



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:JEgl1061037

3 November 2015

Mr Michael Lambert
Swimming Pools 2015 Review
Office of Local Government
Locked Bag 3015
NOWRA NSW 2541

By email: olg@olg.nsw.gov.au

Dear Mr Lambert,

Independent Review of NSW Swimming Pool Barrier Requirements

The Law Society of New South Wales appreciates the opportunity to review the Discussion Paper, *Independent Review of NSW Swimming Pool Barrier Requirements*, issued by the Office of Local Government ("Discussion Paper").

The Law Society's Property Law Committee ("PL Committee") supports the current review of NSW Swimming Pool Barrier Requirements and acknowledges the paramount importance of child safety in this area.

In reviewing the Discussion Paper, the PL Committee has primarily focused on the impact of the existing legislative framework and the proposals contained in the Discussion Paper on the conveyancing process.

1. Simplification of the standard

The PL Committee supports adopting a single standard for pool barrier requirements and removing the current exemptions. It would be necessary to allow an appropriate length of time for phasing in both these significant changes and for provision to be made for limited exemptions to be granted, on a case by case basis, and subject to clear guidelines.

Simplification of the standard will assist the ease with which pools can be inspected for compliance and enable pool owners themselves to more easily check whether their pools comply with the requirements.

In the PL Committee's view, the appropriate standard should reflect a middle ground of the different applicable standards rather than simply implementing the most current or highest benchmark standard. While the chosen standard should be broadly consistent with the national standard, the Committee does not favour the NSW standard automatically mirroring any changes made to the national standard. The PL Committee supports the rationale for this approach as detailed on page 27 of the Discussion Paper, which includes: the ability to control the timing of implementation, the ability to review and deviate if required, greater access to the standard, and better opportunities to educate the public as to requirements.

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2. Mechanism for compliance

The PL Committee supports the regular periodic inspection of swimming pools as the most appropriate mechanism to ensure compliance with swimming pool barrier requirements. The PL Committee also supports the educative role that the conveyancing process can play in alerting purchasers to the importance of compliance with swimming pool barrier requirements. However the conveyance or leasing of a property should not be the primary trigger for checking the status of compliance; all pools should be compliant irrespective of whether they are located at a property about to be sold or leased.

If the conveyancing process is to be the trigger for checking compliance, then the PL Committee supports the approach taken in Queensland where the obligation to obtain a compliance certificate in relation to a swimming pool may be transferred to the purchaser of a property. The purchaser is then obliged to obtain the certificate within a reasonable time after the settlement of the purchase of the property. The PL Committee also suggests that for new properties, such as off the plan apartments, the vendor retains the obligation to provide a certificate of compliance in relation to the swimming pool as a pre-requisite to settlement. This follows the approach taken in relation to the issue of an occupation certificate for off the plan contracts under clause 2 of Schedule 2, *Conveyancing (Sale of Land) Regulation 2010*.

3. Legislative clarification

If the current approach to the enforcement of swimming pool regulation, utilising the conveyancing process, is to proceed a number of clarifications should be made to the legislation. From a conveyancing perspective, the PL Committee regards the following amendments or clarifications as necessary:

- (1) The *Conveyancing (Sale of Land) Regulation 2010* should be amended to make it abundantly clear that the obligation to attach a certificate of compliance in relation to a swimming pool (or evidence of registration and an occupation certificate) applies to a strata or community scheme where a swimming pool is located on the common property or association property. Clearly specifying that the obligation applies to strata and community scheme properties will assist with compliance.
- (2) Off the plan contracts which include a proposed pool require special consideration. It is of course not possible to attach a certificate of compliance in relation to a swimming pool (or evidence of registration and an occupation certificate) where the pool has yet to be built or completed. In such situations, the PL Committee considers the vendor should be required to serve a certificate of compliance (or relevant occupation certificate with evidence of registration) on the purchaser 14 days prior to the vendor being able to require completion. As mentioned previously, this is consistent with the vendor's obligation to provide a certificate of occupation prior to requiring completion when selling off the plan.
- (3) Section 22C of the *Swimming Pools Act 1992* should be amended to clarify that a lot owner in a strata or community scheme may apply to the relevant Council for a certificate of compliance.
- (4) The *Conveyancing (Sale of Land) Regulation 2010* should be further clarified to make it clear whether a compliance certificate is required to be attached to the relevant contract for the sale of land, where the subject property has the

benefit of use of a swimming pool (other than on common property or association property), which is arguably caught by s 3(1A) of the *Swimming Pools Act 1992* as "ancillary to that other building", such as:

