

**Addendum to “Guidelines for
Territorial Authorities on The
Fencing of Swimming Pools
Act 1987”**



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contact details

Change of Administration of the Fencing of Swimming Pools Act 1987

From February 2006 responsibility for the administration of the Fencing of Swimming Pools Act will transfer from The Department of Internal Affairs to the Department of Building and Housing.

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introduction

1. As a consequence of several developments since the “Guidelines for Territorial Authorities on The Fencing of Swimming Pools Act 1987” publication was issued (August 1999) the Department of Internal Affairs, after consideration and consultation with interested organisations and individuals has issued the following amendments to these guidelines.

summary of changes

2. Page 10 – section 2.3 “*Gates and Doors*” – After the last paragraph add new paragraphs about self-closers and latches for sliding and bi-fold doors and multiple doors opening into the “immediate pool area”.
3. Page 10 – Section 2.4 “*Immediate Pool Area*” – What can the “immediate pool area” include? – Changes to the first and second paragraphs as a direct consequence of the High Court Judgment of Randerson J (*Waitakere City Council v Hickman and Others*) dated 1 October 2004.
4. Page 17 – section 5(b) – warning on use of inflatable pools.
5. Page 18 – section 5(c)(i) and (ii) – note about ornamental ponds following a recent Coroners report on a drowning.

amendments

6. Page 10 – Section 2.3 “*Gates and Doors*” – After the last paragraph add the following (Shown in red text).

The question of self-closers and latches for sliding doors and bi-fold doors opening into pool areas is covered by clause 11 of the Schedule to the Act. For these doors to be exempted from requiring these mechanisms the territorial authority must be “*satisfied that such compliance is impossible, unreasonable or in breach of any Act, regulation, or bylaw*”.

Any decision of the territorial authority to approve any non-complying door must be made by the council; or a committee or subcommittee of council delegated for that purpose. (See section 12 of the Act).

Note: The Department understands that self-closing devices are now available for sliding and slide folding doors.

The situation relating to multiple doors opening into the pool area is covered by the Building Industry Authority Determination (BIA 2003/6), which answers most of the questions. Essentially it states that because almost all such doors opened into the pool area then the “immediate pool area” did not exist. In other words, there would inevitably be other activities undertaken in the area, not associated with the use of the pool. However clause 11 of the Schedule to the Act appears to envisage that there could be more than one door opening into the “immediate pool area” when it says “...any door that gives access...” The question then is how many is too many?

The Department is aware that there is a strong body of opinion among some councils that are of the view that allowing several bi-fold or sliding doors to open directly into the immediate pool area does not provide “barriers” restricting the access of 6 year olds as required by clause F4.3.4(f) of the Building Code.

The Department is of the view that in the spirit of the decision of the High Court in the Waitakere City Council v Hickman and others case,

an assessment needs to be made as to which doors can be legitimately said to be opening into the “immediate pool area” taking into account the court’s description and conditions making up that area (refer **Summary and conclusions of the High Court Judgment** in paragraph 7 overleaf).

The BIA (the functions of which have now been transferred to the Department of Building and Housing) considers that some doors can open into an immediate pool area provided there are other doors opening elsewhere where children can exit the house to play. Obviously, any doors opening from the house into the pool area must still meet the requirements of clauses 8 to 10, or have council approval in terms of clause 11, of the Schedule to the Act.

Where negotiation with the property owner fails to achieve a satisfactory level of compliance, an exemption may be applied for. In considering such applications, a hearings committee may take into account whether other layers of protection (if any) have been incorporated into the pool design. Some examples may include child safe covers and pool alarms, as well as childproof locks on the doors.

7. Page 10 – Section 2.4 "*Immediate Pool Area*" under the subheading What can the "immediate pool area" include? Delete the first Paragraph and the first sentence of the second paragraph and replace with the following text: (Changes shown in red text.)

The Department believes that following the High Court Judgment of *Randerson J (Waitakere City Council v Hickman and others)* dated 1 October 2004; Councils should now look in a less restrictive way at the activities taking place in the pool area and at the presence of associated furniture and amenities.

The High Court Judgment implied that the scope of the "immediate pool area" is determined by the extent to which the area is actually used for activities or purposes regarded as taking place in conjunction with a pool. What are those activities and purposes?

Until that judgment the Department was of the view that activities should directly relate to the use of the pool and that on a general basis vegetable gardens, clotheslines, barbeque areas and childrens' play areas and amenities should not be located in the immediate pool area.

The judgment now appears to require an assessment in each case. Facilities such as barbeque cookers, tables and chairs, entertainment furniture (the list is not exhaustive and will depend on the circumstances of each case) can be legitimately in those areas where they have been used at the same time as the pool in the past. The Department considers, however, that activities such as vegetable gardens, clotheslines and childrens play areas and amenities should still be excluded.

