Royal New Zealand Plunket Society (Inc.)

Submission on the Building (Pools) Amendment Bill

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To the Local Government and Environment Committee, submission of the Royal New Zealand Plunket Society Incorporated on the Building (Pools) Amendment Bill

Introduction

1. The Royal New Zealand Plunket Society (Inc.) has been part of New Zealand’s landscape for over one hundred years, and our mission - supporting the development of healthy children and families - is just as relevant now as it was when Plunket was established by Dr (Frederic) Truby King in 1907.

2. Plunket provides universal well child primary health services to over 90% of new babies in New Zealand, as well as parenting education and support services in communities throughout New Zealand. This submission represents the combined experience and views of around 6,000 volunteers who represent a broad spectrum of New Zealanders currently engaged in a variety of voluntary roles with Plunket, as well as more than 650 professional staff who deliver the Well Child/Tamariki Ora service framework to families with children aged from birth to 5 years.

3. Plunket has built an impressive record in advocacy for child safety with significant input into positive outcomes for children through the introduction of the Fencing of Swimming Pools Act 1987 [“the FOSPA”], legislation mandating the use of child vehicle restraints, support for the free national poisons centre phone line, participation in Standards New Zealand’s work, as well as collaboration with other agencies to influence positive child safety outcomes for families. Plunket staff and volunteers play an important role in child safety by incorporating this in their work with families.

4. In the first year of a new baby’s life, Plunket nurses attend the home. These visits include identifying hazards onsite and assessing the risks with the parents, before carrying out primary health care through anticipatory guidance. Guidance on water safety, congruent with the child’s developmental stage, is therefore part of a nurse’s work.
Plunket’s opposition to the Building (Pools) Amendment Bill summarised

1. The intent of the Building (Pools) Amendment Bill [“the Bill”] is stated as reducing compliance costs for pool owners and councils whilst maintaining child safety. Plunket opposes the passage of the Bill for the following reasons.

2. Concerns about lack of evidence of harm minimisation: We do not believe that sufficient evidence has been produced to show that the Bill’s proposals will in fact maintain child safety at an acceptable level. In our submission, the number of drowning and near-drowning events is more likely than not to increase should the Bill pass in its present form (including because spas and other home-based water hazards will be unfenced and unregulated).

3. Repeal of the FOSPA: When passed in 1987, the FOSPA was effectively a legal code, focused entirely on promoting young children’s safety by requiring the fencing of certain swimming pools. To lose the FOSPA (via repeal) is to lose the primary legislative support for the important social target that all home swimming pools, spas and hot tubs are safe for young children.

4. A lost opportunity to strengthen the law: The policy work has provided an opportunity to strengthen and broaden the FOSPA’s application as well as making specific legislative improvements based on research into best practice. Plunket is greatly disappointed that these opportunities have been taken. Examples include isolation fencing for pools opening directly from the dwelling; national reporting to the Ministry responsible for administering the legislation on the nature and level of pool owners’ compliance with the law; a more restrictive definition of ‘immediate pool area’ and so forth.

Concerns about evidence of harm minimisation

5. Section F of the Building Code contains the requirements for the safety of building users and the risks of injury encountered by people in and around buildings. The Building Code

1 Long title to the Fencing of Swimming Pools Act 1987

2 Schedule 1, Building Regulations 1992
has been reviewed once in its entirety. The objective of the safety provisions was described as being: “... to limit the probability that, as a result of the design, construction, use or demolition of the building, a person in or adjacent to the building will be exposed to an unacceptable risk of injury.” [emphasis added].

6. In our submission, this Bill is likely to result in young children being exposed to an unacceptable risk of death or injury. The Bill states that it will reduce compliance costs whilst maintaining child safety. We reviewed the papers associated with the Bill and were unable to find sufficient evidence that child safety would in fact be maintained. We are concerned that amendments such as reductions in frequency of pool inspections, removal of the requirements for spa pools to be fenced and so forth, will actually expose young children to greater risk of drowning or the traumatic brain injury associated with near-drowning accidents.

7. The FOSPA has undeniably been very successful at reducing drowning. There is no room for complacency though, as the following data from the Child and Youth Mortality Review Data Group demonstrates. During the time period 1 January 2002 to 31 December 2014, there were 26 children under the age of six years who drowned in a home swimming or spa pool.

8. The deaths occurred at all ages; however there were more deaths in one year olds than any other year of age. Deaths occurred in children from a number of ethnicities. Europeans had the highest number of deaths over the time period (15/26). The deaths occurred in individuals from most levels of deprivation (as measured by the NZ Deprivation Index 2006). There were no trends between deprivation and the number of deaths.