- (a) an easement to use a pool on another property;
- (b) a swimming pool situated on a waterfront crown reserve where the adjoining landowner holds a crown lease to occupy the swimming pool area; and
- (c) a by-law to use a pool situated elsewhere, such as was the situation in the NSW Court of Appeal decision of *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* [2011] NSWCA 159. That case upheld the validity of by-laws which gave lot owners and occupiers a right to use gym facilities located on land a few kilometres away from the strata scheme.

The PL Committee notes that vendors of such properties are likely to have difficulty in obtaining a certificate of compliance in relation to such pools, particularly if work needs to be done to enable receipt of a certificate of compliance.

- (5) In relation to the register, the PL Committee suggests that any certifier who provides an occupation certificate in relation to a property with a swimming pool (including strata and community schemes) should be mandated to enter such details as required in the register to generate the certificate of compliance. The PL Committee understands that at present some certifiers do this on a voluntary basis.

4. Adequate resources

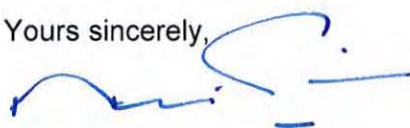
In the PL Committee's view, whichever mechanism for compliance is pursued, it is critical that adequate resources are provided to the bodies responsible for educating, checking and enforcing compliance. Failure to ensure sufficient resources are made available undermines the effectiveness of the mechanism.

5. Further responses

The PL Committee has considered the questions contained in the Discussion Paper and its responses are set out in the attached table. The PL Committee has not responded to questions where it considers that other stakeholders are better placed to respond.

The PL Committee would welcome further opportunities to discuss these comments. Should you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer for the PL Committee by email to gabrielle.lea@lawsociety.com.au or on (02) 9926 0375.

Yours sincerely,



Michael Tidball
Chief Executive Officer

Independent Review of NSW Swimming Pool Barrier Requirements

Submission of the Property Law Committee

Question	Response
QUESTIONS ON POOL SAFETY STANDARDS	
<p>1. Do you support the following possible approaches to a pool barrier standard?</p> <ul style="list-style-type: none">• Control of when and if the State adopts a revised national standard• Provide ready access to pool professionals to the standard• Provide an easy to understand explanation for the general public	<p>The PL Committee supports an approach to the pool barrier standard that incorporates each of the three aspects listed, as referred to in the covering letter.</p>
<p>2. Do you believe the benefits of having a single pool barrier standard outweigh the costs of upgrading existing pools and should be proceeded with?</p>	<p>The PL Committee supports moving to a single pool barrier standard provided an appropriate length of time for phasing in the change is given and that limited exemptions may be granted, on a case by case basis and subject to clear guidelines. In the Committee's view, the appropriate standard should reflect a middle ground of the different applicable standards rather than simply adopting the most current or highest benchmark standard.</p>
<p>3. Do you support the need for an interpretation service to answer queries about the swimming pool barrier standard and how it should be applied?</p>	<p>Yes, knowledge and understanding of the standard will assist compliance.</p>

Question	Response
4. Do you have any additional matters that you feel need clarification with AS1926.1-2012 beyond those matters set out in Table 6.2 of this paper?	The PL Committee defers to the expertise of other stakeholders.
5. Do you believe it is necessary to establish an explicit standard or requirement for temporary pool fencing?	The PL Committee supports establishing an explicit standard or requirement for temporary pool fencing.
6. Do you support requiring pool barrier material being required to be tested and subject to an identification system as a product meeting the required standard?	The PL Committee defers to the expertise of other stakeholders.
QUESTIONS ON EXEMPTIONS FROM THE POOL BARRIER STANDARDS	
7. Do you support the withdrawal of current exemptions from the pool barrier safety standards, with a phase in period for pool owners to comply and allow councils to assess exemptions and alternative suitable safety arrangements on a case by case basis subject to guidelines?	The PL Committee supports this proposal.
8. Do you believe there is sufficient guidance available at present to enable	The PL Committee defers to the expertise of other stakeholders.