The most important factor is the location of the fence in relation to the rest of the property. The fence should prevent young children from moving directly to the pool from the house, other buildings, garden paths, or other areas of the property normally open to them.

Summary and conclusions of the High Court Judgment

[52] Unless exempted, the Fencing and Swimming Pools Act 1987 requires swimming pools and spa pools to be fenced. The pool owner has the option of locating any required fence around the pool itself or around the “immediate pool area”. The scope of the immediate pool area is determined in the first instance by the extent to which that area is actually used for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing.

[53] Activities in conjunction with the use of the pool need not occur exclusively in conjunction with such use and are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool.

[54] But to qualify as an activity or purpose in conjunction with the use of the pool, the activity or purpose must be closely connected, associated or combined with the use of the pool. As well, the area must be sufficiently confined so that it may properly be described as being in the “immediate” area of the pool.

[55] The size of the immediate pool area cannot be defined with precision and will depend on the circumstances of each case. That leaves both territorial authorities and pool owners in a situation of most undesirable uncertainty which is the inevitable consequence of well intentioned but vaguely worded legislation.

[56] It is not within the power of this Court to interpret the Act with any greater precision. That is the proper function of Parliament. Early attention should be given to this as well as clarifying the unsatisfactory inconsistencies between the requirements of the Schedule of the Act and the building code in relation to fences, gates and doors.”

Key Points of the High Court Judgment

- “The immediate pool area” which is to be enclosed by the fence “will extend only so far as the surrounding area is used for activities or purposes carried on in conjunction with the use of the pool”. However, this area is not capable of precise definition in width and will vary depending on the circumstances of each case. (The Judge said that the safety objectives of the Fencing of Swimming Pools Act 1987 would not be compromised by a less restrictive interpretation of the “immediate pool area” than that contended for by the Councils.)
- The activities must be closely connected or associated with the use of the pool and may, but do not have to, be carried on exclusively with use of the pool. It does not matter that the particular activity can be carried on independent of the use of the pool
- There is an unsatisfactory and inconsistent relationship between the requirements of the Building Code and the Schedule to the Act. The Judge recommended early attention to this, particularly the apparent conflict between the Schedule and the Building Code in relation to fences, gates and doors opening to pool areas.

The last point raised by the Court (conflict between Building Code and Schedule to the Act) is a matter yet to be addressed.

In the interim, the Department advises Councils to continue to apply the fencing provisions of both section 8 and clause 11 of the Schedule to the Act, as is already the case.

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.

8. Page 17 and 18 – Paragraph 5.2 “Section 5(b) and (c). (Changes shown in red text.)

Section 5	Comment
<i>Nothing in this Act shall apply in respect of –</i>	
<i>(a)</i>	
<i>(b) An excavation, structure, or product, in which the maximum depth of water does not exceed 400mm:</i>	<p>For example, portable paddling pools and splash pools used by toddlers are exempt if they are not more than 400mm deep.</p> <p>Note 1</p> <p>While inflatable and portable pools where the water depth is less than 400mm are exempt, supervision of their use by a responsible person is essential.</p> <p>Pools should not be left unattended either with water in them or with the potential to gather water. They should be emptied and stored away when not in use.</p> <p>(Read the warning on the packaging).</p>

Section 5 (cont...)	Comment (cont...)
<p>(c) <i>Any excavation, structure or product</i></p> <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>(ii) <i>That is not modified for use, intended to be used, for swimming, wading, paddling, or bathing:</i></p>	<p>For a pool to be exempt under subsection 5(c) it must not be on land where there is a clear "association" with any building listed in 5(c)(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>Note 2</p> <p>Ornamental ponds, deeper than 400mm, and not intended for swimming, paddling, wading or bathing are not exempted if they are used in association with a house or other specified building.</p> <p>(In 2004 a Coroner's report found that a 2-year old girl had drowned in an unfenced pond located 74 metres at its nearest point from the front door of the residence. The Coroner stated that the pool was not "exempt" in his view because it contained</p>

Section 5 (cont...)	Comment (cont...)
	<p>water in excess of 400mm <i>and</i> was “used in association with any house.”)</p> <p>So what does “used in association with” mean?</p> <p>The Act does not specify this so Territorial Authorities should consider the facts of each case in the light of the ordinary meaning of the word “association”.</p> <p>It is noted that some Territorial Authorities are requiring a water depth not exceeding 300mm as a consent condition. In the case of existing ponds (water features) some have had domed mesh barriers over the ponds that take the weight of an adult; and some have been “shallowed” by sand, shingle or bricks to not exceed the 400mm depth.</p>