9. There was one death in a spa pool; the remaining deaths occurred in home swimming pools. There were two deaths in which the pool was fully fenced and appeared to be compliant. There were 11 deaths where the pool was fenced, but the gate was not compliant for either a mechanical (was no longer self closing and self locking) or human (gate being propped open with something) reason. In eleven deaths, the pool was either

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3 Review of the Building Code [http://www.building.govt.nz/bcr-report-2007-9. In the course of that review, it was noted that “…a number of submitters requested that the Code (and Building Act 2004) requirements be aligned with the Fencing of Swimming Pools Act 1987, and that NZS 8500: 2006 be referenced in the Code.]
inadequately fenced, or not fenced at all. There were insufficient details to comment on the fencing state of two pools.  

10. The Convention on the Rights of the Child calls on ratifying State Parties, such as New Zealand, to ensure that children’s best interests are paramount when legislative decisions such as contained in this Bill are being made.  

We are not reassured that this Bill, were it to become law, would reflect this principle.

11. The Children’s Convention also requires State Parties to promote children’s rights to good health and adopt strategies to reduce child and infant mortality.  

In our submission, this Bill is more likely than not to increase mortality.

**Repeal of the FOSPA**

**Pools need fences**

12. This Bill repeals the FOSPA and removes the requirement to fence residential pools, spas and hot tubs from primary legislation, and leaves only a requirement for “physical barriers”. These barriers are required to “restrict” (not prevent) access of unsupervised children under 5 years of age (not 6 years, as in the FOSPA). The means of restricting access is contained in the building code. Unfortunately the code’s new Clause F9 is unduly vague with respect to fencing (as distinct from barriers). We accept that the term ‘barrier’ is preferred by the building code, but pools need fences.

13. While it is tempting to be swept along by enthusiasm for a range of barriers that are not fences, there is no escaping the evidence that a well-maintained fence protects young children when the supervision of caregivers lapses. Not so much has changed in 25 or 30

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4 Data obtained from the Child and Youth Mortality Review Data Group, Department of Women’s and Children’s Health, Dunedin School of Medicine, University of Otago, personal communication with Gabrielle McDonald on 3 November 2015.

5 Article 3, United Nations Convention on the Rights of the Child

6 Article 24, United Nations Convention on the Rights of the Child

7 Clause 15, Repeal of the Fencing of Swimming Pools Act 1987

8 Clause 7—new subpart 7A of Part 2, new Section 162C

9 see for example: Thompson & Rivara, Pool fencing for preventing drowning in children, in the Cochrane Database of Systemic Reviews, 3(1), CD001047, 2005
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.\(^\text{10}\)

14. The text of a suggested flyer for pool owners was similarly direct when it described what the Act was about:

**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.*\(^\text{11}\)

15. At the time, private pools were second only to vehicle crashes as a major cause of accidental death of pre-school children.\(^\text{12}\) None of us want to return to that situation.\(^\text{13}\)

16. The situation for spa pools and hot tubs is even more extreme, as they will no longer require perimeter fencing. The only barrier will be a lockable cover. They will also be unregulated. Spa pools should be treated the same way as swimming pools in our view.

17. Should the number of drowning and near-drowning events increase, this would have a tragic social cost. To put this in context, in the last ten years (from 2005 to 2014) twenty

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\(^\text{12}\) Above, footnote 10

\(^\text{13}\) Notwithstanding our comments above, use of the term “barrier” in new legislation could perhaps be made acceptable if the nature of the barrier were prescribed in primary legislation so that it was a fence that formed the barrier and applications for exemptions were considered by industry and child safety experts.
one children under 5 years old died from preventable drownings in home pools and spas. A further seventy one children in this age group experienced hospitalisations due to a drowning incident in a pool (home/spa/public pool).\textsuperscript{14} Using the Ministry of Transport’s data on the social cost of road crashes and injuries,\textsuperscript{15} it is possible to achieve a reliable estimate of the social costs of these drownings. The total estimated social costs of these drownings would be $82.9 million and hospitalisations would be $28.0 million, resulting in a grand total of $110.9 million over the ten year period, which averages out at an estimate of $11.09 million per annum.

18. For families directly affected by a child’s death or traumatic brain injury, these sorts of monetary discussions may seem offensive; but discussions of the costs of compliance are ‘on the table’ as this Bill is under consideration.

The value of the Schedule to the FOSPA

19. In repealing the FOSPA, the Bill also repeals its Schedule of course. Many agencies have provided information to assist with interpretation of the FOSPA and the Schedule over the years.\textsuperscript{16} The effect of this, whether intended or not, is that the standard for pool fencing will no longer be in primary legislation.\textsuperscript{17} The Schedule is not perfect, but it does provide clear and mandatory direction on pool fencing requirements \textit{at a primary legislative level}.