Question	Response
councils to assess applications for exemptions from the pool barrier standards?	
9. Do you support requiring additional controls on the sale and use of portable pools and spas such as provision of information on safety requirements and registration at point of sale, inspection of the pool once installed as well as greater consumer education?	Given the driver for reform has been to create safe pools for children, particularly those under five years of age who are very vulnerable if there is access to swimming pools without close supervision, this applies equally to portable pools and spas. The PL Committee supports additional controls on the sale and use of portable pools and spas, such as the provision of safety information and registration at point of sale, and inspection of the pools once installed, and greater consumer education.
QUESTIONS ON THE SWIMMING POOL REGISTER	
10. As a user of the register how would you rate it on a scale of 0 to 10 for ease of use and usefulness. Please provide any suggestions on how it could be improved and made more useful.	<ul style="list-style-type: none"> • Members of the PL Committee have varying experiences with the utility of the register. • The PL Committee suggests consideration of the following improvements to the register: <ul style="list-style-type: none"> ○ The details on the register should be expanded to allow the entry of title references for properties. ○ The certificates generated by the register should also refer to the title reference of the property. ○ It should also be possible to search the register by title reference. This would be particularly helpful where a pool is situated on common or association property, as sometimes the registration tends to be listed against one street address only, even if the buildings comprising the scheme have a number of separate street addresses. ○ It should be mandatory for a certifier who issues an occupation certificate in relation to property with a swimming pool to enter that information in the swimming pool register to enable the issue of a certificate of compliance. ○ Where an exemption has issued in relation to a registered swimming pool, this information together with the details of the basis of the exemption should be recorded in the register. ○ Where a certificate of compliance has been cancelled this must be noted on the register immediately.

Question	Response
	<p>Additionally, where the cancellation is in relation to a swimming pool in a strata or community scheme, the notice of cancellation should issue to all individual owners, as well as the owners corporation or community association.</p>
<p>11. Do you believe there is merit in accredited pool certifiers being able to undertake minor repairs where there are non-compliant matters that can be rectified relatively easily?</p>	<p>The PL Committee supports the existing approach where there is separation between the roles of person undertaking the work and person certifying compliance.</p>
<p>12. Do you support council inspectors and accredited pool certifiers being required to fully document each pool inspection, including photographs and supporting notes?</p>	<p>The requirement should be to document as appropriate. Where multiple visits are required, as commonly occurs, mandatory documentation for each visit appears onerous.</p>
<p>13. Do you believe accredited pool certifiers should be required to undertake Continuing Professional Development?</p>	<p>The PL Committee supports Continuing Professional Development for accredited pool certifiers.</p>
<p>14. Do you support council pool inspectors being required to undertake the E1 course and being accredited and A1 to A3 building certifiers wishing to undertake pool certification being required to do the E1 course?</p>	<p>The PL Committee defers to the expertise of other stakeholders.</p>

Question	Response
<p>15. Is there merit in broadening the prequalification requirements for entry to the E1 course and possible accreditation as a pool certifier provided there is relevant experience in the building and swimming pools area and a requirement for pre training in the Building Code of Australia and swimming pool standards as a pre-requisite?</p>	<p>The PL Committee defers to the expertise of other stakeholders.</p>
<p>16. Do you believe there is merit in having the E1 pool certification training course recognised by the national vocational training regulator, ASQA?</p>	<p>The PL Committee defers to the expertise of other stakeholders.</p>
<p>17. Do you support persons undertaking pool barrier installation work being required to have suitable training in pool barrier standards and being accountable for constructing in line with those standards?</p>	<p>The PL Committee supports this proposal.</p>
<p>18. Do you believe the following support and accountability mechanisms would be helpful for E1 certifiers and the operation of the certification system?:</p> <ul style="list-style-type: none"> • Help line • Peer Review Panel 	<p>The PL Committee defers to the expertise of other stakeholders.</p>

