will help us improve the effectiveness of the Act in promoting the safety of young children around swimming pools. Your feedback is most welcome, and should be submitted by 30 June 2008.



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**Department of Building and Housing**

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# The structure of this discussion document

## **PURPOSE**

In the *Purpose* section you will find information about the purpose of this discussion document and its role in the overall evaluation of the Fencing of Swimming Pools Act 1987.

## **INTRODUCTION**

In the *Introduction* section you will find information about the Act and the need for fencing swimming pools, including how it links into the Building Act 2004 and the Building Regulations 1992.

## **BACKGROUND**

In the *Background* section you will find the context for the Act, including current statistics and information on deaths of young children from drowning.

## **ISSUES**

The *Issues* section provides a summary table of the issues that have been raised with the Fencing of Swimming Pools Act, followed by a more detailed analysis of the issues that the Department is seeking your views on.

## **SUBMISSIONS**

The *Submissions* section provides you with an opportunity to make written comments on the issues raised in this discussion document by way of a submission. It explains how to make a submission and a submission form is included for you to complete and return to the Department by 30 June 2008.

## **APPENDICES**

### **APPENDIX A: FENCING OF SWIMMING POOLS ACT 1987**

### **APPENDIX B: REGULATORY IMPACT ANALYSIS REQUIREMENTS**

# Purpose

The aim of the evaluation of the Act is to further reduce drownings by improving compliance and enforcement of the Act and also to:

- assess the current risks posed to young children under the existing provisions of the Act
- improve uniformity in the interpretation and application of the Act by territorial authorities across New Zealand
- provide more certainty to pool owners and territorial authorities on their responsibilities and obligations under the Act
- increase public awareness of pool owners' responsibilities under the Act.

At this early stage we are aware of a number of issues with the Act. Before we make proposals to address these issues, we want to be sure that we have understood them fully and identified the different options for resolving them.

As someone affected by or involved in the operation of the Act, this paper describes and seeks your feedback on:

- the issues and whether they have been accurately defined
- options to resolve the issues
- the impact of the options on pool owners, territorial authorities and the public as a whole
- any other issues affecting compliance with, or enforcement of, the Act.

The closing date for submissions is 30 June 2008. The feedback will be analysed and further research carried out through 2008 in conjunction with key stakeholders. Following this, proposals will be made on the preferred options for resolving some or all of the issues.

A second paper is planned in early 2009 to seek your views on proposals developed from the consultation.

# Introduction

## **WHAT IS THE FENCING OF SWIMMING POOLS ACT 1987?**

The Fencing of Swimming Pools Act 1987 was introduced following general concern about the number of children under six drowning in swimming pools.

The Act requires swimming pools and spa pools to be fenced except where an exemption applies. It states what types of pool must be fenced and how they must be fenced. It also places an obligation on territorial authorities to ensure that pool owners comply with the Act.

Although the Act does not have a stated purpose within its text, the Act was intended to promote the safety of young children around swimming pools. The evaluation of the Act will not question the existence of the Act, but will look at ways to improve its effectiveness.

The Act is closely linked into the Building Act 2004. Figure 1 (on page 6) plots how the two Acts interface and shows that compliance with the Act is dependent on compliance with the Building Act 2004.

A building consent is required to:

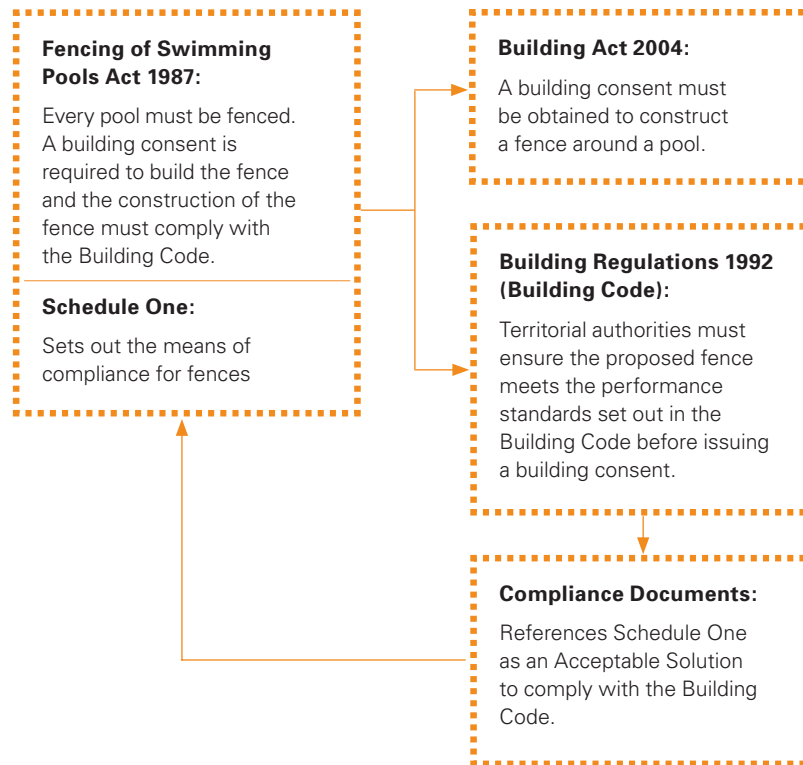
- build or install a pool
- fence an existing pool.

To obtain a building consent, the fence design must satisfy the performance standards of the Building Code (set out in the Building Regulations 1992). One way to do this is to use Compliance Documents<sup>1</sup> which reference Schedule One of the Act.

Someone building a swimming pool must comply with both the Fencing of Swimming Pools Act 1987 and the Building Act 2004. The effect of this is to ensure that territorial authorities are aware of all new pools being built or installed in their area so they can monitor ongoing compliance with fencing requirements.

<sup>1</sup> The Department of Building and Housing publishes Compliance Documents. These set out a method of complying with a specific requirement of the Building Code. Compliance Documents are commonly followed in domestic building projects because they provide a straightforward 'building recipe'.

**Figure 1: Interface between the Act and Building Act 2004**



The Act enables territorial authorities to:

- inspect for fences on existing pools built prior to the Building Act 1991 for compliance
- inspect new pools during the building process to ensure compliance with both the Building Act 2004 and the Fencing of Swimming Pools Act 1987
- make subsequent inspections on all pools to ensure ongoing compliance with the Fencing of Swimming Pools Act 1987 and the Building Code
- prosecute pool owners who fail to erect (where one does not exist) or maintain a compliant fence around their pool.

A key purpose of the Act is to ensure that pool owners (whether they built the pool or inherited it from the previous land owner) do not allow fences to fall into a state of disrepair, enabling a young child to access the pool. Pools incorporated entirely within a domestic house are exempt from fencing requirements.

## BACKGROUND

In 1986, pool fencing was deemed the most effective means of preventing drownings of pre-school children in private swimming pools. The number of unnecessary deaths from drownings in private swimming pools provided the impetus for Parliament to enact the Fencing of Swimming Pools Act 1987. Statistics from Water Safety New Zealand<sup>2</sup> show drownings of children under six years old have decreased significantly since the introduction of the Act.

