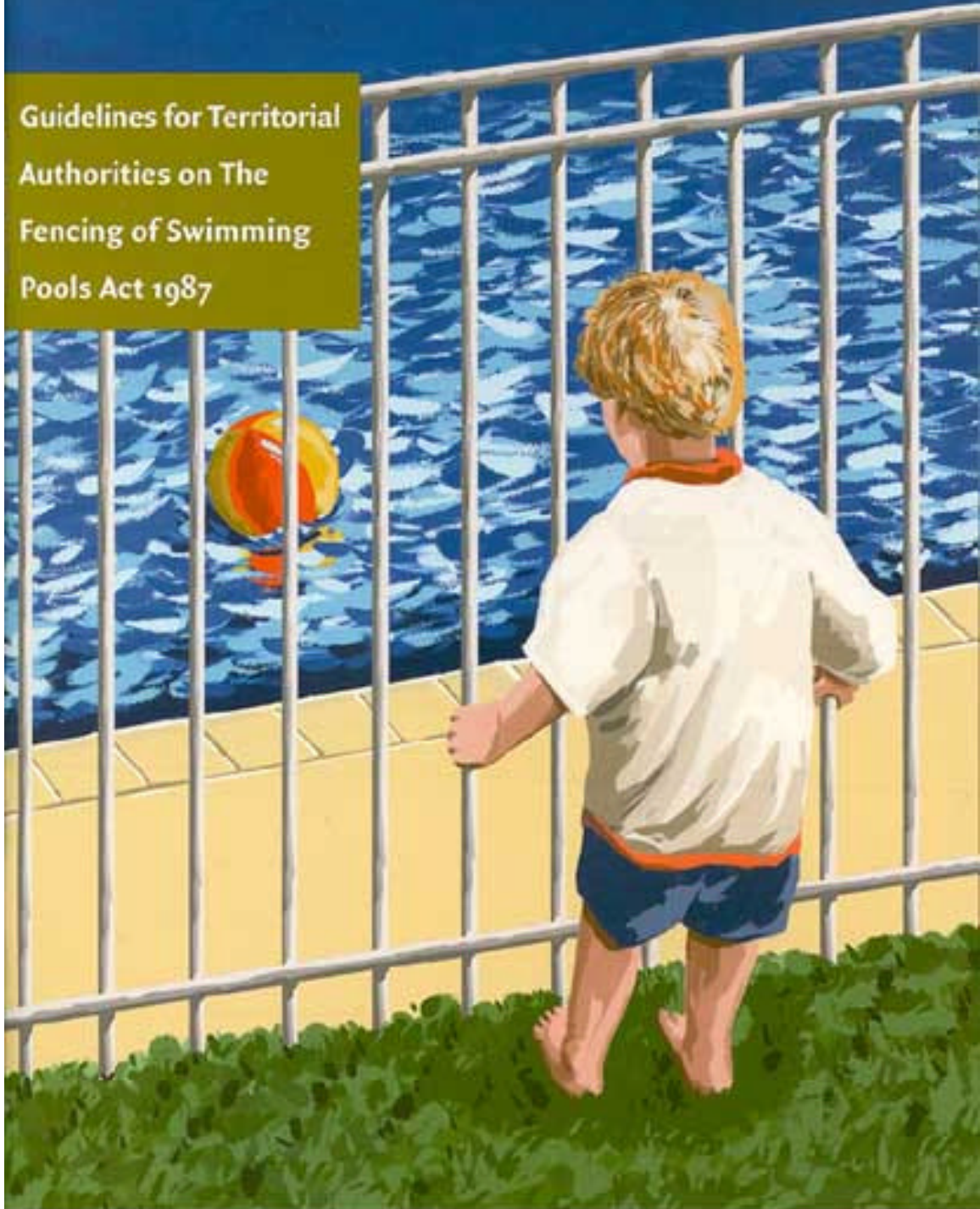


COMMUNITY DEVELOPMENT



Guidelines for Territorial
Authorities on The
Fencing of Swimming
Pools Act 1987



The Department of Internal Affairs Te Tari Taiwhenua

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Foreword

Drowning is a major cause of the accidental death of young children in New Zealand. Many drownings happen in private homes, in unfenced, or inadequately fenced, swimming and spa pools. It has been estimated that, with the adequate fencing of pools, at least half these deaths (and other, non-fatal, accidents) would have been prevented.

General concern about these unnecessary deaths led Parliament to enact the Fencing of Swimming Pools Act 1987. This Act requires that, in the absence of a specific individual exemption, every private swimming and spa pool be properly fenced. Water Safety New Zealand has statistics showing that drownings of children under six years old have decreased since the introduction of the Act.

Each territorial authority is responsible for the enforcement of the Act. However, we have become aware of the development of some problems. Water Safety New Zealand recently had a survey conducted by the Injury Prevention Research Unit of the University of Otago. This survey highlighted difficulties some territorial authorities were having in trying to reconcile the prescriptive regime in the Schedule to the Act with the performance based criteria of the building code introduced under the Building Act 1991.

In an endeavour to deal with these issues, the Department consulted the following organisations:

- the Building Industry Authority;
- the Office of the Commissioner for Children;
- the Ministry of Health;
- Local Government New Zealand;
- Water Safety New Zealand;
- the Injury Prevention Research Unit of the University of Otago; and
- the Royal New Zealand Plunket Society.

The consultations led to the development of the new guidelines attached. These guidelines outline the requirements of both the Act and the Code, and explain how they interact. They are intended to assist territorial authorities to satisfy their responsibilities under both acts and, I hope, to assist them to explain, to individual pool and spa owners, what their duties are. Although there is an assumption that territorial authority officers are familiar with the Act, some departmental comment on its provisions has been included.

Also incorporated is a brief history of events leading up to the introduction of the Act, and a suggested pamphlet outlining the responsibilities of pool owners which territorial authorities are encouraged to distribute to every household.

It is important that territorial authorities fully enforce the fencing of residential swimming and spa pools. The major reason is, of course, to help guard young children from potential drowning or injury.

I commend these guidelines to all territorial authorities, and hope that they will be of assistance to regulatory staff and building inspectors when interpreting and enforcing the Act.

Staff in Local Government Services can further clarify any provisions in the Act (but cannot give opinions or rulings about particular cases). They can be contacted on telephone (04) 495-7200, fax (04) 495-7287, and e-mail

Roger Blakeley
Secretary for Internal Affairs
August 1999

Background

There has been public debate about the desirability and method of fencing swimming pools for many years. In the early 1980's, Parliament's Local Bills Select Committee carried out the most comprehensive investigation of this issue. In its 1983 report, the Committee concluded that swimming pools should be fenced because:

- (a) They are a significant childhood water hazard;
- (b) Pool fencing is the most effective means of preventing drownings of pre-school children in private swimming pools;
- (c) It is totally impossible for parents or guardians to supervise the children in their care every minute of the day;
- (d) There are no equal or greater water hazards for pre-school children;
- (e) Where there is a reasonable and viable means of protecting young children from hazards such as private swimming pools, the children have a right to that protection; and
- (f) The value of aesthetically pleasing gardens cannot be placed above the value of human lives.

A summary of the report is included in this booklet as Appendix A.

