



Swimming Pools Regulation 2018

**The Real Estate Institute of New South Wales
Limited**

Submission on the Draft Regulation

27 June 2018

Swimming Pools Regulation 2018
Better Regulation Division, Department of Finance, Services and Innovation
By email: SPregulation2018@finance.nsw.gov.au

Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the draft Swimming Pools Regulation 2018 (NSW) (**Draft Regulation**) and Regulatory Impact Statement, issued on 4 June 2018.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

REINSW supports, in principle, the Government's initiatives to improve pool safety outcomes and establish standards concerning the prevention of drownings, particularly in young children. Despite this, issues surrounding the enforceability of the Draft Regulation and existing legislation continue to hinder its implementation. Without the proper enforcement mechanisms in place, the primary objectives of the Draft Regulation cannot be achieved and the failure to rectify this will create significant safety risks for consumers and users of swimming pools.

This Submission responds to the questions relevant to real estate agents that are posed in the Regulatory Impact Statement as well as providing comments on topics that REINSW believes require additional consideration by Government in relation to swimming pool safety.

1. Are there any comments on the preliminary matters or do any other updates need to be made to the preliminary matters in the proposed Regulation?

• Date of Commencement – Clause 2

REINSW acknowledges that the existing *Swimming Pools Regulation 2008* is scheduled for automatic repeal on 1 September 2018. However, REINSW is conscious that, given the current date, the date of commencement of the Draft Regulation leaves little scope for the effective consideration of submissions made by key industry stakeholders in response to the Draft Regulation. REINSW always encourages Government to allow sufficient time for an effective public consultation process to ensure the right outcome is achieved.

• Definitions

REINSW encourages the use of concise, straightforward definitions within the Draft Regulation to ensure that potential confusion amongst pool owners and users is limited. Accordingly, there are some key terms which remain undefined but which should have definitions in order to avoid potential ambiguity in interpretation, confusion and disputes.

With an emphasis on protecting children, and the recognised need to communicate this message across a range of mediums, 'young children' is a term that requires defining.

'Young children' are the subject of concern in the warning notice under clause 10(1)(a)(i) of the Draft Regulation. Although Part 1 the AS 1926-2012 (Swimming Pool Safety Standards Set) defines a 'young child' as under the age of 5, the lack of definition in the Draft Regulation raises questions over who is to be 'actively and responsibly supervised'. If the intention is to follow the same definition as found in the AS 1926-2016, this intention needs to be clear and a reference to such definition should be included in the Draft Regulation to avoid any potential confusion.

Although the *Swimming Pools Act 1992* (NSW) (**Act**) is not up for debate or review at this time, REINSW thinks it worthwhile raising the fact that the term "spa pool" is poorly defined in the Act. REINSW recommends the Government consider the definition of "spa pool" in section 34 of the *Public Health Act 2010* (NSW), which provides a far better definition. A clear definition will eliminate the inconsistencies and ambiguities in interpretation amongst pool inspectors and consumers as well as increase awareness in the market.

3. Do you consider that the proposed changes to the content of warning notices (CPR information) will help educate pool owners, occupiers and users about pool safety and pool safety obligations?

REINSW is of the view that issues arise because a 'simple flow chart' (as referred to in clause 10(1)(b)) is undefined. Although the Draft Regulation no longer mandates that the flow chart is to be illustrated by drawings with key words in bold, until the concept of a 'simple flow chart' is properly defined, the term remains subjective. What may be a 'simple' flow chart to some, may not be for others.

Nonetheless, as CPR guidelines and notices are often not read until needed, it is unlikely that changes to the content of notices alone will assist in the understanding of pool safety obligations. Access to education, or a lack thereof, still remains a contributing factor as to why people do not comply with pool safety obligations. Regardless of whether sufficient and adequate notices are present, if pool owners, occupiers and users are not properly educated, such notices are rendered ineffective. REINSW, therefore, strongly encourages increased educational awareness to consumers and pool users to ensure that they are sufficiently aware of their obligations.