Question	Response
<ul style="list-style-type: none"> • Practice Guide • Audit program 	
<p>19. Do you support giving councils greater flexibility in setting fees for pool certification and assessing applications for exemptions, subject to the fee being a cost recovery charge and being publicly displayed and subject to periodic independent review?</p>	<p>The PL Committee opposes the deregulation of fees. The PL Committee prefers charges to be regulated and supports fees being charged for each and every inspection to a maximum of three inspections; beyond that additional fees should not be charged.</p>
<p>QUESTIONS ON SALE AND LEASE CERTIFICATION REQUIREMENTS</p>	
<p>20. Which do you believe is the most appropriate course of action for commencing the sale and lease provisions:</p> <ul style="list-style-type: none"> • Defer commencement six months to a quieter period of the property year • Commence the lease provision as planned and the sale provision six months later • Commence sale and lease provision as planned, with or without flexibility in timing of the compliance certificate 	<ul style="list-style-type: none"> • In the PL Committee's view, splitting the commencement dates would not assist. In strata buildings there are likely to be as many landlords wanting to grant leases as there are owners wanting to sell. If these two types of transactions are to remain the lynchpins for ensuring compliance, the requirement needs to commence for both simultaneously. • In light of the continuing backlog in achieving compliance and certification, further deferral of commencement appears desirable. Consideration could be given to deferring commencement to 1 September 2016, being the date upon which the Conveyancing (Sale of Land) Regulation 2016, once made, is likely to commence.

Question	Response
<ul style="list-style-type: none"> Other (please specify in comment) 	
<p>21. Is there merit in allowing the purchaser of a property to take responsibility for ensuring a non-compliant pool is made compliant in a reasonable time after settlement and with the council to have an enforcement role to ensure this occurs?</p>	<ul style="list-style-type: none"> As stated in the covering letter, the PL Committee prefers periodic inspection of all pools to ensure compliance. If sale or lease transactions are regarded as the best point at which to encourage an owner to ensure compliance, shifting that responsibility to the purchaser has the advantage of broadening the timeframe for compliance. This is attractive from a conveyancing perspective as it allows the vendor to market and sell the property prior to the certificate of compliance being obtained. The PL Committee understands that obtaining a certificate of compliance can take approximately three months, which is a significant constraint on the vendor's ability to market and sell a property in a timely manner. Delays will be considerably longer for a lot owner in a strata scheme with a swimming pool where a certificate of compliance may require substantial work by the owners corporation. The PL Committee recognises that shifting the obligation for compliance to a purchaser may appear to undermine the rationale for imposing the obligation and may result in reducing or delaying compliance generally. The PL Committee also notes that shifting the obligation for compliance to a purchaser would appear to require additional demands for enforcement resources. The PL Committee notes the modifications suggested to the Queensland model set out at the bottom of page 53 of the Discussion Paper. <ul style="list-style-type: none"> The suggestion in the first dot point which includes "a statement detailing the nature of the non-compliance and how it needs to be addressed" may be difficult to achieve with precision unless the vendor attaches a letter from the Council or a certifier which sets out the nature of the non-compliance. The PL Committee is also concerned that if the vendor does not have an objective source of the nature of the non-compliance which it could attach to the contract; it is quite likely that there may be arguments between the vendor and purchaser as to the accuracy and sufficiency of the disclosure made by the vendor, including what is required to remedy a non-compliance. The approach suggested in the second dot point where the vendor and purchaser negotiate whether the vendor or purchaser will make the pool compliant is not feasible for property sold by auction. The approach suggested in the third and fourth dot point contains the problematic statement of non-