20. Plunket is not reassured by the suggestion that the FOSPA Schedule could provide an ‘acceptable solution’, as compliance with the Schedule would no longer be mandatory were it merely one of many ‘acceptable solutions.’ Even if the FOSPA Schedule were faithfully reflected in the proposed new Clause F9 of the Building Code (“Means of restricting access to residential pools”), it would still only be a legislative instrument and therefore the law protecting children from drowning would be weaker than it is today.

\textsuperscript{14} Data source: Drownbase, Water Safety New Zealand.

\textsuperscript{15} The Social Cost of Road Crashes and Injuries Update, Ministry of Transport (December 2014)


\textsuperscript{17} Schedule: Means of compliance for fences under this Act, Fencing of Swimming Pools Act 1987
21. There is scope to make use of the work that has gone into developing NZS 8500: 2006\textsuperscript{18} and the possibility that an updated version could be referenced in the building code. Even so, that would still not address the loss of the primary legislation, which goes to the heart of our concerns for child safety. It does not serve children well if the rules that keep them safe may be relatively easily changed, especially if there are strong competing interests.

**Is the law so complex?**

22. Much has been made of the complexity of current pool fencing law. We are not convinced that these protests are justified. A quick google produced straight-forward one page fencing information sheets issued by Napier, Dunedin and Rotorua Lakes Councils.\textsuperscript{19} And the significant decrease in children drowning suggests the existing requirements are well understood. They have the advantage of providing certainty against a measureable prescribed standard.

23. In our view, it is the legislative instrument, the building code, which needs to be consistent with the FOSPA, and the FOSPA itself strengthened. The need for the code’s consistency with the FOSPA was identified in 2004 by Randerson J. in Hickman’s case.\textsuperscript{20} As the judge said in his declaratory judgment:

   
   
   _Given the specific application of the 1987 Act, the obvious course of action is to have all relevant provisions contained in the 1987 Act with a cross-reference to that Act in the building code._” [Emphasis added]

\textsuperscript{18}NZS 8500:2006, Safety Barrier and Fences Around Swimming Pools, Spas and Hot Tubs. Standards New Zealand, 2006. It was intended that following further development, NZS 8500:2006 would be formally incorporated into the Building Act 2004. This is a far better approach than what the Bill proposes – to head in the other (de-regulated) direction.

\textsuperscript{19} See for example Napier Council’s pool safety page:

   
   

and fencing information:

   
   

The Auckland Council information is also accessible and easily read:

   
   

(accessed 3 November 2015)

\textsuperscript{20} Waitakere City Council v Hickman and Another, HC Ak, Civ 2003-404-7266 [1 October 2004] per Randerson J, at paragraph 50.
24. As we mention in paragraphs 19 and 20 above, the repeal of the FOSPA will leave only the provisions in the Building Act 2004 accompanied by those in the building code. All the information available currently via the FOSPA’s Schedule (put together by a cross section from the pool industry, architects and designers and child development experts) will be gone. Whilst the Ministry says it will develop ‘acceptable solutions’ to meet the standard in F9, these solutions will not be in legislation. Therefore they will be subject to ongoing debate and pressure for change. This is likely to create uncertainty as to the legal requirements and best practice regulations for pool safety.

**A lost opportunity to strengthen the law**

**Pools need three-yearly mandatory inspections**

25. The Bill introduces pool fencing inspections “...once every 5 years,...”. In our submission, three-yearly inspections for all residential pools, spas and hot tubs should be mandatory. This is a key component of ensuring standards are being met.

26. New Zealand and Australian research is clear on the role of pool inspections as part of managing the risks of home swimming pools. The Child and Youth Mortality Review Committee’s research notes the number of deaths in fenced pools with non-compliant gates of doors, and states that:

> There has been a reduction in the number of drowning in home pools coinciding with FSPA [the Fencing of Swimming Pools Act 1987], but it is evident that passing an Act of Parliament is not enough to prevent drowning. Legislation must be enforced.  

27. WaterSafe Auckland reports that Auckland Council is finding a massive fifty percent **failure rate at three yearly inspections**, predominantly from broken fences and gates not working. Therefore inspections every five years will create an unacceptable risk for children in Auckland especially, where 60% of home pools are located.

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21 Clause 12, New section 222A inserted, Periodic inspection of residential pools, section 222A(1)


28. Yet the bill appears to intend to prevent councils from inspecting pools within their jurisdiction more frequently than five-yearly, since Cabinet amended its decision on mandatory inspections to remove the words “at least.”

National data on compliance

29. We believe the policy work would have been better served if it had had access to national data on home pool compliance, the nature of breaches and so forth. This is critical information when assessing whether standards are being met.