4. Do you agree that a warning notice should be required to be displayed from construction until an occupation certificate or certificate of compliance has been issued?

Any property on which a swimming pool is being constructed under clause 10(3) of the Draft Regulation requires properly maintained signage containing a notice that the swimming pool is not to be used or occupied. The onus is placed on the occupier of the premises and REINSW is of the opinion that this burden is unsatisfactory. The requirement of adequate signage should be the responsibility of the builder, being the individual or entity who is in direct control of the construction site at all times.

Section 25 of the Act provides a defence to offences under the Act if owners of the subject property can establish:

- (a) that the owner was not the occupier of the premises when the alleged offence occurred, and
- (b) that the owner had taken all reasonable steps to ensure that the alleged offence would not occur, and
- (c) that the owner was not aware of, and could not reasonably be expected to have been aware of, the facts giving rise to the alleged offence.

The defence itself contemplates the fact that sometimes it is not appropriate for owners to be responsible for activities on their property. The defence makes it clear that owners are not always able to be aware of, or prevent, the facts giving rise to an offence under the Act. Accordingly, a similar defence of this nature should be extended to owners and occupiers who may not be present during the construction of the pool or unable to control what occurs on the construction site. When owners and occupiers are left with the burden of ensuring warning notices are properly displayed, this often becomes an issue for property managers to deal with, which is unjust considering they are not present at all times during construction.

REINSW does not consider it unreasonable to place the onus on an entity, its employees, agents or representatives who are likely to be present at all times during construction. REINSW proposes that these entities/individuals (for instance, builders and not occupiers) are responsible for manifesting and exercising control over the construction and so should be responsible for ensuring adequate signage.

9. Do you believe that registering certificates of non-compliance in the Register will lead to improved pool safety compliance and rectification of issues?

The Draft Regulation relevantly requires local authorities or accredited certifiers responsible for issuing certificates of non-compliance to enter details of the certificates on the Register within 3 business days of issue. Although REINSW appreciates the intention behind this obligation, the issue of concern lies with the enforcement mechanisms that are currently in place or, with respect, a lack thereof.

Once a swimming pool is certified as “non-compliant”, Councils must be responsible for ensuring that any issues of non-compliance are rectified within the requisite timeframe. However, REINSW does not believe that there are sufficient enforcement mechanisms in place to ensure both owners and occupiers maintain compliant pools.

REINSW’s concern is demonstrated where a property with a non-compliant swimming pool is sold to a person who subsequently lives in that property. The new owner has 90 days to rectify the non-compliance, however, without more stringent enforcement mechanisms in place by Council, there is no real pressure for the owner to comply within the 90 days. The situation is slightly different when it comes to a property with a non-compliant swimming pool being sold to an investor who cannot lease the property until

the circumstances or inadequacies are rectified. Whilst Council needs to be more active in enforcing rectification within 90 days, the main driving force for compliance is the inability for the investor to obtain rental income through leasing the property until the pool is compliant. In both these examples, REINSW would like to see Councils made more responsible for ensuring compliance is achieved within the 90 days. REINSW's view is that as long as there are inadequate enforcement mechanisms in place by Council, owners and occupiers of properties with non-compliant pools (as well as their guests and neighbours) remain at risk to such an extent that the purposes of the Draft Regulation are unable to be fulfilled.

Owners and occupiers of properties with pools must remain vigilant about pool maintenance and safety at all times, however, the current requirements mean that people's minds are only thinking about compliance at one point in time – when either buying, selling or leasing their home. To maximise avenues for improved pool safety compliance, REINSW recommends the introduction of frequent mandatory inspections as an appropriate mechanism for policing compliance. This pool inspection system was discussed in REINSW's submission to the Office of Local Government dated 19 October 2015.

