



THE LAW SOCIETY
OF NEW SOUTH WALES

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Window Safety
Fair Trading Policy
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Email: policy@services.nsw.gov.au

Dear Sir / Madam,

Children and Window Safety

The Law Society of NSW appreciates the opportunity to participate in the consultation process for proposed reforms aimed at reducing the incidence of fatalities and serious injuries resulting from young children falling from windows in apartment buildings. The Law Society also commends the important work done by the Children's Hospital at Westmead Working Party for the Prevention of Children Falling from Residential Buildings and notes that the Working Party's recommendations form the basis for the current proposed reforms.

The Law Society's Property Law Committee (Committee) has reviewed NSW Fair Trading's *Children and Window Safety Consultation Paper* (Paper), dated 13 March 2013. The Committee's response comprises some general comments and then answers to the specific questions raised in the Paper. The Committee has confined its response to those questions which it regards as within the expertise and experience of its members.

General Comments

The Committee notes that the time for compliance with the new requirements by an owners corporation is proposed to be five years. The Committee anticipates that NSW Fair Trading wishes to give owners corporations ample time to have the necessary work done but it considers that five years may be too long given the potential consequences of non-compliance.

The Committee agrees that education and increased awareness is an integral part of the proposals, particularly making lot owners and owners corporations aware of their new responsibilities. Parents of young children should also be made aware of the measures that are now likely to be taken as a matter of course.

Questions for Feedback

3. **Are the proposed performance standards (which state what outcome a window safety device has to achieve to be compliant) sufficiently clear?**

Although the Committee recognises the flexibility of an outcomes based approach, the Committee does have concerns as to the practical operation of this approach.

The Committee suggests that NSW Fair Trading should consider issuing guidelines as to various safety devices available on the market and their appropriateness for certain types of windows based on the material of the window frames and whether the windows open horizontally or vertically. Such a guideline would not comprise an exhaustive list of devices that are acceptable but rather be a starting point for owners, occupiers and owners corporations as to the types of devices that are acceptable.

The Committee notes the comment in the Paper that there is no current Australian Standard for window safety devices but that the National Construction Code provides some helpful guidance in identifying windows that could present a safety risk to young children. The Committee suggests that as part of NSW Fair Trading's holistic approach to the issue, NSW Fair Trading might consider either advocating for or assisting with the development of such a standard, or both. In the absence of an Australian Standard, the question of compliance will unfortunately retain a degree of uncertainty.

There are three elements to the performance standard. The device must be:

- capable of restricting a window opening to 125mm;
- strong enough to withstand the pressure exerted by a child; and
- designed to prevent a child unlocking it, which applies only where the device is designed to be locked and unlocked.

In the Committee's view, the first element is capable of determination by a lay person. However the second element of being strong enough to withstand the pressure exerted by a child would be much harder to determine and would appear to require the opinion of an expert. This is not to say that the Committee disagrees with this element as clearly it is critical. It does however reinforce the need for the development of an Australian Standard. The third element, which will only apply if the device is designed to be locked and unlocked, may be capable of determination by a lay person but once again the development of an Australian Standard would be highly beneficial.

At the risk of pointing out the obvious, the question of meeting performance standards is not merely an issue of compliance. Failure to meet performance standards, particularly if parents of young children mistakenly believe that the devices that have been installed are fit for the purpose, may have very serious consequences, and may result in litigation that could be avoided if clear performance standards were established.

6. **Are there any other safety and environmental factors that need to be accounted for in possible exemptions?**

Although the Committee regards it as appropriate to consider whether there are any other safety and environmental factors that should be accounted for in possible exemptions, the Committee is unable to provide an example of such other factors.

7. Could high windows or windows in rooms other than bedrooms, such as a bathroom window located close to the ceiling, pose any safety risk to young children? If not, should they be excluded?

The Committee was unsure whether NSW Fair Trading's current proposal related only to bedrooms, which appears to be the scope of the new National Construction Code Standards commencing in May 2013. In the Committee's view it is foreseeable that any open window of an apartment of sufficient width could pose a safety risk to young children. The Committee sees no reason to limit the proposal to bedroom windows. The new requirements should apply to all apartment windows of sufficient width, not just bedrooms.

8. Do you support lot owners having the automatic right to install window safety devices in their lot, regardless of whether their scheme has adopted the model by-law on this topic? Please give reasons.