**TABLE 1: COMPARISON OF DROWNING FIGURES FOR CHILDREN UNDER SIX IN SWIMMING POOLS (INCLUDING SPA POOLS)**

<b>PERIOD 1980 – 1986 (7 YEARS PRIOR TO THE ACT)</b>	<b>PERIOD 1987 – 1996 (DECADE POST ACT)</b>	<b>PERIOD 1997 – 2006 (THE LAST DECADE)</b>
81	68	44

Between 1980 and 2006, 193 children under six years old drowned in swimming and spa pools in New Zealand. Of these, 162 drownings were in private pools (74 in the seven years prior to the Act and 88 in the 20 years following its introduction).

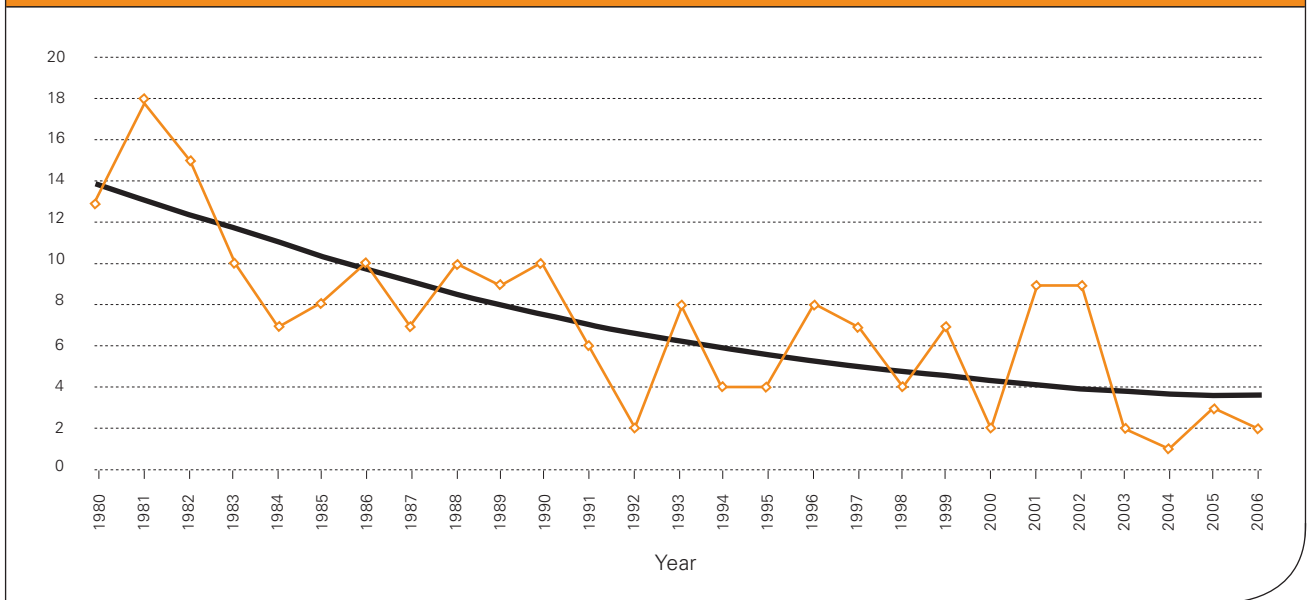
The effect of the Act can be seen in Figure 2 (on page 8) which plots the trend over the last 27 years. While the precise number of swimming pools (including spa pools) in New Zealand is not known, it is estimated that they have increased from around 57,593 in 1996 to 73,670 in 2006<sup>3</sup> (there are no estimates on the number of pools prior to 1996).

The gradual decline in the number of children drowning under six years old shows that the Act has had an effect, particularly bearing in mind the increase in the number of swimming pools by an estimated 30% in the last 10 years alone.

<sup>2</sup> Water Safety New Zealand Inc is a national organisation responsible for educating New Zealanders on water safety issues and raising public awareness of dangers associated with water. The organisation maintains a comprehensive database of statistics on drowning incidents.

<sup>3</sup> Based on a study in January 2007 by the University of Otago's Injury Prevention Research Unit into the compliance and enforcement of the Fencing of Swimming Pools Act 1987 commissioned by Water Safety New Zealand. The study estimated 16,600 new pools were constructed in the last 10 years from data provided by territorial authorities.

**FIGURE 2: NUMBER OF SWIMMING POOL DROWNINGS BY YEAR SINCE RECORDS BEGAN**



Although the statistics have shown a reduction in drowning numbers, children are still drowning.

There has been criticism of the clarity of parts of the Act (see Table 2: Summary of Issues (on page 10). Since the Act came into force, various arms of the Judiciary (namely the High Court and Coroners Court), have requested urgent attention by government to address discrepancies and ambiguities. Territorial authorities have also said they face difficulties enforcing the Act effectively because the Act is not clear and because they do not have the powers and resources they need to force pool owners to comply. Consequentially, pool owners have said this uncertainty has led to inconsistent and unfair enforcement of the Act.

Following the transfer of the administration for the Act to the Department in October 2006, the Department agreed with the Minister for Building and Construction a programme of work to address these issues. Once the evaluation is complete, the Department will report its findings back to the Minister.