Whilst the sale or lease of a property with a pool acts as a trigger for compliance, those triggers potentially allow many pools to remain non-compliant indefinitely if a property with a pool is not sold or leased, posing a significant threat to child safety and consumer protection. Further, the trigger for compliance may never be activated, for instance, if people inherit properties. Therefore, the requirement for a mandatory inspection of pools every 3 years is likely to improve pool safety compliance and promote child safety in pools. REINSW additionally proposes that the 3-year cycle be annual where high risk factors are involved. This is not dissimilar to the Queensland model where tourist accommodation inspection cycles are annual because they are considered to be of high risk.

Improved pool safety is also hindered when inspections are carried out by individuals who do not possess the relevant industry qualifications or expertise. The criteria for compliance may not be adequately assessed in situations where Council employees do not have (nor are they required by law to have) the requisite skills and knowledge to make an accurate determination with regards to non-compliance. Rather than taking a "tick-box" or one-size-fits-all approach to assessing swimming pool safety, REINSW believes that Council inspections should only be carried out by those with the knowledge and expertise as is required by independent certifiers, and that is guaranteed to improve swimming pool safety. In REINSW's view, if the inspectors are unable to understand and apply the legislation accurately then there is little to no hope of getting consumers educated about compliance and swimming pool safety. Whilst REINSW appreciates the potential strain on Council resources that may result from this approach, safety is jeopardised when inexperienced and underqualified employees are assigned to assess the extent of compliance in swimming pools.

REINSW's position is that the quality of reporting from inspectors is substandard and needs improvement. One way to do this is to introduce a requirement for inspections to be carried out only by competent, experienced and qualified certifiers at all times (as discussed above). This would assist with eliminating the inconsistencies in interpretation of the legislation that exists amongst the inspectors. Further, more often than not, consumers are unable to attend to issues of non-compliance as they lack the required information from the inspection reports. To resolve this issue, REINSW proposes that Council inspection reports be more detailed and follow a similar standard (including with regards to content) as those reports issued by private inspectors and accredited certifiers. Clause 21 of the Draft Regulation fails to provide any assistance on the extent or comprehensiveness of information to be included in a certificate of non-compliance and simply states that it *"must include ... whether the local authority or accredited certifier is of the opinion that the swimming pool poses a significant risk to public safety"* (clause 21(3)(c)). REINSW strongly encourages the inclusion of further guidelines and requirements in the Draft Regulation to ensure that consumers are provided with a sufficient amount of information to assist in ensuring their pools are compliant.

10. Will providing access to an expanded range of Australian Standards improve compliance with safety obligations? If so, does the proposed Regulation identify all possibly relevant Australian Standards?

Access to Australian Standards will undoubtedly increase the awareness of pool owners to safety obligations and provide a means for obtaining knowledge on swimming pool requirements. Nonetheless, this access will prove to be ineffective unless pool owners are provided with more information and education regarding their statutory obligations. The purpose of the Draft Regulation is to deliver better safety outcomes for pool owners, users and the broader community. However, REINSW does not believe this can be achieved when a significant number of consumers remain in the dark when it comes to understanding their obligations as pool owners.

On another but related note, REINSW recommends that Councils display all versions of the Australian Standards, not just those from 2007, because different standards apply to different pools.

Conclusion

REINSW supports the Government's initiatives regarding the Draft Regulation and its steps to establish standards and improve safety outcomes across the board. Nonetheless, to allow for the successful facilitation and implementation of the Draft Regulation, regard should be had to the current lack of enforcement mechanisms and the growing need to provide adequate levels of information and education to pool owners and users.

As outlined in detail above, the Draft Regulation requires clear and concise definitions to ensure that pool owners and users are sufficiently aware of their statutory obligations and

measures need to be in place to ensure that only those who are qualified and skilled are capable of making decisions regarding pool safety and compliance.

REINSW appreciates the opportunity to provide this Submission and would be pleased to discuss it further, if required.

Yours faithfully

A handwritten signature in black ink, appearing to be 'T. McKibbin', written over a faint, stylized graphic element that resembles a triangle or a stylized letter 'A'.

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales Limited