Question	Response
	<p>compliance, however the ability to vary the time for compliance in certain circumstances may have merit generally.</p> <ul style="list-style-type: none"> • The PL Committee supports evidence of registration of the pool to be annexed to the contract as a mandatory vendor disclosure. • The Discussion Paper appears to query whether Councils would have sufficient notice of the sale of a property to follow up purchaser compliance. The PL Committee notes that the Council is contacted at several points in the conveyancing process. Initially when the sale contract is being prepared, the vendor or its agent or solicitor will contact the Council for a zoning certificate which must be annexed to the contract. Following exchange but prior to settlement, the purchaser's solicitor will obtain a certificate as to outstanding rates from Council. Lastly once the conveyance has settled, the Council will be notified of the sale through the Notice of Sale. It is at this point that Council records are altered to capture the details of the new owner.
<p>22. Would you support an expanded pool inspection system that involves providing a more effective way to achieve compliance than the current sale and lease compliance arrangements?</p>	<ul style="list-style-type: none"> • The PL Committee strongly supports an expanded pool inspection system as a more effective and appropriate way to achieve compliance than the current sale and lease compliance arrangements. • The sale and lease mechanism is dependent on the purchaser or lessee holding the vendor or lessor to their obligations. If neither party cares about pool safety, properties containing pools will continue to be sold or leased without regard to the requirements of the Act.
<p>23. Which approach would you believe is the most appropriate way to inspect pools?</p> <ul style="list-style-type: none"> • inspecting all pools over a defined period (for example annually for high risk pools and every four years for pools in general as is the case in Western Australia) • an expanded and more consistent risk based inspection program undertaken 	<p>The PL Committee believes each of these approaches has merit. Ultimately the approach chosen needs to reflect the level of resources provided for inspections, otherwise the system will be ineffective. To the extent that the Government is intent on superintending pool safety, the Government should provide adequate training and resources to whichever arm of government (most likely local government) is given responsibility for regular inspection, certification and enforcement.</p>

Question	Response
<p>by councils</p> <ul style="list-style-type: none"> • other (please specify in comment) 	
<p>QUESTIONS ON COMPLIANCE AND ENFORCEMENT</p>	
<p>24. Where a pool is assessed as non-compliant do you believe there is a need for both accredited pool certifiers and council pool inspectors to give a clearer explanation of why it is non-compliant and provide options for how the problems could be rectified, but noting that there could be multiple ways to achieve rectification?</p>	<p>The PL Committee supports this proposal.</p>
<p>25. Do you believe there needs to be greater responsibility taken by an accredited pool certifier to seek to resolve matters of pool non-compliance before the matter is transferred to the relevant council?</p>	<ul style="list-style-type: none"> • A certifier should be given an opportunity to work with the pool owner to achieve compliance, subject to the scope of the certifier's engagement. It appears that greater clarification as to the way in which private certifiers interact with Council is required. • In relation to the bullet points set out at the top of page 57: <ul style="list-style-type: none"> ○ the PL Committee does not support the requirement that a pool owner cannot remove a certifier without the approval of the Building Professionals Board; ○ the PL Committee supports expanding the period within which a certifier seeks to achieve compliance from six weeks to three months with an ability for a further extension if substantial progress is being made; and ○ the Committee does not support requiring a certifier to follow up with the pool owner after assessing non-compliance to develop an action program. Certainly the certifier should provide details of steps that need to be taken to achieve compliance but in the absence of being engaged to reinspect, compliance and enforcement is a matter for the Council.

Question	Response
26. Do you believe there needs to be a broad consistency in the approach taken by local government councils to the design and operation of swimming pool compliance programs?	Apart from the benefits of consistency, the sharing of design and operation of compliance systems would particularly assist smaller Councils with limited resources.
QUESTIONS ON SUPERVISION AND THE EDUCATION OF POOL OWNERS AND USERS	
27. Do you believe enough is being done to educate pool owners and users in pool safety and the importance of active supervision where children are pool users?	The PL Committee notes the critical importance of supervision by adults and supports greater education targeted at pool owners who have young children.
28. Is enough being done in the area of educating the community in both the importance and the approach to pool safety?	The PL Committee supports greater education of the community generally in both the importance and the approach to pool safety.
29. What more needs to be done in the area of educating the community in both the importance and the approach to pool safety?	The PL Committee defers to the expertise of other stakeholders in relation to possible education strategies.
QUESTIONS ON THE SWIMMING POOL ACT AND REGULATION	
30. On a scale of 0 to 10 (0 being totally unclear and 10 being totally clear) how	The PL Committee suggests further clarifications would improve the utility of the legislation, as set out in this submission.

Question	Response
would you rate the Swimming Pool Act 1992 and the Swimming Pool Regulation 2008 in regard to ease of understanding and use?	
31. If you have any additional suggestions to improve the clarity of the Act and Regulation please let us know.	The PL Committee's response is set out in the covering letter.