# Problem identification

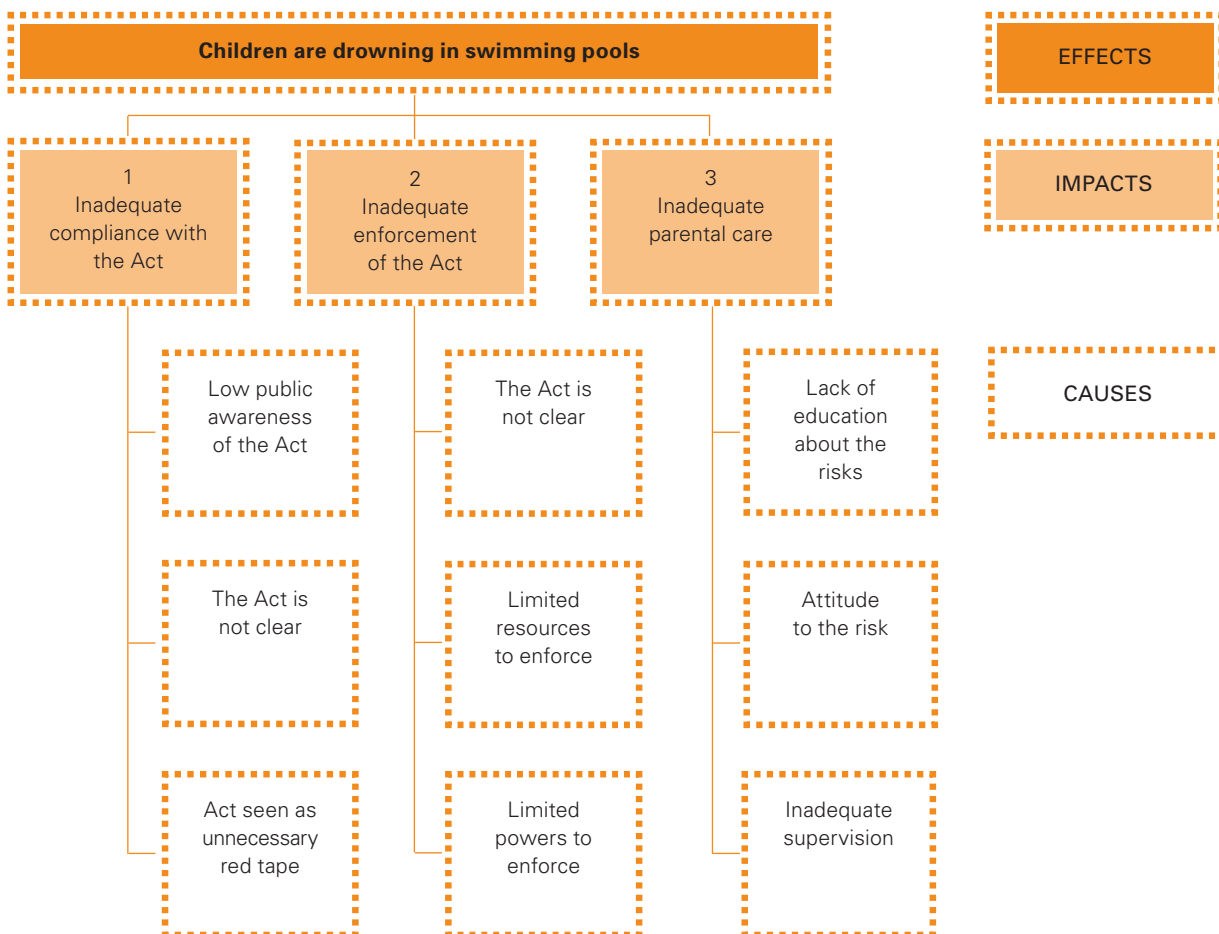
The reason the law requires people to fence their swimming pools is to promote the safety of young children around swimming pools. The number of children under six years old drowning in swimming pools has reduced from an average of 11.5 drownings per year in the seven years before the Act, to an average of four drownings per year in the last seven years.

However, on average four children under six years old are still drowning each year. By addressing the issues with the Act and how they impact on the safety of children around swimming pools the Act may be made even more effective. We have identified nine main causes why young children continue to drown in swimming pools and the impact this has on their safety around swimming pools. Figure 3 identifies the impact of the causes that lead to drownings.

## QUESTIONS

Q Do you agree with this breakdown of the causes of child drownings and, if not, why not? Have we missed anything?

**Figure 3: reasons for children drowning in swimming pools**



# Issues

The evaluation of the Act will not question the existence or purpose of the Act. Statistics show the numbers of drownings have continued to fall steadily since 1987. However, children are still drowning and the Department is aware there are operational issues around compliance and enforcement. The following is a table summarising the issues we would like your feedback on.

**Table 2: Summary of Issues**

	ISSUE	SUMMARY
1	Restricting the access of young children to swimming pools	This section begins a discussion on whether fencing is still the best means of keeping young children safe around swimming pools. It discusses the various methods of restricting children's access to swimming pools outlined in a new New Zealand Standard, and what changes would need to be made to the Act to reference all the changes.
2	Public awareness of the Act.	This section addresses the perceived issue of how low public awareness of pool owners' obligations under the Act is affecting compliance levels.
3	Section 2 and 5 interpretation of 'swimming pool'	This section looks at concerns raised by pool owners and territorial authorities that sometimes it is difficult to determine whether a pool is a swimming pool for the purposes of the Act and therefore requires fencing.
4	Section 2 interpretation of 'immediate pool area'	This section is a discussion around difficulties in determining what should be fenced and what should remain outside the fenced pool area. For example, barbecues, a dining area, a children's play area.
5	Boundary fencing	This section looks at the issue of whether fencing the boundary of a property satisfies the requirements of the Act to fence the pool.
6	Ready-made pools	This section looks at issues to do with ready-made pools. These are often installed without adherence to either the Act or the Building Act 2004. Territorial authorities have little or no way of knowing how many properties have ready-made pools in their area so they can enforce the legislation.
7	Non-notification of pools	This section deal with problems experienced by territorial authorities in enforcing the Act when they are not notified of the existence of pools in their area.
8	Records	This section deals with record-keeping. Many territorial authorities do not have systems for recording the whereabouts of swimming pools in their area that need to be inspected.
9	Re-inspection	This section deals with re-inspection issues. Not all territorial authorities have a policy to re-inspect pool fencing for ongoing compliance with the Act.
10	Territorial authorities' powers	This section addresses the need for greater powers of enforcement. Territorial authorities have expressed a need for more powers to enforce the Act and ensure pool owners meet their obligations.

## ANALYSIS OF ISSUES

### 1 Restricting the access of young children to swimming pools

In this section we begin a discussion on whether fencing should be the only means of protecting young children around swimming pools or whether there are alternatives that are equally (or more) effective in preventing young children from drowning.

The Act in its current form is centred on the need for fencing around swimming pools. There is no clear objective or purpose statement in the Act, although it is implicit that the reason for fencing is to prevent unsupervised access to swimming pools. The intention of this discussion is not to do away with fences, but to look at widening the options and shifting the focus away from fences and towards what the Act is trying to achieve: ensuring swimming pools do not pose a drowning risk to young children.

Similarly, the Building Code sets performance standards only for fences as a means of achieving compliance with the Act. The performance-based Code sets out the standard that must be achieved, provides an Acceptable Solution to achieving the standard, but leaves the way open for alternative fencing solutions to meet the standard. There is an opportunity to shift the focus away from performance standards for fences and instead provide a wider performance standard in line with the purpose of the Act, ie, to put in place safety systems around pools that will prevent unsupervised access to swimming pools and reduce drownings.

The Act has been in place for 20 years and since then there have been changes in the way pools are designed and built, how they are used and the safety systems to prevent drowning. This evaluation is an opportunity to look at alternatives to fencing and assess whether any of these are viable.

The New Zealand Standard NZS 8500 takes a first step in this direction. It talks about the use of lockable lids for spa pools as an alternative to fencing. Also available on the market are rigid retractable covers for swimming pools. It is solutions like these we are seeking your feedback on.

In addition we are looking at whether to reference the Standard in a Compliance Document. This would give a benchmark for the performance standard set by the Code. The Standard cannot currently be referenced because the Act clearly states that a pool must be 'fenced by a fence', whereas the Standard enables spa pool owners to do away with fences if they have a lockable lid. To reference the Standard, the Act must be changed to allow alternatives to fencing.

If the Act is changed to allow alternatives to fencing, some of the following changes will need to be made.

- 1) The name of the Act would need to change to reflect the 'purpose' rather than the method of compliance (as it currently does).
- 2) The Act would need to state clearly its purpose (to ensure pool owners restrict young children accessing their pool) and objectives (to prevent drowning).
- 3) The wording of the Act would need to change to be in line with the purpose of the Act.
- 4) The Building Code would need to set clear performance standards to enable territorial authorities to assess the validity of alternatives.