The first Standard Model Bylaw (NZS 9201) relating to the fencing of swimming pools, was developed in 1979 by the then Standards Association. At the time, it was generally believed that pre-school drownings were caused by toddlers wandering from adjoining properties, or the road, onto properties which had a pool. The model bylaw, therefore, provided a pool owner with the options of either erecting a fence around the property, or around that part of the property which contained the pool.

The Local Bills Committee concluded that this view was mistaken. It found that about 80% of pre-school drownings in private pools occurred either in a child's home, or when it was visiting as an invited guest. In light of this new information, the Committee recommended that the model bylaw be amended to delete the option allowing the property only to be fenced. This recommendation was adopted in 1984 when a new model bylaw was issued by Standards New Zealand. The Committee also strongly recommended that all territorial authorities which had not adopted a bylaw requiring the fencing of private swimming pools, should do so as soon as possible. However, by 1987, only about one-third of all territorial authorities had made such a bylaw.

It was the desire to see provisions similar to the Standard Model Bylaw in legislation that led to a Private Member's Bill being introduced into Parliament in 1986. This triggered the enactment of the Fencing of Swimming Pools Act the following year.

The purpose of the Act is stated in the long title as, "*An Act to promote the safety of young children by requiring the fencing of certain swimming pools*". It does this by requiring that pool owners fence their swimming or spa pools and the immediately surrounding areas. In certain situations, exemptions from the provisions of the Act can be granted.

Building Act 1991

The Act was subsequently amended by the Building Act 1991. The amendment requires that new pool fences, or alterations to existing fences comply with the performance standard of the Building Code in force under that Act. Previously, pools had to be fenced to the standard specified in the Schedule to the Fencing of Swimming Pools Act. Because the Building Act is not retrospective, existing pool fences are still required to meet the standard specified in the Schedule. However, that Schedule is deemed a compliance document in terms of the Building Act.

Performance standard F4.3.4 of the Building Code provides for alternative means of fencing a pool. It does this by requiring fences to be a continuous barrier of appropriate height, rigidity, and strength to restrict access to the pool or the immediate pool area by children under six years of age. This gives territorial authorities the flexibility to approve varying structures as long as they meet the performance standard, and thereby affords owners a choice in how they may fence their pools. However, the recognised acceptable rules for pool fences are in the Schedule to the Fencing of Swimming Pools Act. That is, the Schedule represents the “benchmark” which territorial authorities should judge fences against when deciding on the appropriateness of any alternative. Any alternative design must be at least as safe as if the fence were constructed to the specifications in the Schedule in order to comply with the performance standard of the Building Code.

It is assumed that a common sense approach will be taken when deciding on the appropriateness of an alternative design, keeping in mind the purpose of the Act and the standard specified in the Schedule. If there is a dispute with a pool owner or some uncertainty with regard to a particular pool fence, the Building Industry Authority can be approached to make a determination.

The survey undertaken for Water Safety New Zealand in 1997 found that some territorial authorities believe that an exemption is required from some, or all of the provisions of the Act before an alternative design may be approved. This is not the case. A territorial may grant an exemption from any or all of the requirements of the Act (see section 12) if it is satisfied that such an exemption, “...*would not significantly increase danger to young children*”.

Necessity for the Fencing of Swimming Pools Act

Between 1980 and 1997, 129 children aged under six drowned in private swimming and spa pools in New Zealand.¹ This accounts for nearly 40% of all drownings involving pre-school children. Drowning is second only to road accidents as the major cause of accidental death for these children. An Australian study found that for every child who drowns, there are at least nine others involved in serious near drowning accidents². Such accidents can leave children with permanent moderate to severe brain damage. Fencing is necessary, therefore, to prevent not only deaths, but also serious injury.

¹ Source: Water Safety New Zealand

² Health Department of Western Australia

Parental/Caregiver Responsibility

Parents/caregivers do have a responsibility to care for children. However, it is unrealistic to expect supervision alone to prevent pre-school children from gaining access to private swimming and spa pools. The Local Bills Committee found that in each case where a child drowned, in a private pool, an adult was present on the property.

Young children are inquisitive and tend to be attracted to water. This attraction is one reason why the existence of a pool is particularly dangerous to pre-school children. It is extremely difficult to constantly supervise a child every minute, especially where there is more than one child. Pre-school children and toddlers are mobile, and it can take only a few moments for them to get out of sight of parents/caregivers. A study of the circumstances in which pre-schoolers had drowned, reported that it was common for parents/caregivers to have taken their eyes off the child for only a few minutes.³ Attention may temporarily lapse for a number of reasons. For example, one may assume that another person is supervising the child, or may leave the child unwatched to answer the telephone, or perhaps be distracted by a domestic emergency. Pool fences will safeguard a child even when a parent/caregiver is not in a position to supervise it.

Water Safety Training

Children between the ages of one and three years are those most vulnerable to drowning in private swimming and spa pools. Statistics show that over 70% of pre-school fatalities in private swimming and spa pools occur to children in this age group. Research suggests that educating pre-schoolers is not a practical solution to the drowning problem.⁴ The Local Bills Committee concluded that pre-school children can not be expected to learn the elements of water safety or be taught how to react appropriately in an emergency.

It is also unrealistic to expect pre-school children to keep away from an unfenced pool merely because they have been told to do so. While some five-year-olds may understand that pools can be dangerous, it would be unreasonable and unrealistic to expect every child to understand this, and to have the self-discipline never to go near a pool.

Role of Pool Suppliers

It is recognised that pool suppliers are in the unique position of being able to provide information to pool owners on their obligations to fence their pool to the required standard. A leaflet outlining pool-owners' responsibilities has been distributed to pool suppliers nation-wide, and they have been encouraged to give a copy of this to all their customers.

³ Hassall, I B, Australian Pediatrics Journal, 1989; 25

⁴ Geddis, D, New Zealand Medical Journal, 1984; 97

FENCING OF SWIMMING POOLS ACT 1987

SUMMARY AND COMMENT

SECTION 1 – SHORT TITLE

- 1.1 This section names the Act the Fencing of Swimming Pools Act 1987.

SECTION 2 – INTERPRETATION

- 2.1 This section defines certain terms used in the Act. These are discussed below:
- 2.2 “*Fence*” – The Act requires that new fences and alterations to existing fences be constructed to meet the performance standard of the Building Code. This Code requires fences to be a continuous barrier of an appropriate height, rigidity, and strength to restrict access to the pool or the immediate pool area. In order for a fence to meet the performance standard, it must be built to be at least as safe as if it were constructed to the specifications in the Schedule to the Fencing of Swimming Pools Act. A fence constructed to the Schedule’s specifications automatically meets the standard of the Building Code. Existing pool fences are still required to meet the specifications of the Schedule.
- 2.3 “*Gates or Doors*” – The term “gates or doors” refers to gates in pool fences and doors in any building which makes up part of a fence.

Gates must be constructed so that they open outwards and close and latch automatically. Latches must be at least 1.2 metres above the ground, if located on the inside of a fence, or 1.5 metres above the ground if located on its outside.

A door may be built in the wall of a building that forms part of a pool fence. If it does, it must be fitted with a lock which prevents it being readily opened by children under the age of six. As an extra safety precaution, it is preferable that the lock be at a height not easily reachable by toddlers.

- 2.4 “*Immediate Pool Area*” – This definition is of particular importance for the application of the Act. Section 8 requires pool owners to fence the pool, and some or all of the “*immediate pool area*”, that is 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”.

What can the “immediate pool area” include?

