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COMMENCEMENT OF THE *SWIMMING POOLS AMENDMENT ACT 2009* AND GUIDANCE TO COUNCILS

The purpose of this circular is to advise councils that the *Swimming Pools Amendment Act 2009* (the Amendment Act) was assented to by the Governor of NSW on 14 December 2009 and commenced on and from that date.

The circular also provides guidance to councils in relation to the amendments and details about where to get further information and resources.

Background

Drowning is a leading cause of accidental death in very young children who lack the cognitive and water skills to deal with the danger.

A comprehensive review of the *Swimming Pools Act 1992* was undertaken to identify appropriate amendments to enhance the safety of children under the age of five years around private ('backyard') swimming pools in NSW.

The review considered research which indicates that the risk of toddler drowning is significantly less in pools with stronger barrier requirements. The review also included consultation on reform options with the local government sector, water safety advocacy groups, swimming pool industry groups, State Government agencies, pool owners and others. The Division thanks councils for their input to this review.

Aims of the Amendment Act

The Amendment Act aims to strike a balance between the responsibilities of the State Government, local councils and individuals in reducing drownings and serious immersion injuries of very young children.

The Amendment Act provides the legislative framework for a high standard of four-sided, child-resistant pool barriers to be consistently applied to all newly constructed private pools in NSW. It also provides appropriate additional mechanisms to encourage compliance with the legislation.

Amendments

Removal of automatic exemptions for new pools

The Amendment Act removes the automatic exemptions from the four-sided barrier requirement for new pools on very small properties (less than 230 square metres), large properties (2 hectares or over) and waterfront properties.

These amendments ensure that, unless specifically exempted under section 22 of the Act, all new pools are separated by a complying barrier from the house, adjoining properties and public spaces at all times.

There is a delayed commencement period for these provisions. Pools for which construction or installation has commenced before 1 July 2010 on a very small property, large property or waterfront property (as defined) can still rely upon an automatic exemption.

Councils should note that boundary fences and house walls may still be used as part of the swimming pool barrier, as long as they meet the legislative requirements.

Councils should also note that owners will also still be able to apply for a specific exemption under section 22 if they believe that the barrier requirements are impractical or unreasonable.

Requirement for councils to investigate complaints

The Amendment Act requires councils to investigate complaints received about possible non-compliance with the Act.

While most councils already investigate and resolve such complaints, these amendments ensure that all councils commence investigation of a written complaint within 72 hours, where practicable. This timeframe balances the need for councils to investigate complaints as quickly as possible while allowing for weekend interruptions and urgent, competing priorities.

Councils may decline to investigate a complaint that is vexatious, misconceived, frivolous or lacking in substance.

Ability for councils to rectify non-compliant pool barriers

The Amendment Act gives councils optional power to enter a property to undertake remedial work to rectify deficient pool barriers in situations where the owner has failed to comply with a direction to comply with the Act, or where councils consider that the requirements of the direction need to be carried out urgently. Before any work is done councils must serve a notice of intention to carry out the work.

Councils should note that the use of this power is to be strictly limited to situations where non-action poses a significant risk to public safety.

Requirement to issue a notice of intention to serve a direction to comply

The Amendment Act has introduced the requirement for councils to serve a notice of intention to serve a direction on a pool owner to comply with the Act at least 14 days before serving the direction.

This requirement does not apply in situations in which it is considered that a person's safety would be at risk if the requirements of the direction were not carried out as soon as possible.

This amendment aims to emphasise that councils' focus should be on encouraging compliance with the Act rather than enforcement action, while still enabling councils to exercise discretion in situations in which immediate enforcement action is warranted.

Increase to penalty amounts for offences under the Act

The Amendment Act increases the maximum court-imposed penalty amounts for most offences under the Act from \$1,100 to \$5,500, including failure to provide and maintain a swimming pool barrier to standard and failure to keep gates securely closed when not in actual use.

These penalties have been increased to better align them with the seriousness of the offences and the significant risks they pose to young children.

Consequential increases to penalty notice amounts will be prescribed by an amendment to the Swimming Pools Regulation 2008 to be made in 2010. See further details in relation to amendments to the Regulation below.

Meanwhile, councils are reminded that when addressing offences under the Act their focus should generally be on encouraging compliance. For example, councils may consider issuing a caution instead of a penalty notice in accordance with recent amendments to the *Fines Act 1996* and the forthcoming Attorney General's *Caution Guidelines*.

Other amendments

The Amendment Act provides other minor amendments to clarify the intent of the Act, the role of councils, and to make the Swimming Pools Act consistent with other legislation.

General duties, including inspections and education

Councils are reminded of their general duties under section 5 of the Swimming Pools Act to:

- take appropriate steps to ensure that they are notified of the existence of all pools in their areas to which the Act applies
- promote awareness within their areas of the Act's requirements, and now to
- investigate complaints about breaches of the Act when required to do so.

These duties are particularly important to consider in the context of the recent spike in child drownings in private swimming pools, a number of which have occurred in non-compliant pools.

Councils are encouraged to undertake inspections and education activities, such as backyard swimming pool safety awareness campaigns. Information about education resources is provided below.

Councils are reminded that, in relation to inspections, section 608(4) of the *Local Government Act 1993* prevents councils from charging the owner of a pool located on non-commercial premises for an inspection that was not requested by the owner.

Councils may, however, charge a fee of up to \$70 for an application from an owner for a certificate of compliance and may choose to promote this service to the community.

Swimming Pools Regulation 2008

Councils are reminded that the Swimming Pools Regulation 2008 was re-made on 1 September 2008. It calls up *AS1926.1-2007 Swimming Pool Safety, Part 1: Safety barriers for swimming pools*, which includes new requirements for non-climbable zones, mesh sizes for fences, retaining walls that form part of a barrier and balconies that project into the pool area.

Further changes to the Regulation consequential to the Act review will be made shortly. These will include an increase to penalty notice amounts and referencing the Standard via the Building Code of Australia commencing after 1 May 2010.

In the meantime, councils are requested to advise the Division about any issues they may have with the latest Australian Standard by 29 January 2010 so that these may be resolved in consultation with the Department of Planning.

Education

Additional private pool safety education initiatives are also under development.

The Division's website at www.dlg.nsw.gov.au has information and resources targeted at the general public under the topic 'Backyard Swimming Pools'. This includes the brochure *Swimming Pool Laws*, which is being updated to reflect the latest amendments. It also includes a *Home Swimming Pool Safety Checklist* and a link to the Royal Life Saving Society Australia's Home Pool Safety webpage at www.homepoolsafety.com.au, which includes a checklist, fact sheets and other resources relevant to private swimming pools. Information in relation to the recent amendments is also available under the topic 'Review of the *Swimming Pools Act 1992*'.

Councils are encouraged to check these web pages for updates and to promote these and other backyard pool safety resources to pool owners within their areas.

Further guidance to councils

Councils will be provided with further guidance to assist with the implementation of the proposed amendments where appropriate.

Meanwhile, councils should familiarise themselves with the requirements of the Amendment Act available at www.legislation.nsw.gov.au and check the existing information and resources available on the Division's website.



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