The current model by-law for residential schemes to which the Paper refers, model by-law 5, came into effect in 2010. The text of that model by-law, found in Schedule 2 of the *Strata Schemes Management Regulation 2010* is:

"5 Damage to common property

- (1) An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the owners corporation.
- (2) An approval given by the owners corporation under clause (1) cannot authorise any additions to the common property.
- (3) This by-law does not prevent an owner or person authorised by an owner from installing:
 - (a) any locking or other safety device for protection of the owner's lot against intruders or to improve safety within the owner's lot, or
 - (b) any screen or other device to prevent entry of animals or insects on the lot, or
 - (c) any structure or device to prevent harm to children, or
 - (d) any device used to affix decorative items to the internal surfaces of walls in the owner's lot,unless the device is likely to affect the operation of fire safety devices in the lot or to reduce the level of safety in the lots or common property.
- (4) Any such locking or safety device, screen, other device or structure must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with the appearance of the rest of the building.
- (5) Despite section 62 of the Act, the owner of a lot must:
 - (a) maintain and keep in a state of good and serviceable repair any installation or structure referred to in clause (3) that forms part of the common property and that services the lot, and
 - (b) repair any damage caused to any part of the common property by the installation or removal of any locking or safety device, screen, other device or structure referred to in clause (3) that forms part of the common property and that services the lot."

The Committee notes that a similarly worded by-law (without the proviso at the end of clause (3)) is contained in the *Strata Schemes Management Regulation 1997* and the *Strata Schemes Management Regulation 2005*.

For strata schemes registered prior to 1 July 1997 (an "old strata scheme"), the relevant by-law is by-law 5, set out in Schedule 1 of the *Strata Schemes Management Act 1996*. The text of that by-law is relevantly briefer, and is as follows:

"5 Damage to common property

- (1) An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property without the approval in writing of the owners corporation.
- (2) An approval given by the owners corporation under subclause (1) cannot authorise any additions to the common property.
- (3) This by-law does not prevent an owner or person authorised by an owner from installing:
 - (a) any locking or other safety device for protection of the owner's lot against intruders, or
 - (b) any screen or other device to prevent entry of animals or insects on the lot, or
 - (c) any structure or device to prevent harm to children.
- (4) Any such locking or safety device, screen, other device or structure must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with the appearance of the rest of the building.
- (5) Despite section 62, the owner of a lot must maintain and keep in a state of good and serviceable repair any installation or structure referred to in subclause (3) that forms part of the common property and that services the lot."

The Committee agrees with NSW Fair Trading that it is not known how many strata schemes have a version of by-law 5 as the operative by-law. Even if schemes have adopted this model by-law, that fact it is often unknown to owners and occupiers.

For schemes that have adopted model by-law 5 under the Regulations, lot owners have the automatic right pursuant to subclause 3(a) of by-law 5 to install window safety devices in their lot provided they comply with the terms of the by-law. For schemes which have model by-law 5 as set out in the Act, an owner or authorised person would need to rely on the less explicit provisions of subclause 3(c) of by-law 5 in Schedule 1 of the Act.

Schemes that do not have model by-law 5 clearly are currently unable to install window safety devices without the consent of the owners corporation. It is in this context the reforms proposed by NSW Fair Trading may have the greatest impact in that the proposals will circumvent the current need to obtain the consent of the owners corporation on the basis that installing a safety device most likely involves work to the common property.

Currently if a lot owner wishes to do work to the common property it will seek the consent of the owners corporation under sections 52 or 65A of the *Strata Schemes Management Act 1996* (Act), which requires a special resolution to be passed at a general meeting of the owners corporation that specifically authorises the work. Commonly the owners corporation may consent to the work being done with the making of a special by-law specifying that the lot owner pay for the cost of the work, make good any damage to the common property in the course of doing the work and that the lot owner accepts liability for ongoing maintenance of the alteration or improvement to the common property. The drafting, approval, passing and registration of such a by-law can involve expenses that are not merely incidental, which may act as a disincentive in many cases, especially if the owners corporation seeks to pass on those expenses to the owner requesting the making of the by-law, and can take a matter of months if not longer to finalise.

The advantage of having an automatic right to install window safety devices is that the work can be performed without delay and without incurring expenses which might otherwise inhibit the making of the necessary by-law. The Committee considers that such a measure would enable immediate action to be taken by an owner, or a tenant authorised by an owner, to protect children falling from windows which present a current danger. If an automatic right to install window safety devices is to be enshrined in the Act it would be more expedient to provide this right irrespective of whether or not a particular scheme was regulated by a version of model by-law 5.

The Committee also notes that section 43(4) of the Act states: "A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law." In this respect, if the Act is to be amended to give owners an automatic right to install window safety devices, an owners corporation would not be entitled to pass a by-law which is inconsistent with that legislative right. Allowing owners and occupiers (with consent of the owners) to install devices immediately would encourage owners to take urgent action in the case of windows which present a current danger (to minimise the risk of liability in negligence for death or injury).

9. Are there any practical problems with this proposal? Please give details.

The Committee considered the practical operation of this proposal at length. Ideally, if an owner or an occupier of a strata scheme wished to install window safety devices, the owner or occupier would make that request and the owners corporation would promptly start looking at proposals for various types of window safety devices that would be appropriate to the particular scheme. Once agreement had been reached by the owners corporation regarding the particular device and its cost, the owners corporation could engage a suitable tradesperson, arrange for access, and installation could commence. The Committee agrees with NSW Fair Trading that economies of scale would be enjoyed by the owners corporation in approaching the installation as a large one off work order.