30. We would like to see any further legislation provide for this to create the possibility of review and improvement.

Isolation fencing for doors opening directly from the dwelling

31. We are very disappointed to see the Bill continues to allow doors to open directly onto a pool area, albeit with self-closing mechanisms or alarms. This continues the possibility of mechanical or human error. The research is now clear on the risks this design poses for children; four-sided isolation fencing is considered international best practice.

Risks from spa pools, hot tubs and portable pools

32. Removing the requirements for building consents for spas and hot tubs, their fencing and any inspections whatsoever, means that they will become an unregulated water hazard. We believe that removing spa fencing is likely to have a major impact on children drowning.

33. The proliferation of portable and temporary pools supports the Bill regulating for the lower water depth of 300mm; 400mm is too deep, in our view (and also those of the Australians).

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24 On 3 August this year, Cabinet agreed to amend the pool inspection regime EGI agreed on 25 November 2013, so that inspections would not be required at least five-yearly; rather councils would be required to inspect pools once every five years [CAB Min 15(26/SB)].

The immediate pool area

34. The Bill proposes to insert a new definition of the ‘immediate pool area’ into the Building Act 2004.\(^{26}\) The new definition is very similar to that which resulted in the case of Waitakere City Council v Hickman.\(^{27}\) The opportunity has been missed to tighten the definition by basing it on the submissions of the Waitakere City Council.

35. We propose the definition be amended to read:

\[
\textit{immediate pool area means the land in or on which the pool is situated and so much of the surrounding area as can be used \textit{exclusively} for activities involving the pool.}[\text{emphasis added}]
\]

Conclusion and recommendation

As a State Party to the Convention on the Rights of the Child, this government has undertaken to ensure that children’s best interests are paramount when legislative decisions are made and that steps will be taken to reduce infant and child mortality.\(^{28}\)

The numbers speak for themselves – there is no denying that the FOSPA has been very successful in reducing the numbers of young children who have died by drowning. Today there are many more pools and spas than in the 1980s, yet a great many fewer children drown. To jeopardise progress like this seems very unwise.

Plunket would support amending pool fencing legislation to make it easier to comply with, so long as the primary legislation contained the single, robust prescriptive standard, and related pool safety matters are addressed, as referred to in this submission. We believe this Bill will result in much less guidance on how to prevent a young child’s access to a pool area than is available currently via the FOSPA’s Schedule.

Plunket believes that children’s safety is more likely than not to be compromised were the Building (Pools) Amendment Bill to proceed into law. We submit that the work required to sufficiently remedy the Bill would be substantial. We respectfully request this committee \textit{recommends} the Bill is not progressed into law and that further policy work is undertaken.

\(^{26}\) Clause 5 — Section 7 amended (interpretation)

\(^{27}\) Waitakere City Council \textit{v} Hickman and Another, HC Ak, Civ 2003-404-7266 [1 October 2004]

Thank you for considering Plunket’s submissions. We would appreciate the opportunity to appear before the Committee.
## APPENDIX

**Plunket: Child Safety: home pools, spa pools, hot tubs: what’s required to reduce risk of injury to an acceptable level?**

<table>
<thead>
<tr>
<th>What is required</th>
<th>By whom</th>
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<tbody>
<tr>
<td>1. Personal responsibility (supervision and compliance with best practice)</td>
<td>Property owners; tenants; children’s caregivers; communities looking out for children and knowing neighbouring pool is compliant/reporting compliance failures</td>
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<tr>
<td>2. Legally compliant pool fencing, based on accumulated best practice</td>
<td>Owners on advice (council, architect, builder); real estate agents on sale and purchase</td>
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<td>3. Compliance documentation, such as home pools checklists, accompanied by publicity.</td>
<td>Councils; pools suppliers and retailers; government and quasi-government organisations; non-government organisations</td>
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<tr>
<td>4. Regular checking for pools and ad hoc compliance checking.</td>
<td>Councils (e.g. using satellite technology; when dealing with another matter onsite or within close proximity)</td>
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<tr>
<td>5. Frequent, mandatory home pool inspections</td>
<td>Councils either directly or contracting out</td>
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<tr>
<td>6. Education/Safety messages</td>
<td>Primary health professionals (e.g. Plunket nurses when visiting homes and discussing child safety; GPs and hospital specialists, e.g. for child with epilepsy) Local news media Government and quasi-government organisations; non-government organisations (e.g. running national campaigns)</td>
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<tr>
<td>7. Cycle of continuous review and improvement (increase in the collection, review and discussion of national data on home pool compliance/breaches/child injuries and deaths by drowning in home pools)</td>
<td>MBIE (overview); Councils; CYMRC; WSNZ via Drownbase; DHBs</td>
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