



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:DHgl1552866

28 June 2018

Swimming Pools Regulation 2018
Better Regulation Division
Department of Finance, Services and Innovation
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: SPregulation2018@finance.nsw.gov.au

Dear Sir/Madam,

Draft Swimming Pools Regulation 2018 (“Draft Regulation”)

The Law Society of NSW appreciates the opportunity to comment on the Draft Regulation. The Law Society’s Property Law and Environmental Planning and Development Committees have contributed to this submission.

We note that the Regulatory Impact Statement (“RIS”) raises a number of matters for consideration. A number of these matters are better addressed by other stakeholders. We set out below our response to several of the matters raised in the RIS.

7. Do you agree that the cap on fees for exemption applications should be increased to match the maximum fees charged for pool inspections?

Yes, in our view this is appropriate as the fees should be consistent.

8. Are there any reasons why a local authority should not be allowed to charge for third and subsequent pool inspections?

The local authority should not be able to charge a fee for a third inspection if the matter was not identified in the original inspection and specified in the notice issued under clause 20 of the Draft Regulation. We note that no cap on fees applies to private certifiers.

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

While in principle this seems a positive step, and will be beneficial to the conveyancing process, we are concerned that the Register may not have the capacity to deal with this change. Additionally, the certificate of non-compliance is only valid for a year from the date it issues. With the short life of the certificate we query whether it is appropriate for it to be entered into the Register.

The Draft Regulation should also clearly impose an obligation to remove a certificate of non-compliance once the rectification work has been done. It is also not clear what process will apply to have the certificate of non-compliance removed if the rectification work is done by the new owner.

Our members continue to note wide discrepancies in the practice of different councils following the issue of a certificate of non-compliance. Some councils will issue a direction notice, generally within 14 days, where the certificate of non-compliance indicates that the non-compliance does not pose a 'significant risk' to public safety. The time frame to comply with the direction also varies.

This particular issue was previously raised in the Swimming Pools Regulation 2008 RIS – Discussion Guide prepared ACIL Allen Consulting on behalf of the Office of Local Government ("Discussion Guide"). The Discussion Guide states that Part 5, clauses 18B, 18BA and 18BB of the *Swimming Pools Regulation 2008* ("Regulation") was:

intended to support vendors being issued with a certificate of non-compliance to give the new owners 90 days to fix any non-compliance that do not pose a significant risk to public safety and facilitate the sale of houses with pools.

Clause 18BA(6) of the Regulation (now clause 21(6) of the Draft Regulation) provides that a certificate of non-compliance remains valid for one year, consistent with an appropriate time frame for a vendor to market and complete a sale. Clause 18BB of the Regulation (now clause 22 of the Draft Regulation) provides that the deferred 90 day compliance time frame operates only for the benefit of the purchaser upon completion of the sale.

A direction notice issued to a vendor in response to a certificate of non-compliance in circumstances where the non-compliance does not pose a significant risk to public safety appears to undermine the intent of the Regulation. It compromises the time frame that a vendor is able to rely on a certificate of non-compliance (which is meant to remain valid for one year) and the ability to require a purchaser to rectify the non-compliance following completion by attaching a copy of the certificate to the contract. It also places the vendor at risk of facing penalties for failure to comply with a direction within the time frame set out in the direction.

The proposal to record certificates of non-compliance in the Register within three business days of the inspection is likely to increase the occurrence of this issue if councils are expected to monitor the Register for non-compliance, particularly where a private certifier has carried out the inspection.

Currently, section 22E of the *Swimming Pools Act 1992* ("Act") requires certifiers to provide councils with a copy of the notice specifying the non-compliance issues six weeks after the inspection, where the non-compliance does not pose a significant risk to public safety.

If the proposal in the Draft Regulation is adopted, councils may respond to the recording of certificates of non-compliance in the Register by issuing direction notices three business days after the inspection.

This issue could be addressed by limiting the circumstances in which councils may issue a direction notice where the non-compliance does not pose a significant risk to public safety; for example, the direction could be deferred until after the certificate of non-compliance lapses.

Alternatively, the Draft Regulation could require councils issuing direction notices in these circumstances to give the vendor the same time frame to comply with the direction as the period for which the certificate of non-compliance remains valid (ie. one year from the date of the certificate). This would allow the vendor to rely on the certificate of non-compliance for the whole period of its validity, enabling the vendor to market and complete the sale, consistent with intent of the Regulation.

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?

In our view, providing access to an expanded range of Australian Standards will improve compliance with safety obligations.

Whether the Draft Regulation identifies all possibly relevant Australian Standards is a matter outside our knowledge.

11. Are local authorities best placed to continue to provide access to documents, including an expanded range of Australian Standards? If so, how long (if any) would local authorities require in order to provide access to the expanded range of Standards?

We would prefer if the Department continued to provide access, given the restricted access to the relevant Australian Standards. If legislation is to include reference to material that is not publicly available and not free of charge, we consider that the Department administering that legislation should be in a position to provide access to that material.

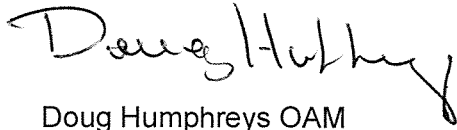
Other matters

We are also concerned about whether the current inspection provisions are sufficiently robust. The certificate regime captures those properties to be sold or leased. The three-yearly inspection program imposed by section 22B(2) of the Act captures any swimming pool situated on premises on which there is tourist and visitor accommodation or more than two dwellings. We consider that many properties with swimming pools will not satisfy either category. It is possible that each of the local authority pool inspection compliance programs required under section 22B(1) of the Act have adequate provisions requiring random inspections of pools for single dwellings which are not sold or leased. However we believe that it would be appropriate for the requirements of such programs regarding frequency of random inspections to be detailed in the Draft Regulation.

Additionally, we are advised that in a number of cases councils attempting to inspect pools under the inspection program have been confronted with significant difficulties in obtaining access (particularly where the inspection is initiated by the local authority). We note that section 27B(2) of the Act imports the powers contained in Part 2 of Chapter 8 of the *Local Government Act 1993*. We suggest that consideration should also be given to enhancing the powers of local authorities to impose substantial penalties for failing to comply with a request for access within a reasonable period of time.

Should you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer by email to gabrielle.lea@lawsociety.com.au or by phone on (02) 9926 0375.

Yours sincerely,

A handwritten signature in black ink that reads "Doug Humphreys". The signature is written in a cursive style with a large initial 'D' and a long, sweeping tail on the 'y'.

Doug Humphreys OAM
President