The definition of immediate pool area is important because it is only that area, along with the pool, which can be enclosed by the fence. The Department believes the examples given below adequately portray the common sense approach which territorial authorities should take in determining the appropriate area to be fenced.

In the Department's view the "*immediate pool area*" could include the pool, its decking, and any changing sheds, but not a vegetable garden, a clothes-lines, a barbecue area, a children's sand-pit, or a slide or swing. The most important factor is the location of the fence in relation to the rest of the property. 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.

The diagrams on the following pages illustrate various fences around pools, some of which meet the requirement to fence the pool, including some or all of the "*immediate pool area*", and some of which do not.

DIAGRAMS OF SWIMMING POOL FENCES

The following diagrams* illustrate differing situations where fences would and would not comply with the Act.

KEY

- A Fence constructed to the Act's requirements
- B Swimming Pool
- C Boundary fence
- D Gate or door meeting the Act's requirements
- E Ordinary door not meeting the Act's requirements
- F Ordinary door meeting the Act's requirements
- G House or building

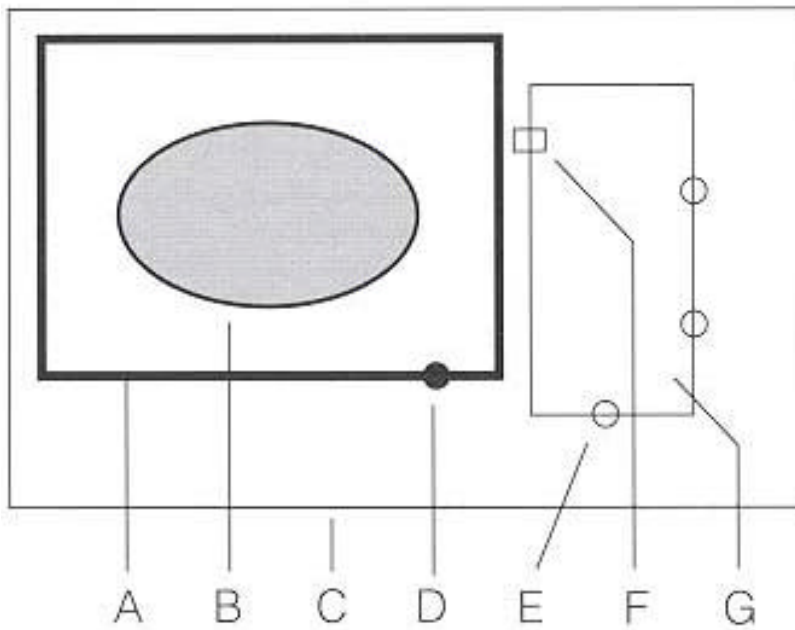
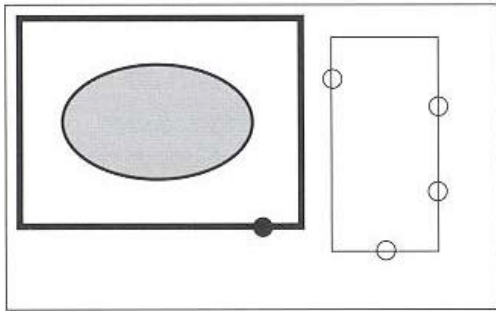
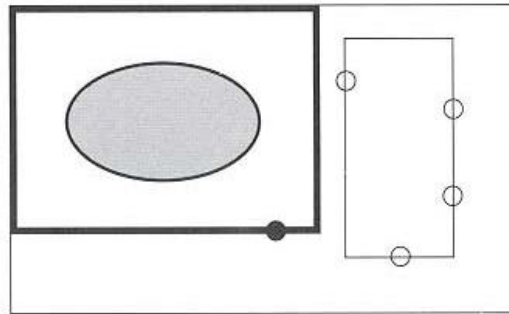


Diagram 1



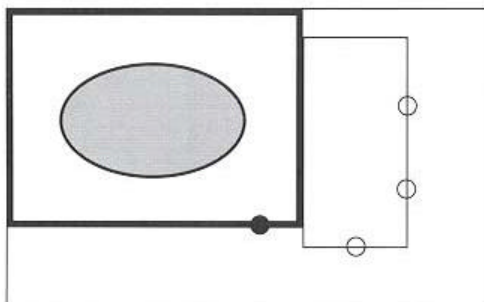
Pool fenced separately from both the house and the boundary fence.

Diagram 2



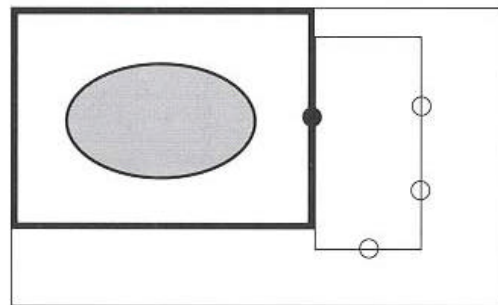
Pool fenced separately from the house but where part of the boundary fence is also part of the pool fence.

Diagram 3



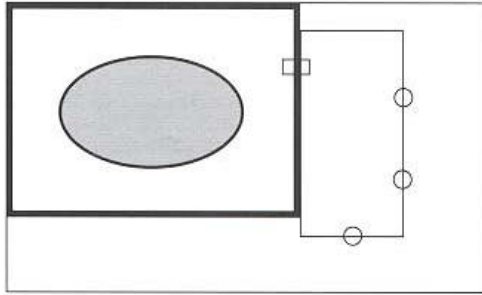
Pool where part of the house is part of the pool fence but there is no access to the pool from the house.

Diagram 4



Pool where part of the house is part of the pool fence, but the only access is by a door complying with the requirements of the Act.

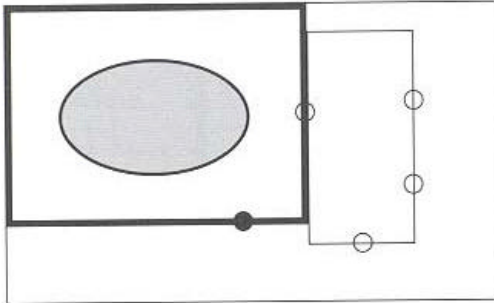
Diagram 5



Pool where part of the house is part of the pool fence. There is access to the pool directly from the house by a door which the council is satisfied cannot be made to meet the requirements of the Act. It is *instead* fitted with a lock that, when properly operated, prevents the door being readily opened by children under six.

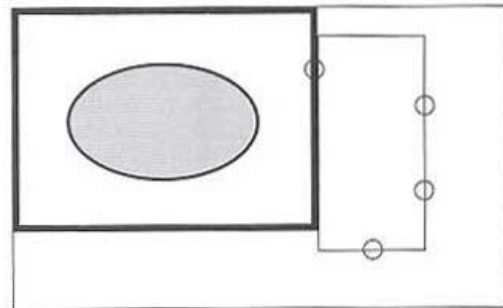
Diagrams 1-5 all depict situations, which would comply with the Act.

Diagram 6



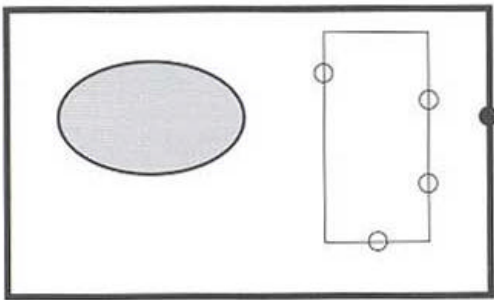
Pool can be reached either through a gate complying with the Act or from the house through an ordinary door which does *not* have a lock that could prevent the door from being readily opened by children under six.