QUESTIONS
Q1.1 Is fencing the most effective means of preventing young children from drowning?
Q1.2 What alternatives to fencing are available? What are the advantages and disadvantages of these? How does the drowning risk compare to fencing a pool?
Q1.3 What <b>advantages</b> do you anticipate from shifting the focus from fencing to a purpose statement requiring pool owners to restrict access to the pool to prevent drowning?
Q1.4 What <b>disadvantages</b> do you anticipate from shifting the focus from fencing to a purpose statement requiring pool owners to restrict access to the pool to prevent drowning?
Q1.5 What costs would be involved for territorial authorities, pool owners and/or anyone else in making this change?
Q1.6 Are there other impacts we should consider in making this change?
Q1.7 Are there other options that should be considered?

## 2 Public awareness

We have identified that one of the major barriers to compliance with the Fencing of Swimming Pools Act 1987 is the low level of public awareness of the law. This was supported in a recent report (published in January 2007) commissioned by Water Safety New Zealand which surveyed territorial authorities on compliance and enforcement with the Act.

In the survey, territorial authorities were asked to rank six commonly given reasons for not fencing a pool. Lack of knowledge of the law was the second most common reason given by pool owners.

The reasons given ranked from most to least common were:

- lack of fencing options
- lack of knowledge of the law
- cost of fencing
- presence of other unfenced water hazards on the property
- owner doesn't agree with the law
- no pressure from the local authority to comply.

We would like to understand why public awareness of pool owners' obligations to install and maintain a fence around their pools is low.

QUESTIONS
Q2.1 Do you agree that there is low public awareness of pool owners' responsibilities under the Act?
Q2.2 What evidence is available to support this view?
Q2.3 What do you think of the following options for increasing public awareness? <ul style="list-style-type: none"> <li>• More information available on the Act</li> <li>• A clearly stated 'purpose' in the Act</li> <li>• Information on the Act distributed to pool owners by territorial authorities, designers, retailers and builders of pools and pool fencing</li> <li>• Incorporating the Act into the Building Act 2004</li> </ul>
Q2.4 What other options are there to increase public awareness?
Q2.5 What is your preferred option and why?
Q2.6 What would be the impact of your answer to the last question on pool owners, territorial authorities, and the public as a whole (including advantages and disadvantages and estimates of any financial impacts)?
Q2.7 What would be the impact if this issue is not addressed?

### 3 Interpretation of 'swimming pool':

The Act requires pool owners to erect and maintain a fence around their swimming pool. We have been told that sometimes it is hard to determine whether a pool is a swimming pool for the purposes of complying with the Act. Examples might include garden ponds, lakes or other water features.

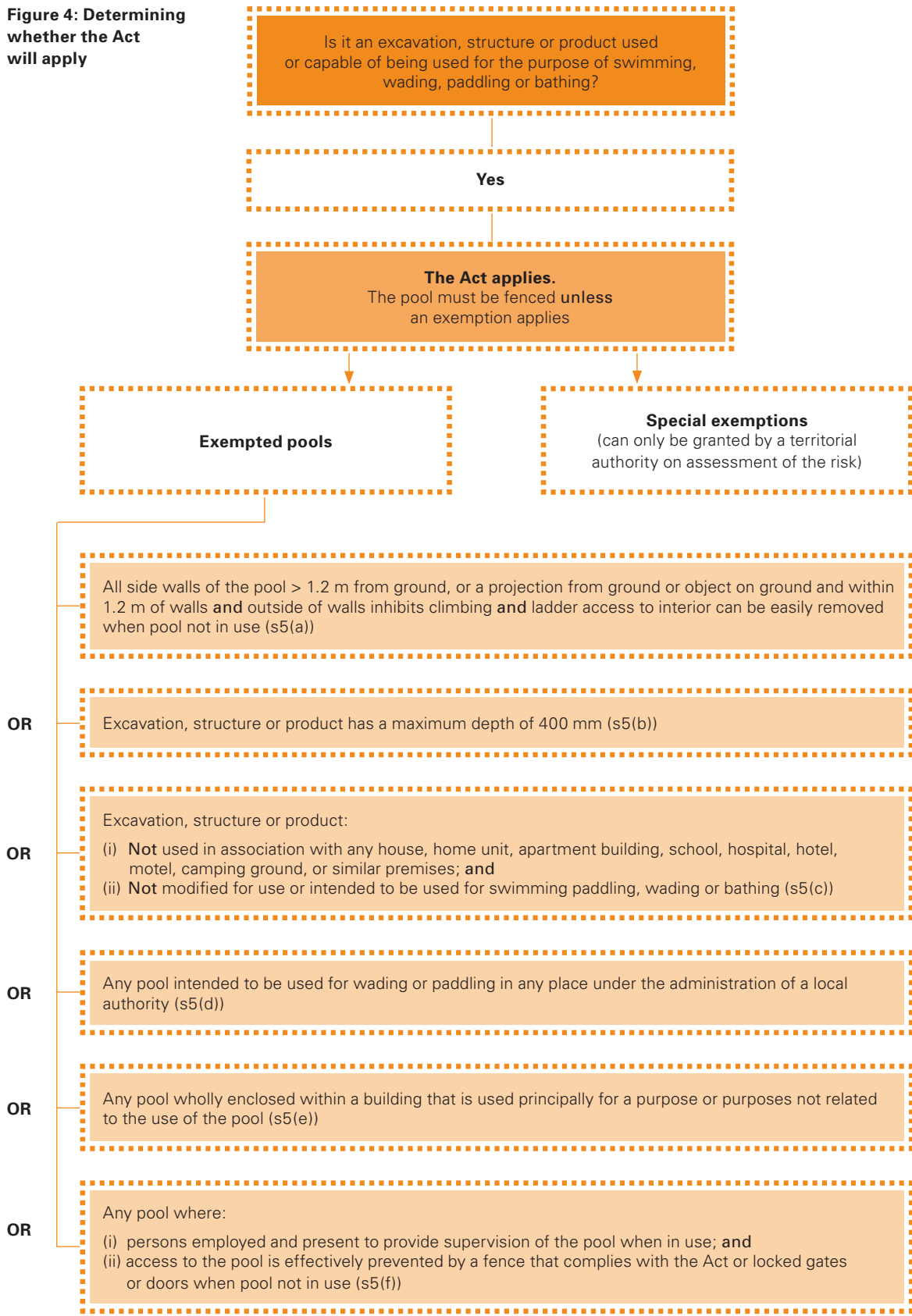
The Act defines 'swimming pool and pool' as 'an excavation, structure or product that is used or is capable of being used for the purpose of swimming, wading, paddling or bathing; and includes any such excavation, structure or product, that is a spa pool'.

The intention is to cast the definition broadly as children drown in all manner of pools.