However, even if the owners corporation moved relatively quickly, that would still take a lot longer than an individual affixing a basic window safety lock and getting immediate peace of mind from making the apartment safe.

The Committee considered a possible two staged variation to the proposal as follows. It considers that the making of a request for installation of window safety devices by a lot owner or occupier could be a trigger for obliging the owners corporation to install window safety devices within a certain time. Where the owners corporation fails to install devices within a certain timeframe, that might then be the trigger to give the lot owner the automatic right to install window safety devices. (Mere commencement by the owners corporation of a process of starting to gather quotes, evaluate alternative options etc would not be enough to prevent an individual taking action, the devices would need to have been installed). Using this approach, the owners corporation would have the opportunity to install devices in a uniform and organised fashion and take advantage of economies of scale. However if the owners corporation moved too slowly, a lot owner could then take action.

Further consideration needs to be given to the following issues which arise under the current proposal (and the two staged variation):

- If the window safety device is installed by the lot owner, does the lot owner accept an obligation for ongoing maintenance, but if the window safety lock is

installed by the owners corporation does the owners corporation accept the obligation for maintenance?

- If an occupier wants a window safety device to be installed should the occupier first approach the landlord who will then contact the owners corporation? Should the landlord lot owner be obliged to pass on the request within say 14 days of receipt to the owners corporation? Presumably the landlord lot owner ought to be notified but should the landlord need to consent? Arguably it would be in the landlord's interest to have the device installed, as the landlord might be held liable if an accident occurred.
- If the window safety device is installed by an individual lot owner should the owners corporation be obliged to inspect the work done, check that it is compliant and if so, might it then be appropriate for the owners corporation to take on the liability for maintenance? If the device was not satisfactory then the owners corporation would be obliged to replace it otherwise it has not complied.
- The question of access is not without difficulty and the Committee suggests that it may be appropriate to insert a provision akin to section 65C of the Act in respect of access for fire safety inspections.
- Ideally all work should be done by a licensed tradesperson. However if the work is done by an individual lot owner rather than the owners corporation, the value of the work order may not justify the engagement of a licensed tradesperson. Consideration as to further regulation should be given.
- What type of notice requesting installation of window safety devices would be sufficient, need it be in writing or simply a verbal request?
- Consideration should be given to work, health and safety issues and who bears the responsibility if a tradesperson engaged by an owner is injured on site.
- Ideally any provision in the Act which will grant a right to install window safety devices should specify some of the matters canvassed in model by-law 5, namely: the device must not affect the operation of fire safety devices, must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with the appearance of the rest of the building. Additionally:
 - the obligations for ongoing maintenance and making good any damage in the installation should be specified;
 - the owners corporation should be given the right at executive committee level to suggest the type of device that would be acceptable as regards the aesthetic appearances and architectural integrity of the building. (This would assist owners and promote uniformity); and
 - owners who carry out the works themselves should be required to give the owners corporation notice before the works are carried out.

10. Do you support condition reports having to state whether or not a premises has working window safety devices installed? Please give reasons.

The Committee supports condition reports stating whether or not premises have window safety devices installed but it would be difficult to stipulate whether "working" window safety devices have been installed. A managing agent for the premises and prospective tenant would be able to determine visually whether window safety devices have been installed but whether such devices are "working", which would appear to include whether or not they could withstand the weight of a child, is something that is not easily determined and arguably requires expert opinion.

11. Are there any practical problems with this proposal? Please give details.

If the word "working" is excluded from the reference in the condition report the Committee sees no further practical problems.

12. What (if any) sanctions should apply to owners corporations that fail to ensure all relevant windows in their strata scheme have window safety devices installed?

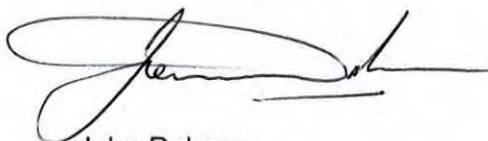
The Committee agrees with the introduction of a sanction on the owners corporation for non-compliance. This would form an incentive for the owners corporation to do the work. However, the imposition of this sanction should be separate from and in addition to any damages that would ordinarily flow in the event of an accident occurring where window safety devices had not been installed.

The Committee also suggests that regulations make it an offence to remove an installed window safety lock even though it may have been installed by an outgoing lot owner or tenant.

A regime of regular inspection of window safety devices should also be considered.

Please contact Gabrielle Lea, Policy Lawyer, Property Law Committee if you have any questions regarding this letter by email: gabrielle.lea@lawsociety.com.au or on telephone (02) 9926 0375.

Yours faithfully



John Dobson
President