Diagram 7



Pool can be reached only from the house, but through an ordinary door that does *not* have a lock that could prevent the door from being readily opened by children under six.

Diagram 8



Pool which is fenced only by a boundary fence.

Diagrams 6-8 depict situations that would not comply with the Act.

**(Reproduced with amendments to suit New Zealand's situation from: Report, Cabinet and Legislative Division, Queensland Department of Housing and Local Government, 1990).*

Is a boundary fence sufficient?

A boundary fence can form part of a pool fence if it complies with the requirements of the Act (see diagrams 2 to 5). However, because the fence is permitted to enclose only the pool and some or all of the “*immediate pool area*”, the whole of a boundary fence, by itself, would not comply (diagram 8). This is because there are areas on any property that cannot be part of “*the immediate pool area*”.

The greatest need is to protect those children who are legitimately on the property. Over 85% of pre-school drownings occur when the child is resident on the property or is present as an invited guest (Water Safety New Zealand). The Local Bills Committee concluded that the-

“fencing of properties only, and not pools is not an effective means of preventing pre-school drownings”.

2.5 “*Judicial Officer*” – The term “*judicial officer*” is used in section 11 of the Act, and means any District Court Judge, Justice, or Registrar of a District Court (other than a constable). It does not include a member or employee of a territorial authority.

2.6 “*Owner*” means any person who owns a pool, except—

- (a) where the pool is on hire purchase, when the owner is the purchaser of the pool or;
- (b) where the pool is on premises *not* subject to a tenancy under the Residential Tenancies Act 1986, and the pool is included in the lease, when the owner is the person who is leasing the pool or the premises.

Where the pool is on premises that *are* subject to a tenancy under the Residential Tenancies Act 1986, the owner is the owner of the premises.

- 2.7 “*Swimming Pool*” and “*Pool*” means any excavation, structure or product that is or can be used for swimming, wading, paddling, or bathing—including spa pools (section 5 sets out which pools are exempt from the Act).
- 2.8 “*Territorial Authority*” means any city or district council, and includes the Chatham Islands Council.

SECTIONS 3 AND 4—APPLICATION TO EXISTING AND NEW POOLS

- 3.1 The Act applies to all pools when filled or partly filled with water (subject to any exemption granted under section 5 or section 6), regardless of when the pool was constructed.
- 3.2 Pools existing at the date of coming into force of the Building Act 1991 should have had fences which complied with the schedule to the Fencing of Swimming Pools Act. New pool fences or alterations to existing fences must be constructed in accordance with the performance standard of the building code under the Building Act. Section 13B of the Act provides that any pool constructed in accordance with the Schedule shall be deemed to comply with the building code under the Building Act.

SECTION 5–EXEMPTED POOLS

5.1 Because the intention of the Act is to promote the safety of young children, the Act only applies to pools where young children, particularly pre-schoolers, are at risk. For this reason there are certain pools to which the Act does not apply. Exempt pools are listed in section 5 of the Act. They include–

- pools with sides higher than 1.2 metres with ladders etc., that can be removed or made inoperable;
- pools 400mm or less deep;
- pools not on a residential property and not used for swimming;
- paddling pools administered by a territorial authority;
- indoor residential pools; and
- pools which are supervised when in use and locked when not in use (i.e., public swimming pools)

5.2 The criteria for exempted pools under section 5 of the Act are as follows:

Section 5	Comment
<i>Nothing in this Act shall apply in respect of –</i>	
(a) <i>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:</i>	If the outside walls of the pool are 1.2 metres or more above the ground, a fence is not required. Permanent object includes decking or terracing. Built in steps leading up to the pool would mean the pool would not be exempt. It must be shown that the ladder is readily removable or can be rendered inoperable.
(b) <i>An excavation, structure, or product, in which the maximum depth of water does not exceed 400 mm:</i>	For example, portable paddling pools and splash pools used by toddlers are exempt if they are not more than 400mm deep.
(c) <i>Any excavation, structure, or product, –</i>	

- | | |
|---|--|
| <p>(i) <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</i></p> | <p>For a pool to be exempt under subsection 5(c) it must not be on land on which there is any building listed in 5(c)(i).</p> |
| <p>(ii) <i>That is not modified for use, or intended to be used, for swimming, wading, paddling, or bathing:</i></p> | <p>Nor may it be intended for use for the purposes listed in 5(c)(ii). Both conditions must be met for such a pool to be exempt.</p> |
| <p>(d) <i>Any pool intended to be used for wading or paddling in any place that is under the administration of a local authority:</i></p> | <p>Paddling and wading pools administered by a local authority are exempt.</p> |
| <p>(e) <i>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:</i></p> | <p>This means that, for example, an indoor pool such as a spa pool within a house is exempt.</p> |
| <p>(f) <i>Any pool where –</i></p> | |
| <p>(i) <i>Persons are employed and present to provide supervision of the pool whenever the pool is available for use; and</i></p> | <p>For a pool to be exempt under subsection 5(f), a council has to be satisfied that-</p> <p>(i) there would be persons employed specifically to provide supervision of the pool when it is in use, and</p> |
| <p>(ii) <i>Access to the pool is effectively prevented by a fence that complies with the Act or by locked gates or doors whenever the pool is not intended to be available for use.</i></p> | <p>(ii) when the pool is not in use, access to it is prevented by a fence that complies with the Act or by locked doors or gates.</p> <p>Both of the above conditions (i) and (ii), must be met for a pool to be exempt under this subsection. The view of the Department's is that there must always be at least two supervisors in attendance when a pool is open.</p> |

School Pools

- 5.3 The Fencing of Swimming Pools Act does not expressly state that it is binding on the Crown. Therefore, any state school pools located on Crown land, and built prior to the coming into force of the Buildings Act, do not have to be fenced. However, because it is desirable that all school pools are fenced, the policy of the Ministry of Education is that all school swimming pools should comply with the spirit and intent of the Act.
- 5.4 The Building Act, however, is binding on the Crown. Therefore, new school pools must be fenced in accordance with the Building Code. An alteration to an existing pool fence must also comply with the Code. Private and integrated school pools must be fenced, because they are on private land.
- 5.5 It is pertinent to point out that between 1980 and 1997 only 3 pre-school children drowned in school pools while 129 drowned in private swimming and spa pools.

SECTION 6–SPECIAL EXEMPTIONS

- 6.1 Under section 6 territorial authorities may grant exemptions from the requirements in the Act for particular pools. Territorial authorities can also impose special conditions on a property and a pool. A council can only grant an exemption, or impose a special condition, if, after having regard to the characteristics of the pool and the property, it is satisfied that it “*would not significantly increase danger to young children*”. No exemption is required for a new pool fence, or an alteration to an existing fence, if the new or altered fence is at least as safe as one built in accordance with the standard in the schedule of the Act.

What criteria are appropriate for council consideration when deciding on exemptions?