The Act requires all pools caught by the definition to have a fence unless the pool is one of the six types exempted in section 5 of the Act, or the pool owner obtains a special exemption from their territorial authority (local council).

Figure 4 (on page 14) shows the process for determining whether the Act will apply.

**Figure 4: Determining whether the Act will apply**



We understand the issue is about the determination of whether a pool must be fenced. The effect is different interpretations of the Act being applied. For example, a pool that may be exempt in one area is not exempt in another.

QUESTIONS
Q3.1 Do you agree that clarity of the law and inconsistent application of it are issues? if so, please provide examples of types of pools where the Act is not clear or where there has been inconsistent application of the Act.
Q3.2 What do you think of the following options for improving clarity? <ul style="list-style-type: none"> <li>• Amending the Act to simplify the test</li> <li>• More information available on the Act</li> <li>• Information on the Act distributed to pool owners by territorial authorities, designers, retailers and builders of pools and pool fencing</li> </ul>
Q3.3 What other options are there to improve clarity?
Q3.4 What is your preferred option and why?
Q3.5 What would be the impact of your answers on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?
Q3.6 Are there pools that should not require fencing? What are these and why?
Q3.7 What would be the impact of your answer on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?
Q3.8 What would be the impact if this issue is not addressed?

#### 4 Interpretation of ‘immediate pool area’:

The Act requires pool owners to ensure some or all of the immediate pool area, including all of the pool, is fenced. Section 2 of the Act defines the ‘immediate pool area’ as:

the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool.

In 1999, the Department of Internal Affairs produced a guidance document for territorial authorities to help them determine the boundaries of the immediate pool area. This said the ‘immediate pool area’ may include the pool, its decking, and any changing sheds, but not a vegetable garden, a clothes-line, a barbecue area, a children’s sandpit, or a slide or swing. The fence should prevent young children moving directly to the pool from the house, other buildings, garden paths, or other areas of the property normally open to them.

In 2004, Waitakere City Council sought a declaratory judgment in the High Court to get further clarity on the meaning of immediate pool area. This indicated that the activities included in the ‘immediate pool area’, for example a barbeque, need not occur exclusively in conjunction with the use of the pool. However, the activity must be closely connected, associated or combined with the use of the pool.

Currently the Act requires the size of the ‘immediate pool area’ to be determined by territorial authorities based on the circumstances of each case. In practice, ‘immediate pool area’ is being interpreted very differently from one territorial authority to the next.

In 2007, a survey report commissioned by Water Safety New Zealand, found that defining the immediate pool area was stated by territorial authorities as the greatest difficulty they faced in enforcing the Act.

## QUESTIONS

Q4.1 Do you agree that the interpretation of 'immediate pool area' is unclear? Why?

Q4.2 What do you think of the following options for improving clarity?

- Amending the Act to increase clarity
- More information available on the Act
- Information on the Act distributed to pool owners by territorial authorities, designers, retailers and builders of pools and pool fencing

Q4.3 What other options are there to improve clarity?

Q4.4 What is your preferred option and why?

Q4.5 What would be the impact of your answers on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q4.6 What do you think the 'immediate pool area' should include? Why?

Q4.7 What would be the impact of your answer on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q4.8 What would be the impact if this issue is not addressed?

## 5 Boundary fencing

The Act requires pool owners to ensure some or all of the immediate pool area, including all of the pool, is fenced. A definition of 'immediate pool area' is in the previous section.

We have been told the words 'some or all' create uncertainty about exactly what area must be fenced, and in particular whether boundary fencing is compliant, since the Act does not explicitly exclude fencing all of the immediate pool area and more.

This point was also identified by High Court Judge Randerson in *Waitakere City Council v Hickman and Anor*,<sup>4</sup> where the territorial authority sought declaratory judgments on several interpretation issues with the Act.

Judge Randerson ruled out boundary fencing, concluding the fenced area must be sufficiently confined so that it may properly be described as being in the 'immediate' area of the pool. This supports the guidance document issued by the Department of Internal Affairs which said: 'The fence should prevent young children moving directly to the pool from the house, other buildings, garden paths, or other areas of the property normally open to them.'

However, the 2007 survey report commissioned by Water Safety New Zealand shows that territorial authorities identified boundary fencing as the second greatest difficulty they faced in enforcing the Act.

4 *Waitakere City Council v Hickman* [2005] NZRMA 204

## QUESTIONS

Q5.1 Do you think the legitimacy of boundary fencing is unclear? Why?

Q5.2 What do you think of the following options for improving clarity?

- Amending the Act to increase clarity
- More information available on the Act
- Information on the Act distributed to pool owners by territorial authorities, designers, retailers and builders of pools and pool fencing

Q5.3 What other options are there to improve clarity?

Q5.4 What is your preferred option and why?

Q5.5 What would be the impact of your answers on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q5.6 Do you think boundary fencing should be a means of compliance? Why?

Q5.7 What would be the impact of your answer on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q5.8 What would be the impact if this issue is not addressed?

## 6 Ready-made pools

Since 1980, of the 162 children under six years old who drowned, 17 drowned after climbing or falling into a spa pool. Spa pools and other 'ready-made pools' are included within the definition of 'swimming pool' under the Act, and owners of these type of pools must comply with the fencing requirements.

As ready-made pools can be bought in a shop and easily installed by the owner, the building control process is known to be inadvertently or intentionally bypassed.

The reason for requiring that ready-made pools enter the building control process is so they can be assessed for the drowning risk they pose to young children. The building consent process enables territorial authorities to assess the drowning risk and require, or give special exemption from, the fencing requirements to be met.

These controls are important because once territorial authorities are notified of the existence of a ready made pool they can:

- assess the drowning risk to young children
- inform the pool owner of their obligations under the Act
- ensure the pool owner complies with the Act and or any special exemptions so that young children's lives are not put at risk
- do re-inspections to ensure that the Act and/or any special exemptions are being complied with.

## QUESTIONS

Q6.1 What could be done to increase compliance with the Act in respect of ready-made pools?

Q6.2 Given the level of risk, should spa pools be treated the same as swimming pools?

Q6.3 What do you think of the following options for improving compliance?

- More information available on the Act
- Information on the Act distributed to pool owners by territorial authorities, designers, retailers and builders of pools and pool fencing

Q6.4 What other options are there to improve compliance?

Q6.5 What is your preferred option and why?

Q6.6 What would be the impact of your answers on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q6.7 What would be the impact if this issue is not addressed?

### 7 Non-notification of pools

Every pool owner is obligated to inform their territorial authority of the existence of the pool. Likewise, every person who proposes to construct or install a pool that falls within the definition of swimming pool under the Act must inform the territorial authority before they start the work. Since the Building Act 2004 requires a building consent be obtained to do the work, an application for a building consent is deemed to be notification.

Non-notification of pools puts the lives of young children at risk and makes it very difficult for territorial authorities to meet their obligation to enforce the Act. Notification of the existence of a pool is important because territorial authorities:

- need to have complete records of all the pools in their area
- must inspect all pools in their area and cannot do so unless they know a pool exists
- can assist pool owners to understand their obligations under the Fencing of Swimming Pools Act 1987
- can systematically re-inspect pools to ensure ongoing compliance.