Appropriate criteria

- 6.2 The criteria in section 6 are discussed below:

<i>Section 6</i>	<i>Comment</i>
<i>“A territorial authority may, by resolution, grant</i>	An exemption can only be granted by resolution of the council or of a council committee comprising only members, not a council officer.
<i>an exemption from some or all of the requirements of this Act</i>	An exemption must state specifically what requirements of the Act will not apply. It is possible for a pool to be exempt from all of the requirements of the Act i.e., to have no fence at all.
<i>in the case of any particular pool</i>	Pools must be considered separately, on a case by case basis.
<i>where the territorial authority is satisfied,</i>	A territorial authority must be satisfied that grounds for exemption exist for each particular case.
<i>having regard to the particular characteristics of the property</i>	A territorial authority must consider the particular characteristics of the property.
<i>and the pool,</i>	Similarly, the particular characteristics of the pool must be considered.
<i>any other relevant circumstances,</i>	A territorial authority must consider whether any other factors are relevant.
<i>and any conditions it imposes under subsection (2) of this section,</i>	Under subsection (2), a territorial authority may set other reasonable conditions relating to the property or the pool.
<i>that such an exemption would not</i>	This provides the test against which an

significantly increase danger to young children”.

application for exemption must be considered. Thus, while the council may give an exemption for a pool, which is not to the specified standard, it must be satisfied that the increased risk to small children is not.

- 6.3 As stated above, when granting an exemption, a territorial authority can impose conditions relating to the property or pool that are reasonable in the specific circumstances. For example, a requirement that the pool owner notify the territorial authority of any change in the particular circumstances that justified the exemption.
- 6.4 Any exemption or condition may be amended or revoked by council resolution.
- 6.5 The overarching criterion is whether the territorial authority is satisfied that an exemption would not significantly increase danger to young children. In coming to its decision in each case it is desirable that the authority bears in mind the long title of the Act– “*An Act to promote the safety of young children by requiring the fencing of certain swimming pools*”.
- 6.5 Territorial authorities should be aware of the “*danger to young children*” which a pool presents. Statistics and research information are widely available on drownings of young children in swimming pools; for example, the Local Bills Committee Report. Up-to-date statistics are available from,

Water Safety New Zealand
P O Box 10-126
Wellington.

- 6.6 It would be reasonable to expect a territorial authority to be aware of these statistics when considering whether an exemption would significantly increase the danger to young children. In this regard, Water Safety New Zealand advises that since the introduction of the Act the majority of drownings have occurred in pools that did not comply with the Act at the time of the incident.
- 6.7 An application for exemption solely for the reason that a pool is on an isolated property in a rural area with no children resident, would not, in the Department’s opinion, be acceptable because:
- there can be no guarantee that children will never visit the property (the Local Bills Committee found that one-third of drownings occurred when children were visiting as invited guests); and
 - children may well live on the property in the future.

Other inappropriate criteria

- 6.8 From time to time councils receive applications for exemptions on what, the Department considers, are inappropriate grounds. In addition to those cited in the preceding paragraph, some others are, the presence of other water hazards;
- other means of protection;
 - proximity of the pool to other residences; and

- effects on appearance of the property.

The presence of other water hazards

6.9 Statistics show that private swimming pools are the single most significant water hazard for small children. Between 1980 and 1997, nearly 40% of pre-school drownings occurred in private swimming and spa pools (Water Safety New Zealand statistics). Less than 1 in 4 pre-school drownings for this period occurred in rivers, streams, or other running water - the next most frequent sites of pre-school drownings. One reason for this is that most pre-school drownings occur in and around children's homes where there is not constant supervision. Often a child may gain access to the pool area in the course of normal play. The Injury Prevention Research Unit of the University of Otago reported studies, which showed that a large number of the toddlers drowned in private pools, were fully dressed at the time they entered or fell in a pool. A much higher standard of supervision is likely on outings to rivers or beaches, because there is an expectation that the child is likely to play in the water. It is probably this constant, short term, awareness that has meant that these other water hazards do not present the same danger to small children. The Local Bills Committee Report stated:

“... there is no inconsistency in fencing private swimming pools and not these other water hazards”.

6.10 The Department's view is that the presence of other water hazards is no reason to fail to fence private swimming and spa pools.

Other means of protection

6.11 The Local Bills Committee investigated alternative methods of protecting pre-schoolers, including the use of pool covers, electric alarm systems, buoys, poles, and ropes. The Committee found them “unlikely to prove greatly effective in preventing pre-school drownings.”

Pool Covers

6.12 The Injury Prevention Research Unit of the University of Otago is opposed to reliance on pool covers, including heavy wooden covers on spa pools, as a safety measure, because they must always be replaced after use. Unfortunately, because they can be heavy and difficult to manage, there is a constant danger they will not be replaced. There have been cases where

- children drowned after climbing under insecure pool covers; and
- small children drowned in water that had collected on top of a cover.

Since January 1980 at least 14 pre-school children have drowned in pools which had covers (Water Safety New Zealand statistics).

6.13 The major advantage of fencing a pool to the standard required by the Fencing of Swimming Pools Act and the Building Code is that there is constant protection. It does not require continual action or surveillance to prevent children gaining access.

6.14 Territorial authorities should note that they must grant a specific exemption, pursuant to section 6 of the Act, prior to permitting the use of only a pool cover. A general

policy cannot be adopted to allow the automatic acceptance of pool covers as an alternative to fencing.

Pool Alarms

- 6.15 An alarm will not keep a young child out of a pool. Its sole purpose is to sound an alert after an incident has taken place, in the hope that someone will hear and come to the victim's aid. It requires that someone will be continually available to monitor and respond to an alarm. This may not be the case.
- 6.16 The Local Bills Committee found the effectiveness of an alarm was often diminished because objects falling into a pool can set it off. With repeated false alarms, comes the danger that response time in a real emergency may be delayed.

Buoys, Poles, and Ropes

- 6.17 Buoys, poles, and ropes will not prevent pre-school children from gaining access to a pool.

Whether children are resident on the property

- 6.18 The absence of children as current residents of a property would not be an appropriate criterion for councils to use when considering an application for an exemption. There is no guarantee that children will not visit the property, or live there in the future.
- 6.19 The normal stages of family development mean it is likely that young children will, at some time, either live on a property or visit as grandchildren or in the company of other relatives. In any event, the property may be later sold to people who have young children or who will be visited by children accompanying friends or relatives.
- 6.20 It is important that the pool, and its fence, should be seen as a permanent feature of the property that will still be there after its present occupants have moved on.

Distance of the pool from other residences

- 6.21 As has already been shown, the greatest danger is not to children on adjoining properties, but those who live on the property or who are visiting. Therefore, distance from other residential properties should not be taken into consideration. It is noted that a number of rural pool owners use this reason when applying for an exemption.

Effects on appearance of the property

- 6.22 An exemption granted on the basis that a pool fence would diminish the appearance of a property would be contrary to the intention of the Act. Exemptions can only be granted where the danger to young children is not significantly increased. As the Local Bills Committee commented:
- “The value of aesthetically pleasing gardens cannot be placed above the value of human lives”.*

SECTION 7 – NOTIFICATION OF EXISTENCE OF POOL TO TERRITORIAL AUTHORITY

- 7.1 Pool owners must comply with any reasonable requirement of a territorial authority to advise it of the existence of a pool. If a person intends to build a pool, an application for a building consent under the Building Act 1991 to construct or install a pool must be obtained. Such applications are considered acceptable notification.
- 7.2 If a pool owner or prospective pool owner neglects this duty, it does not follow that a territorial authority can ignore its obligations. Section 10 requires that the authority take all reasonable steps to ensure compliance with the Act within its district.

SECTION 8 – OBLIGATIONS OF OWNER AND PERSONS IN CONTROL OF POOL

- 8.1 Pool owners must ensure that, “*except as provided in any exemption granted under section 6, ... the pool, or some or all of the immediate pool area including the pool*” is fenced to the appropriate standard.
- 8.2 If a condition associated with an exemption under section 6 has been imposed, the owner must also comply with that.
- 8.3 Any person having possession of a property with a pool, whether or not that person is the “*owner*”, has a specific duty under the Act. This duty is to ensure that the pool is empty while the person knows or could reasonably be expected to know that the Act is not being complied with. This means, for example, that a tenant must ensure that any unfenced pool on the property is drained and kept empty. In an ordinary family home, where the owner of the property is absent, the question of whether a spouse or relative has “*possession of the property*” would have to be determined on a case by case basis.
- 8.4 The fact that a person has complied with the obligations under the Act does not excuse him or her from any other duty imposed by law.

SECTION 9 – OFFENCES

- 9.1 Any person who fails to comply, without reasonable cause, with sections 7 or 8 of the Act, commits an offence. Conviction can attract a fine of up to \$500 and a further fine of up to \$50 per day if the failure to comply continues.
- 9.2 The offences under the Act are,
- (a) failure to comply with any reasonable requirement of a territorial authority to advise of the existence of a pool (s. 7(1));
 - (b) failure of a person proposing to build a pool to tell the territorial authority of that intention (s. 7(2));
 - (c) failure of an owner to fence a pool (s. 8(1));
 - (d) failure of an owner to comply with a condition imposed as part of an exemption (s.8(2)); and
 - (e) failure of a person in possession of a property to ensure that a pool is not filled or partly filled with water when the pool is not fenced or when a condition imposed as part of an exemption is not complied with (s. 8(3)).
- 9.3 Section 9(2) of the Act applies to the owner of property with a pool that may be let or leased. It would also apply to the owner of a hotel, or motel, or camping ground where a pool is for the exclusive use of a guest. This section provides that it can be a defence in relation to section 8 that the owner took all reasonable steps to ensure that:
- (a) the obligation in section 8 was complied with; and
 - (b) those in possession of the property or those likely to be in the immediate pool area were made aware of the pool.
- 9.4 If a person is convicted of an offence under section 8, the Court may order that the pool is drained and kept empty until an appropriate fence is erected or any condition imposed under section 6 is met.
- 9.5 A recent case in Auckland also shows that criminal charges may be brought against any person in control of a property where a child drowns in an inadequately fenced pool.

SECTION 10 – OBLIGATIONS OF TERRITORIAL AUTHORITIES

10.1 Every territorial authority is required to take “*all reasonable steps*” to ensure that the Act is complied with. While the Act does not specify these “*reasonable steps*”, in the Department’s view, they should include:

- (a) Informing householders of the need to:
 - (i) fence pools;
 - (ii) tell the territorial authority of the existence of pools; and
 - (iii) tell the territorial authority of an intention to build a pool
- (b) Locating existing pools in the area;
- (c) Inspecting pools the territorial authority is aware of and:
 - (i) instructing pool owners of any changes required to upgrade fences to the appropriate standard;
 - (ii) carrying out periodic inspections to ensure that any instructions are complied with;
 - (iii) carrying out periodic inspections on all pools to ensure that fences are being maintained and that they still meet the standard required by the Act; and
- (d) Taking court action against non-complying pool owners when all other means of obtaining compliance have failed.

These are all discussed in more detail below. Territorial authorities are strongly encouraged to implement these steps in order to aid in the prevention of drownings or accidents. They should include suitable pool safety objectives in their annual plans.

Informing householders

10.2 It is important that pool owners and intending pool owners are informed of their legal responsibility to tell territorial authorities of the existence of a pool, or of an intention to build one. Section 7 provides that pool owners and prospective pool owners must comply with this responsibility. Informing *all* residents of this requirement will increase the chance that *all* pool owners and prospective pool owners know of it. Appendix B contains a suggested pamphlet that could be distributed.

10.3 Territorial authorities could also increase public awareness in a number of other ways, such as: newspaper advertisements or the inclusion of a message with rates assessments. It would also be beneficial to advise people applying for a Land Information Memorandum of the Act’s requirements.

Locating existing pools

10.4 To be effective, a territorial authority needs to know the location of every pool in its district. If its information is considered inadequate, a first step could be to circulate a general request throughout the district seeking information about the existence of pools. The subsequent responses of pool owners would then be the start of a

database. However, further work is likely to be needed to discover all the pools in the district. This could involve, for example:

- house to house surveys;
- aerial surveys;
- identification of existing pools during a property inspection for some other purpose; or
- checking with Valuation New Zealand for details of properties.

- 10.5 The database could be progressively extended as applications for building consents for new pools and alterations to existing pools are received.

Pool inspections

- 10.6 Inspectors should inspect new pool fences to ensure that they comply with the Act. If the fence does not comply, owners should be informed, and told how to bring the fence up to an appropriate standard. A further inspection would be required, after a period specified by the inspector, to ensure that the owner has made the necessary changes. A code compliance certificate is to be issued to pool owners who complete work that was subject to a building consent.

- 10.6 Periodic inspections of pool fences should be made to in cases where the authority suspects that appropriate standards are not being maintained.

- 10.7 It is vital that pool owners know it is illegal to fill, or partly fill a pool while it is not fenced to the standard required.

Court action

- 10.8 Territorial authorities have an obligation to ensure that the Act is complied with, and section 9 provides a remedy for non-compliance. Territorial authorities should act through the Courts to seek sanctions against non-complying pool owners if all other steps to get compliance fail.

Costs of enforcing the act

- 10.9 Territorial authorities can recover the costs of enforcing the Act from the public at large through the general rate, or by charging pool owners inspection fees under section 690A of the Local Government Act.

- 10.10 That section provides that territorial authorities may prescribe fees for any certificate, approval, or inspection made under any Act. Such fees may recover the reasonable costs of the territorial authority for each inspection.

SECTION 11 – POWER OF ENTRY FOR TERRITORIAL AUTHORITY OFFICERS

- 11.1 Section 11 of the Act provides that a territorial authority officer may, at any reasonable time, enter and inspect a property if there are reasonable grounds to believe that:
- there is an unfenced or inadequately fenced pool on the property, or
 - a condition imposed under section 6 is not being complied with.
- 11.2 Any officer entering a property must carry a warrant issued by the territorial authority which specifies the officer's name and position, and that the officer is authorised by the territorial authority to enter the land and carry out the inspection. The warrant, and evidence of identity, must be produced on first entering the property if it is practicable to do so, and whenever it may subsequently be required. The Department is of the view that the warrant can be generally worded to authorise the officer to enter any property in the area which he or she believes contains a pool not complying with the Act.
- 11.3 The Act does not authorise entry to a property on a regular basis, for example, to allow an annual check that a pool fence is being properly maintained. However, Otago University's Injury Prevention Unit reported that some territorial authorities are of the view that the passage of time in itself raises a question whether a pool fence would continue to be adequate. Those councils believe that this doubt is, of itself, a sufficient ground to authorise an inspection.
- 11.4 An officer can only gain entry to a dwelling with a warrant issued by a judicial officer (the definition of judicial officer is contained in section 2). Such a warrant can only be given to a specified officer and is valid for a maximum period of one month. A warrant may only be granted where entry is essential for an inspection to be carried out.