A pool owner commits an offence when they do not notify the territorial authority of the existence of their pool by contravening either the Act, the Building Act 2004, or both.

The problem of non-notification is two-fold.

- People who buy a property with a pool may assume that the existence of the pool has been notified to the territorial authority and that the fence has been inspected and approved.
- A person who proposes to construct or install a pool may fail to notify their territorial authority as they are either unaware of, or unwilling to adhere to, the Act.

## QUESTIONS

Q7.1 Do you think there is a problem of non-notification?

Q7.2 If so, why is this? How big a problem is it?

Q7.3 What do you think of the following options for improving notification?

- More information available on the Act and pool owners' responsibilities
- Information on the Act distributed to pool owners by territorial authorities, designers, retailers and builders of pools and pool fencing

Q7.4 What other options are there to improve notification?

Q7.5 What is your preferred option and why?

Q7.6 What would be the impact of your answers on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q7.7 What would be the impact if this issue is not addressed?

## 8 Records

The Act does not specify that territorial authorities must keep records, only that they must take 'all reasonable steps' to ensure the Act is complied with.

This is a wide obligation, intended to enable territorial authorities do everything within their means to ensure pool owners comply with the Act, including locating and inspecting existing pools in their area.

While most territorial authorities keep records of pools in their area, we have been told some territorial authorities do not keep any records. We would like to understand the importance of record-keeping to territorial authorities in ensuring that pool owners comply with the Act.

## QUESTIONS

Q8.1 How important is record-keeping, and why?

Q8.2 Do you think record-keeping is necessary for territorial authorities to meet their obligations under the Act?

Q8.3 What do you think of the following options for improving records?

- Amending the Act to require records to be kept
- More guidance information available on how territorial authorities can meet their obligations under the Act

Q8.4 What other options are there to improve record-keeping?

Q8.5 What is your preferred option and why?

Q8.6 What would be the impact of your answers on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and estimates of any financial impacts)?

Q8.7 If you are a territorial authority, what system of record-keeping do you have? If none, please state this.

Q8.8 If none, what other means do you use to meet your obligations under the Act?

Q8.9 What would be the impact if this issue is not addressed?

## 9 Re-inspection of pools

The Act gives territorial authorities the power to inspect the pool fencing at the time the pool is being built, and to subsequently make periodic re-inspections.

The importance of re-inspection is to ensure that fences are not left to degrade to an extent that children are able to access the pool. For example, broken latches on gates must be fixed. It is also important because properties with pools change ownership, and new owners need to be aware of the importance of maintaining the fence.

However, the Act does not specify that territorial authorities must carry out re-inspections to ensure the fencing is being maintained and is still compliant.

We would like your feedback on the importance of re-inspections.

QUESTIONS
Q9.1 How important are re-inspections, and why?
Q9.2 Do you think re-inspections are necessary for territorial authorities to meet their obligations under the Act? How frequently should re-inspections occur? Who should meet the costs of re-inspections?
Q9.3 What do you think of the following options for re-inspections? <ul style="list-style-type: none"><li>• Amending the Act to require territorial authorities to do regular re-inspections</li><li>• More guidance information available on how territorial authorities can meet their obligations under the Act</li></ul>
Q9.4 What other options are there for re-inspections?
Q9.5 What is your preferred option and why?
Q9.6 What impact would your suggestions have on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and financial costs)?
Q9.7 If you are a territorial authority, what policy of re-inspection do you have? If none, please state this.
Q9.8 If none, what other means do you use to meet your obligations under the Act?
Q9.9 What would be the impact if this issue is not addressed?

## 10 Territorial authorities powers

We have been told by territorial authorities that they do not have sufficient powers to enforce the Act, as their only enforcement option is bringing costly prosecution proceedings.

Since the Act came into force in 1987, only a small number of prosecutions have been brought by territorial authorities for offences under section 9 of the Act.

Unlike the Building Act 2004, this Act does not provide for intermediate enforcement measures like infringement notices. Territorial authorities have told us they use Notices to Fix under the Building Act 2004 as a means of enforcement. However, territorial authorities must still undertake prosecution proceedings where a pool owner does not comply with the Notice to Fix.

The main difference is there is a much higher penalty for the offence of failing to comply with a Notice to Fix under the Building Act 2004 than for an offence under the Act.<sup>5</sup>

The Building Act 2004 does provide for infringement notices and fines, and regulations for these are currently being developed. Once these regulations are in force, territorial authorities will be able to issue infringement notices to people who do not comply with a Notice to Fix.

We have been asked to look at whether infringement notices and fines could be adopted as an enforcement method under the Act to reserve prosecution as a last resort for persistent offenders only.

QUESTIONS
Q10.1 There have been a very small number of prosecutions brought by territorial authorities since the Act came into force. In your view, does this accurately reflect the number of pool owners not complying with the Act? If not, please provide more details about why there are not more prosecutions.
Q10.2 If you are a territorial authority, what is your policy for enforcing the Act when a pool owner is not complying with their obligations? Do you regularly use Notices to Fix and, if so, how many did you issue in the last year? How effective are they in enforcing the Act?
Q10.3 What do you think of the following options? <ul style="list-style-type: none"> <li>• Amending the Act to enable territorial authorities to issue infringement notices and fines for offences under the Act</li> <li>• Moving enforcement of the Act under the Building Act 2004 to bring it into line with other building-related offences, ie, by moving offences under the Act into the Building Act, and providing for infringement notices to be issued for offences under the Building Act.</li> <li>• Do nothing</li> </ul>
Q10.4 Are any other options available?
Q10.5 What impact would each of these options have on pool owners, territorial authorities, and the public as a whole (including advantages, disadvantages and financial costs)?
Q10.6 What is your preferred option and why?
Q10.7 Do you think the penalty for an offence under the Act needs to be increased? If so, by how much? What would be the advantages and disadvantages of this?
Q10.8 In light of your responses above would enforcement measures be improved, and to what extent?

<sup>5</sup> Prosecutions of an offence under the Act may attract a fine not exceeding \$500 and, where the failure is a continuing one, a further fine not exceeding \$50 for every day on which the failure has continued. Compare this with a failure to comply with a Notice to Fix, which may attract a fine not exceeding \$200,000 and, in the case of a continuing offence, a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.

# Appendix A: Fencing of Swimming Pools Act 1987

## 1. Short Title—

This Act may be cited as the Fencing of Swimming Pools Act 1987

## 2. Interpretation—

In this Act, unless the context otherwise requires,—

### [“fence”—

- (a) means a fence that complies with the requirements of the building code in force under the Building Act 2004 in respect of swimming pools subject to this Act; and
- (b) includes any part of a building and any gates or doors that form part of the fence]

“Gates or doors” does not include any door to which clause 11 of the Schedule to this Act applies:

“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:

“Judicial officer” means any District Court Judge, justice, [Community Magistrate,] or Registrar of a District Court (other than a constable); but does not include any person who is a member or employee of the territorial authority:

“Owner” means the owner of a pool; except—

- (a) Where the pool is subject to a hire purchase agreement within the meaning of the [Income Tax Act 2004], in which case it means the purchaser of the pool:
- (b) Where the pool is on premises that are not subject to a tenancy under the Residential Tenancies Act 1986 and the pool is subject to a lease or is part of premises subject to a lease, in which case it means the lessee of the pool or the premises:

“Swimming pool” and “pool” mean an excavation, structure, or product that is used or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product, that is a spa pool:

[“territorial authority” has the same meaning as in the Local Government Act 2002]

## 3. Application to existing pools—

This Act shall apply in respect of any swimming pool constructed, erected, or installed before the 1st day of September 1987 at any time on or after the 1st day of May 1988 when the pool is filled or partly filled with water.

## 4. Application to new pools—

This Act shall apply in respect of any swimming pool constructed, erected, or installed on or after the 1st day of September 1987 at any time when the pool is filled or partly filled with water.

## 5. Exempted pools—

Nothing in this Act shall apply in respect of—

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

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

## **6. Special exemptions—**

- (1) A territorial authority may, by resolution, grant an 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) of this section, that such an exemption would not significantly increase danger to young children.
- (2) In granting an exemption under subsection (1) of this section, 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, by resolution.

## **7. 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 or to which this Act will apply on or after the 1st day of May 1988 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.]

## **8. Obligations of owner and persons in control of pool—**

- (1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the [building code in force under the [[Building Act 2004]] in respect of swimming pools subject to this Act] at all times when this Act applies in respect of the pool.
- (2) Every owner of a pool to which this Act applies shall comply or ensure that there is compliance with every condition imposed under section 6(2) of this Act.
- (3) Every person who has possession of the property on which any pool to which this Act applies is situated shall ensure that the pool is not filled or partly filled with water at any time when the person knows or could reasonably be expected to know that any obligation imposed by this section on that or any other person is not being complied with.

- (4) The fact that a person complies with any obligation imposed by this section shall not excuse that person from any other duty imposed by law.

#### **9. Offence—**

- (1) Every person who, without reasonable cause, fails to comply with any obligation imposed by section 7 or section 8 of this Act commits an offence and is liable on summary conviction to a fine not exceeding \$500 and, where the failure is a continuing one, to a further fine not exceeding \$50 for every day on which the failure has continued.
- (2) Where the owner or person entitled to possession or control of a pool to which this Act applies is not entitled to possession of the property on which the pool is situated or the immediate pool area (whether because of any tenancy agreement, agreement to occupy a hotel room, motel, or camping ground, or otherwise) it shall be a defence to any proceedings for any offence described in subsection (1) of this section in relation to section 8 of this Act if the Court is satisfied that the owner took all reasonable steps—
- (a) To ensure that the obligation was complied with; and
- (b) To ensure that the persons in possession of the property or entitled or likely to be in the immediate pool area are made aware of the existence of the pool.
- (3) Where any person is convicted of the offence described in subsection (1) of this section in relation to section 8 of this Act the Court may order that the pool be drained of water and be kept empty until the pool is fenced in a manner that complies with this Act or any condition imposed under section 6(2) of this Act is met, as the case may require.

#### **10. Obligation of territorial authorities—**

Every territorial authority shall take all reasonable steps to ensure that this Act is complied with within its district.

#### **11. Power of entry for territorial authority officers—**

- (1) Without limiting any other powers of any territorial authority, any officer of a territorial authority who has reasonable grounds to believe—
- (a) That there is on any land within the district of the territorial authority a swimming pool to which this Act applies; and
- (b) That the pool is not fenced as required by this Act, or any condition imposed under section 6(2) of this Act is not being complied with,—
- may at any reasonable time enter on the land and carry out an inspection to determine whether or not there is on the land such a pool that is not fenced as required by this Act, or whether or not the condition is being complied with.
- (2) Nothing in subsection (1) of this section shall confer on any person the power to enter any house, home unit, or apartment building unless the entry is authorised by a warrant given by a judicial officer on written application on oath, which shall not be granted unless the judicial officer is satisfied that the entry is essential to enable the inspection to be carried out.
- (3) Every warrant issued under subsection (2) of this section shall be directed to a named officer of the territorial authority and shall be valid for a period of 1 month from the date of its issue or such lesser period as the judicial officer considers appropriate; and the period of validity shall be shown in the warrant.

- (4) Every person exercising the power of entry conferred by subsection (1) of this section shall carry a warrant of authority issued by the territorial authority and specifying—
- (a) The name and the office or offices held by the person;
  - (b) That the person is authorised by the territorial authority to exercise the power conferred by subsection (1) of this section to enter the land and carry out the inspection.
- (5) Every person exercising the power of entry conferred by subsection (1) of this section shall produce the warrant of authority and evidence of identity—
- (a) If practicable on first entering the land or premises; and
  - (b) Whenever subsequently reasonably required to do so.

**[12. Delegation of powers to committees of councillors—**

The territorial authority may delegate its powers and functions under section 6 and clause 11 of the Schedule to any committee of the territorial authority appointed under clause 30 of Schedule 7 of the Local Government Act 2002 that comprises only members of the territorial authority; but may not delegate those powers and functions to any committee that has any members who are not members of the territorial authority or to any officer of the authority.]

**13. Effect of Act on bylaws and other laws—**

- (1) Repealed.
- (2) Repealed.
- (3) Nothing in this Act shall in any way restrict the power of any territorial authority to make and enforce bylaws relating to the fencing of pools to which this Act does not apply.

- (4) Nothing in this Act shall in any way restrict the power of the Crown or any territorial authority or other person to enforce any other law relating to the fencing of pools to which this Act applies or any other pools.

**[13A. Effect of [[Building Act 2004]] on bylaws—**

- (1) A territorial authority may not make any bylaw under this Act that purports to have the effect of requiring any pool subject to this Act to achieve performance criteria additional to or more restrictive than those specified in the [[Building Act 2004]] or the building code in force under that Act.
- (2) A territorial authority may not make any bylaw purporting to have the effect of allowing a pool subject to this Act to be fenced to a standard that would provide less protection against young children gaining access to the pool than the performance standard set by the said building code.]

**[13B. Fencing in accordance with Schedule must be treated as means of compliance—**

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of—

- (a) matters subject to the Building Act 2004, be treated as a compliance document establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act;
- (b) building and premises not subject to the Building Act 2004, be treated as a reasonable and adequate provision for the purposes of this Act.]

**[13C. Amendment and replacement of Schedule—**

The Governor-General may from time to time, by Order in Council made on the advice of the Minister of Internal Affairs, amend the Schedule to this Act or repeal that Schedule and substitute a new Schedule.]