SECTION 12 – DELEGATION OF POWERS TO COMMITTEES OF COUNCILLORS

- 12.1 A council may delegate its powers and functions, under section 6 of the Act or clause 11 of the Schedule, to grant exemptions or impose conditions on particular fences.
- 12.2 Such a delegation can only be to a committee consisting solely of elected council members. No delegation may be made to a committee with any non-elected members, or to any territorial authority officer (including any council inspector).

SECTION 13-EFFECT OF ACT ON BYLAWS AND OTHER LAWS

SECTION 13A-EFFECT OF BUILDING ACT 1991 ON BYLAWS

- 13.1 Section 13 provides that a territorial authority may make other bylaws or enforce any other law relating to the fencing of pools to which this Act does not apply.
- 13.2 Section 13A states that a territorial authority cannot make a bylaw requiring any pool subject to the Act to achieve performance criteria greater or lesser than those specified in the Building Act or a building code.

**SECTION 13B-FENCING IN ACCORDANCE WITH SCHEDULE DEEMED A
MEANS OF COMPLIANCE**

SECTION 13C-AMENDMENT AND REPLACEMENT OF SCHEDULE

- 13.3 The Schedule to the Act is deemed to be a document establishing compliance with the Building Code. This means a fence constructed to the specifications contained in the Schedule automatically meets the requirements of the Building Code.
- 13.4 The Schedule may be amended or replaced by Order in Council.

SECTION 14—AMENDMENT TO FENCING ACT 1978

- 14.1 Section 9A of the Fencing Act 1978 was inserted by the Act. It provides that:
- (a) where work on a fence is required solely because of the Fencing of Swimming Pools Act, it shall be the responsibility of the pool owner; and
 - (b) no person, other than the pool owner, shall be required to make any contribution under the Fencing Act towards the fence which is greater than would have been necessary if the pool did not exist. This appears to envisage the situation where the pool fence is on part of the boundary line. In this case, the next-door neighbour only has to contribute to the cost of the fence as if it were an ordinary boundary fence.
- 14.2 In (a) above, the words “*work on a fence*” probably have the same meaning, as far as they are applicable, as the definition of the term in the Fencing Act. This includes “the erection, replacement, repair, and maintenance of a fence in whole or in part.”

SCHEDULE TO THE ACT

The Schedule contains the technical requirements for existing fences, for the construction of new fences, and for alterations to existing fences. The following comments are the Department's interpretation of the Schedule's requirements.

Height of fence

Clause 1:

The top of a fence must be at least 1.2 metres above the ground on its outside. It must also be at least 1.2 metres above any permanent object that is within 1.2 metres of the outside of the fence.

This means, for example, that the fence must be at least 1.2 metres above the level of any decking outside of it. It also means that there must be no trees, hedges, or stacks of wood, etc, which can be climbed, within 1.2 metres of the outside of the fence.

A problem may arise where a boundary fence forms part of a pool fence and the neighbour has trees, stacks of wood, etc within 1.2 metres of it. Under section 8 of the Act, it is the responsibility of the pool owner to ensure that the pool is fenced in compliance with the Act.

If the pool owner is unable to reach an agreement that the neighbour will keep his or her side of the fence clear, in the Department's view, the pool owner must make other arrangements that would comply with the Schedule. For example, build another fence inside the boundary fence, or ensure that the pool is not filled or partly filled with water.

Ground clearance

Clause 2:

The space between the bottom of the fence and the ground must not exceed 100 mm.

Materials

Clause 3:

The fence must be made of durable materials. The manner of construction should prevent children under the age of six from gaining access to the pool.

Clause 4

Except where the fence is horizontally close-boarded, or made of perforated material, netting, or mesh, the space between any *vertical* supporting posts, etc, may not exceed 100mm.

This clause was amended to allow the use of polypropylene netting, or mesh for fences. This material requires support only from corner posts.

Clauses 5 and 5A

All fencing supports, rails, rods, wires, and bracing which are not vertical shall be inaccessible for climbing from the outside of the fence. This means that a fence can have vertical fencing supports, rails, rods, wires, or bracing on its outside. Any supports, etc, that are not vertical (for example, horizontal or near horizontal rails which could be used for climbing), must either be inaccessible from the outside, or be at least 900mm apart, with no other support (other than a vertical rail) between them.

Clauses 5 and 5A replaced the previous clause 5 to allow horizontal supports to run through the middle of a fence rather than requiring them to be entirely on the pool side of it. The requirement that there be a gap of at least 900mm between any two horizontal supports, is to ensure that small children cannot readily use them to climb over the fence.

Clause 6

Where a fence is made of perforated material, netting, or mesh, no opening in that material, netting or mesh shall be greater than 50mm. When read together, clause 1(2) and clause 6 mean:

- if the openings in the perforated material, netting or mesh are 10mm or less, the fence must be at least 1.2 metres high;
- if the openings are more than 10mm, the fence must be at least 1.8 metres high; and
- an opening of more than 50mm is not permitted in any circumstances.

Clause 7

Perforated material, netting, or mesh, shall be firmly attached to a rail or pipe at the top and bottom of the fence, or else be so arranged that the fence cannot be readily crossed by children under the age of six years.

This is to ensure that access to the pool cannot be gained by climbing or crawling through loose material at the top or bottom of the fence.

Gates and doors

Clause 8

Gates and doors must be constructed to comply with the relevant parts of clauses 1 to 7 of the Schedule. They must also be so mounted that:

- (a) they cannot open inwards;
- (b) they are clear of anything which could hold them open and no other means of holding them open is provided; and
- (c) when lifted up or pulled down they do not release from the latch, come off the hinges, or provide a ground clearance of greater than 100mm.

The reason for prohibiting gates and doors from opening towards the pool, is that any gate or door left unlatched cannot be opened by a young child who merely leans against it. It is more difficult for young children, especially those unsteady on their feet, to open a gate or door if they have to pull against the required self-closing device.

Operation of gates and doors

Clause 9

Every gate or door must have a latch. Where the latch is inside the fence, and can only be reached over the top of, or through a hole in, the fence, gate, or door, the latch and the lowest point of the hole must be at least 1.2 metres above the ground on the outside of the fence.

Where the latch is on the outside of the fence, it must be at least 1.5 metres above the ground.

Clause 10

Every gate and door must have a device which will automatically close and latch it when it is stationary and 150mm from the closed position.

This is to ensure that the gate or door will not remain open when it is released. A self-closing and latching gate or door is critical to the safety of a pool. An Australian study of drownings and non-fatal accidents in pools states, “*no child scaled a fence and all children who gained access to a pool did so through an open or unlatched pool gate or house door.*”

Doors in walls of buildings

Clause 11

Where a building forms part of a fence, a door in the building wall does not have to comply with clauses 8 to 10 if a territorial authority is satisfied that:

- (a) compliance with these clauses is impossible, unreasonable, or in breach of another Act, regulation, or bylaw; and
- (b) the door is fitted with a lock that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

Diagrams 4 and 5 on page 10 [**check page number in final version**] illustrate examples of doors in buildings that form part of a fence.