#### **14. Amendment to Fencing Act 1978—**

The Fencing Act 1978 is hereby amended by inserting, after section 9, the following section:

“9A. Contributions where fence required by Fencing of Swimming Pools Act 1987—

“Where any person is required to provide a fence in order to comply with the Fencing of Swimming Pools Act 1987—

- “(a) All work on that fence that is required because of the application of that Act and would not otherwise be required shall be the responsibility of the owner of the swimming pool; and
- “(b) No person, other than the owner of the swimming pool, shall be required to make any contribution under this Act to the work on a fence greater than the contribution that the person would be required to make to the work on a fence (whether of the same type or not) if the swimming pool did not exist.”

#### **SCHEDULE ONE**

##### **Sections 13B, 13C**

##### **[MEANS OF COMPLIANCE] FOR FENCES UNDER THIS ACT**

##### **Height**

1.
  - (1) The fence shall extend—
    - (a) At least 1.2 metres above the ground on the outside of the fence; and
    - (b) At least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.
  - (2) Notwithstanding subclause (1) of this clause, where the fence is constructed of perforated material, netting, or mesh and any opening in the material, netting, or mesh has a dimension (other than the circumference or perimeter) greater than 10 mm, the fence shall extend at least 1.8 metres above the ground or the projection or object.

##### **Ground clearance**

2. Any clearance between the bottom of the fence and ground level shall not exceed 100 mm.

##### **Materials**

3. All materials and components shall be of a durable nature and shall be erected so as to inhibit [any child under the age of 6 years] from climbing over or crawling under the fence from the outside.
4. Except where the fence is horizontally close-boarded [or is made of perforated material, netting, or mesh], the spacing between adjacent vertical pales, panels, or other posts shall not exceed 100 mm at any point.

[5. All fencing supports, rails, rods, and wires, that are not vertical, and all bracing that is not vertical, shall be inaccessible for use for climbing from the outside.]

- [5A. Notwithstanding clause 5 of this Schedule, a fence may have horizontal supports, rails, rods, or wires, that are accessible for use for climbing from the outside, and horizontal bracing that is accessible for such use, if—
- (a) The distance between any 2 of them at any point is at least 900 mm; and
  - (b) There is no other support, rail, rod, wire, or bracing (other than a vertical rail) between the same 2 at any point.]
6. Where any perforated material, netting, or mesh is used, no opening in that material, netting, or mesh shall have any dimension (other than the circumference or perimeter) greater than 50 mm.
7. All perforated material, netting, or mesh material shall be firmly attached at both top and bottom to a rail, pipe, or similar firm structure, or otherwise be of such a nature that the fence cannot readily be crossed by children under the age of 6 years.

### **Gates and doors**

8. Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7 of this Schedule, and shall be so mounted that—
- (a) It cannot open inwards towards the immediate pool area:
  - (b) It is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided:
  - (c) When lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.

### **Operation of gates and doors**

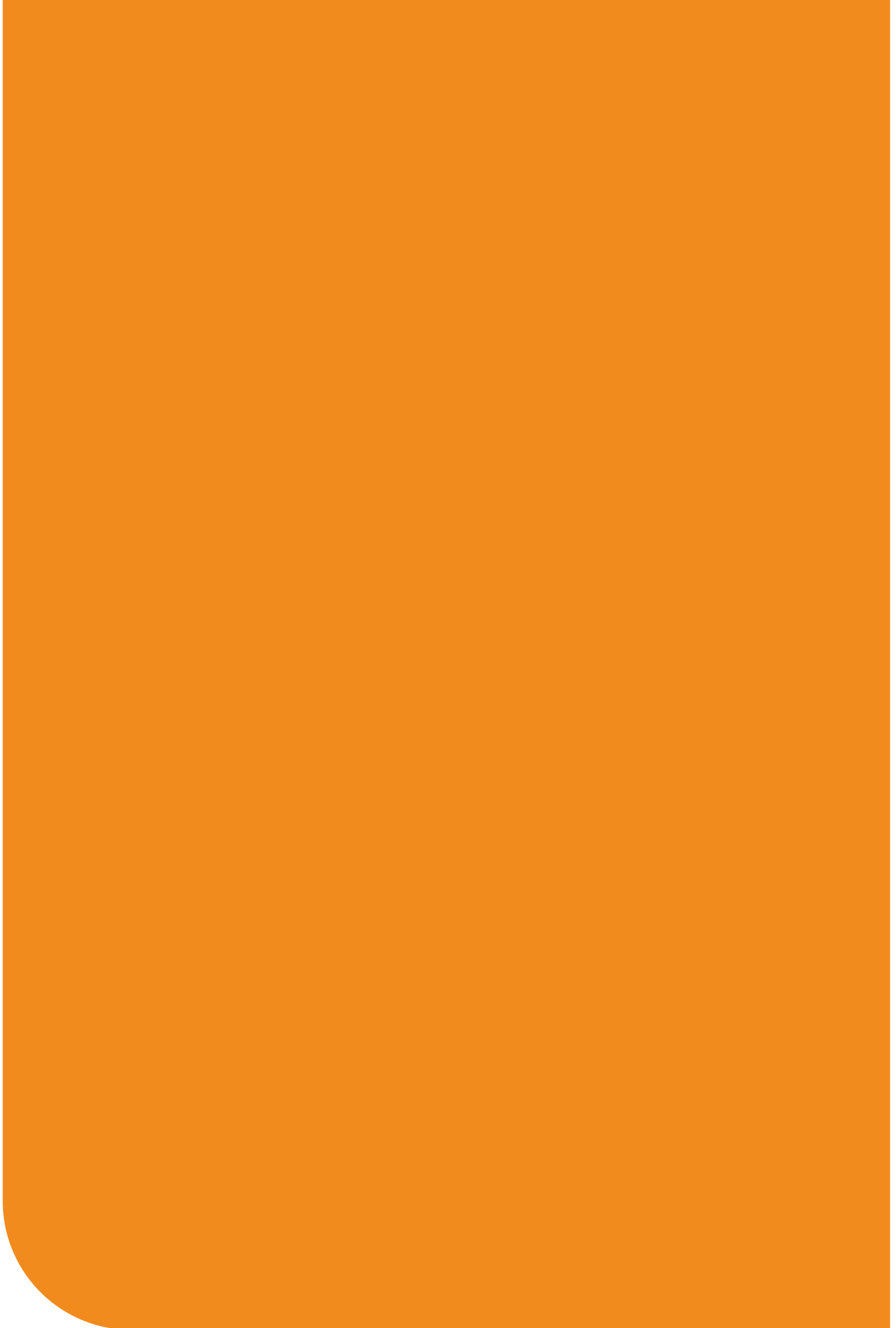
- 9.
- (1) Every gate or door shall be fitted with a latching device.
  - (2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.
  - (3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.
10. Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.

### **Doors in walls of buildings**

11. Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 of this Schedule to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

# Appendix B: Regulatory impact analysis requirements

The Ministry of Economic Development *Guide to Regulatory Impact Analysis* (March 2007) states that the Department of Building and Housing must include questions and/or discussion of the substantive regulatory impact analysis elements (problem, what the range of feasible options is, impacts of these options) in this discussion document. The Department of Building and Housing confirms that this discussion document includes the substantive regulatory impact analysis elements as required.



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