Clause 11 allows territorial authorities to determine that it may be impossible to make doors in buildings conform to clauses 8 to 10 of the Schedule. In such cases, the door, including a sliding door, should have a lock, which is not easily operated by children. It would be preferable if this could also be located at a height not easily reached by children as an extra safety precaution.

It is important that councils consider carefully all applications for exemption and, if any are granted, ensure that appropriate locks are fitted to doors.

The council's powers under clause 11 can be delegated to a committee comprising only council members.

APPENDIX A

SUMMARY OF REPORT OF THE LOCAL BILLS COMMITTEE ON THE FENCING OF PRIVATE SWIMMING POOLS (1983)

- 1 A very large number of New Zealand children are exposed to the hazard of a private swimming pool in their immediate home environment.
- 1 Private swimming pools are a major cause of accidental death of pre-school children and are second only to motor vehicle crashes in this regard.
- 2 Reliance on education alone would achieve very little in reducing the number of pre-school drownings in private swimming pools.
- 3 Pre-school drownings in private swimming pools are preventable and pool fencing is the most effective means of achieving this.
- 4 Drownings of pre-school children in private swimming pools are both a rural and an urban problem.
- 5 The main reason given by councils for adopting a fencing provision was concern for the safety of young children.
- 6 The most frequently mentioned reasons given by councils for not adopting a fencing provision were that there were other equal or greater water hazards in the district, that such a provision would be too difficult to enforce, and that the matter was outside the council's responsibilities.
- 7 The most frequently mentioned circumstances in which those councils without fencing provisions would adopt such provisions would be a requirement by Central Government and public pressure on the council.
- 8 The Committee concluded that the overwhelming weight of evidence and argument required that private swimming pools should be fenced. In particular the Committee concluded that private swimming pools should be fenced because:
 - (a) They are a significant childhood water hazard;
 - (b) Pool fencing is the most effective means of preventing drownings of pre-school children in private swimming pools;
 - (c) It is totally impossible for parents to supervise their children every minute of the day;
 - (d) There are no equal or greater water hazards for pre-school children;
 - (e) Where there is a reasonable and viable means of protecting young children from hazards created in the environment such as private swimming pools, then those children have a right to that protection; and
 - (f) The value of aesthetically pleasing gardens cannot be placed above the value of human lives.

Source: Appendices to the Journals of the House of Representatives, 1983, I 10A

APPENDIX B

SUGGESTED PAMPHLET FOR POOL OWNERS*

FENCING OF SWIMMING POOLS ACT 1987

**Territorial authorities may, if they wish copy or amend this suggested pamphlet and distribute it to households.*

- WHY DO I HAVE TO FENCE MY SWIMMING POOL?

A private swimming pool is a significant asset for the home. It becomes the centre of activities in summer; the place for the family to sit around in the evenings or when friends come over for a barbie. A place to relax, or even to talk business in relaxed surroundings.

It can also be a deadly danger for small children. Sadly, a significant number of toddlers drown in private swimming and spa pools. The natural attraction water has for small children and the existence of private pools is a dangerous combination.

You may not have small children. You may have grandchildren, or perhaps the children of relatives or friends may come to visit you. Most often, the children who drown in private pools live on or are visitors to the property. So, it is not just to protect children who may stray onto your property, that private pools need to be fenced.

Ask anyone with practical experience of minding children. They will tell you that it is not possible to constantly supervise small children. Even the most careful parent may become distracted for two or three minutes. That is enough time for a small child to get to, and fall in an unfenced or unsecured pool. Even if a toddler is saved from drowning, the outcome is not always a happy one. If a child's brain is deprived of oxygen for only a few minutes, it can suffer moderate to severe damage. There are even suggestions that mild, otherwise undetectable damage may generate subtle changes in the later behaviour of children.

Some years ago Parliament decided that there was no reason for children to continue to fall into private pools and drown, or suffer brain damage, where this could be almost entirely avoided by adequate fencing. Parliament's answer was the Fencing of Swimming Pools Act 1987.

- WHAT IS THE ACT ABOUT?

The Fencing of Swimming Pools Act exists to protect young children from the dangers of unfenced swimming pools and spa pools. It does this by requiring owners to fence their pools.

- WHOM DOES THE ACT APPLY TO?

Pool owners, and people, including tenants, with pools on their property, all have duties under the Act.

Pool owners must tell the council if they have a pool or are intending to get or build a pool. A building consent is required before constructing any type of pool or altering a fence around a pool. All pools must be fenced to the standard set out in the Act. If a pool is not fenced to this standard, the owner must ensure that the pool is kept empty.

Everybody renting or leasing a house with a pool must ensure the pool is empty if it does not have a fence, which complies with the Act.

This council is required to take all reasonable steps to make sure that the Act is complied with.

- WHICH POOLS NEED TO BE FENCED?

All private pools and spa pools have to be fenced unless:

- the maximum depth is 400mm or less; or
- the walls of the pool are 1.2 metres or more above the ground (or the pool's surrounds). This means no permanent means of access such as steps are allowed and temporary steps must be removed after being used; or
- the pool is indoors

- WHERE MUST THE FENCE BE BUILT?

The fence may only surround the pool and the area immediately around the pool. This area can only include things used in association with the pool, for example, a sunbathing deck or a changing shed. **It may not include the clothesline, barbecue or a vegetable garden.** A secure boundary fence is not, on its own sufficient. It would not comply with the Act. However, subject to strict conditions, part of a boundary fence may be used as a part of a pool fence.

If a boundary fence is made use of, there is a danger that a neighbour may unwittingly make the fence unsafe. For example, the neighbour may stack timber against the fence so that it becomes easy for a child to climb over into the pool area.

- WHAT ABOUT AN EXISTING POOL?

There are still existing pools, which were built prior to the Act coming into force. These were often subject to a bylaw which only required that the property itself be adequately fenced. This reflected the view at that time, that the greatest danger arose through children straying onto a property. This does happen, but later research in New Zealand and overseas has shown that the majority of accidents happen to the children of pool owners or of their legitimate visitors.

Therefore, the Act requires that all pools must be fenced to the standard set by it.

- CAN A BUILDING FORM PART OF A FENCE?

Buildings can form part of a fence but have to meet certain requirements in the Act.

- CAN POOL OWNERS BE EXEMPTED FROM THE ACT?

Pool owners can apply to the council for an exemption from the Act. The council, in granting an exemption, could specify certain conditions that the pool or the property must meet. The council can only grant an exemption or a special condition if this would **not significantly increase danger to young children.**

- WHAT STANDARD OF FENCING IS REQUIRED?

Pool fences must meet the standard required by the Act. This requires existing pools to be fenced to the specifications of the schedule to the Act. A new fence or alterations to an existing fence must meet the performance standard of the Building Code. Ask the council for information about the criteria that your fence must conform to.

The Schedule of the Act set out specifications which, if followed, will automatically ensure that a swimming pool or spa pool fence meets the performance standard of the Building Code.

- WHAT HAPPENS IF I USE AN UNFENCED POOL?

Any person who uses an unfenced pool commits an offence under the Act, and is liable to a fine. Criminal proceedings were recently taken against the tenants of a property with an unfenced pool in which a small child drowned. Both tenants were convicted and required to pay substantial fines.

- NEED FURTHER INFORMATION?

Council officers can provide you with the information you need.

Our postal address is:

our telephone no. is:

email:

The person to ask for is:

The Fencing of Swimming Pools Act 1987 Guidelines for Territorial Authorities

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