

BUILDING AMENDMENT BILL 2003

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the legislation

The objective of the Bill is to improve safety for young children around residential swimming pools.

Reasons for the Bill

The Bill is required to address the incidence of drowning and near drowning of young children in domestic swimming pools. Approximately seven young children drown each year in residential swimming pools.

Ways in which the objectives are to be achieved

The objectives of the Bill are to be achieved by amending the *Building Act 1975* (BA). The amendments will –

- Restrict a local government's ability to grant pool fencing exemptions to only those situations where it would not be practicable, because of a disability of an occupant of the building, to provide access in accordance with the standards.
- Require new pools that are constructed on or after the commencement of the Bill that are "on" residential buildings to be fenced. The BA currently only requires fencing around "outdoor swimming pools". Pools "on" a building are currently not considered to be "outdoor swimming pools" and are not required to be isolated by a fence. For example, a pool on a deck attached to a house meets the definition of a pool "on" a building and therefore is not covered by the current law.
- Insert a new provision into the BA to require warning signs to be provided on the property where a swimming pool is to be constructed prior to its commencement. The purpose of the sign is to alert those supervising young children that a danger, in the

form of a swimming pool under construction, is present. The signs are to remain in place until a complying swimming pool fence has been erected on the site and the fence certified by a building certifier.

- Clarify that a pool owner must ensure that a complying pool fence is in place and maintained to appropriate standards at all times while the pool is filled with water.
- Insert a new provision into the BA to require a sign to be placed near a new pool that contains instruction on the application of Cardiopulmonary Resuscitation.

Why this way of achieving the objectives is reasonable and appropriate

The legislative framework requiring fences to be constructed around swimming pools is contained in the Act. There is no alternative to amending legislation to achieve the objectives of the Bill.

Alternatives to the Bill

There are no alternatives considered appropriate for achieving these objectives.

Administrative cost to government of implementing the Bill

There will be no other direct cost burden on the Government by adopting the proposed changes to the legislation. However, there will be costs associated with the implementation of a proposed communication strategy to directly target affected parts of the community.

Consistency with fundamental legislative principles

The office of the Parliamentary Counsel has advised that the provisions do not infringe fundamental legislative principles.

Consultation

The following community organisations have been consulted during the preparation of the Bill:

Local Government Association of Queensland, Gold Coast City Council, Brisbane City Council, Housing Industry Association, Queensland Master Builders Association, Swimming Pool and Spa Association, Royal Australian Institute of Architects, Building Designers Association of Queensland, and Australian Institute of Building Surveyors.

The following Government Agencies have been consulted about the proposed legislation: Department of the Premier and Cabinet, Queensland Treasury, Department of State Development, Queensland Health, Department of Industrial Relations, Department of Housing, Department of Emergency Services, Department of Justice and Attorney-General, and Dr Robert Pitt (Queensland Injury Surveillance Unit).

EXPLANATION OF PURPOSE AND INTENDED OPERATION OF EACH CLAUSE

Short title

Clause 1 describes the short title of the Act as being the *Building Amendment Act 2003*.

Commencement

Clause 2 provides that the provisions of the Act will commence on a date to be fixed by proclamation.

Act amendment

Clause 3 declares that the *Building Amendment Act 2003* amends the *Building Act 1975*

Amendment of section 3 (Definitions)

Clause 4 amends section 3 dealing with definitions for the Act.

Subclause (1) inserts new definitions for:

“**construct**”, means for part 3, for an outdoor swimming pool on residential land, includes install or place the pool on the land. This

covers both the installation of an inground pool and the placement of an above ground pool or a portable pool exceeding a specified size on the land. The current Act does not require “portable wading pools” to be fenced. A “portable wading pool” is defined as a pool that can only be filled with water to a maximum depth of 450mm, and has a volume no more than 2000 litres, and has no filtration system.

“fencing standards”, means for part 3, for an outdoor swimming pool on residential land, constructed before the commencement of the *Building Amendment Act 2003*, the standards applying for the fencing for the pool immediately before the commencement. The Department proposes to prepare guidelines, which will clearly identify the standards applying at any particular time before the commencement.

For a pool constructed on or after the commencement, the “fencing standards” are the standards applying after the commencement of the Bill.

However, if on the commencement of the *Building Amendment Act 2003* the existing pool is not fenced or the fencing does not comply substantially with the “fencing standards”, the fence must be upgraded to comply with the standards as though the pool was constructed after the commencement. This would apply where the pool owner has made little or no attempt to comply with the “fencing standards”. It would not be appropriate in this case for the pool to be fenced to outdated and inferior standards. This concept is consistent with the proposed new section 16 which requires fences which have been demolished, removed or in substantial disrepair to be replaced with a fence as though the pool was a new pool constructed after the commencement of the *Building Amendment Act 2003*.

“pool owner”, means for part 3, an owner of residential land on which there is an outdoor swimming pool. However, if the occupier of the residential land, or part of the land, on which the pool is situated is the owner of the pool, the occupier is the “pool owner” of the pool and not the owner of the land.

Subclause (2) amends the existing definition of “indoor swimming pool” so that only pools wholly enclosed by the walls of the building are considered to be “indoor swimming pools”. Pools on a deck or on a roof and not wholly enclosed by walls are “outdoor swimming pools”.

Subclause (3) deletes the existing definition of “revocation notice” and inserts a new definition of “revocation notice”.

Insertion of new ss12T to 12V

Clause 5 inserts new sections 12T to 12V.

New Section 12T (Definitions for pt 3)

Section 12T inserts new definitions of “**construct**”, “**fencing standards**” and “**pool owner**”, (See Clause 4 – sub clause 1 and 3).

New Section 12U (Meaning of “fencing standards”)

Section 12U inserts a new definition of “fencing standards” (see clause 4 – sub clause 1).

New Section 12V (Meaning of “pool owner”)

Section 12U inserts a new definition of “pool owner” (see clause 4 – sub clause 1).

Replacement of ss14 to 16

Clause 6 omits existing sections 14 to 16 and inserts new sections 14 to 16E.

New Section 14 (Outdoor swimming pool must be fenced)

Section 14 only applies to **existing** outdoor swimming pools on residential land. An outdoor swimming pool is defined in section 3 of the Act.

Subsection 14(1) specifies that the pool owner of an outdoor swimming pool on residential land must ensure the pool has around the pool, fencing complying with the “fencing standards” for the pool and that the fencing is kept in good condition.

For example, and unless the local government granted an exemption to fence the pool:

- For a swimming pool constructed before 1991, in a local government area that had a local law that required a swimming pool to be fenced (to a height not less than 900mm) and which required openings from a building to be such that they inhibited access by young children from a building to a swimming pool,

the fence and openings would have to be constructed and maintained to that standard. If the council's local law did not require the fence and openings in the building giving access to the pool to meet this standard, the local law is of no effect.

- For a swimming pool constructed before 1991, in a local government area that had no local law requiring a swimming pool to be fenced, the pool must be fenced and the fence maintained to the standards applicable for existing pools in the 1991 pool fencing laws. That is, the pool fences must be constructed to a height not less than 900mm and any openings from a building being such that they inhibit access by young children from the building to the swimming pool.
- For a swimming pool constructed after 1991, the fence must be constructed in accordance with the standard specified in the Regulation in force at the time the pool was constructed.

Subsection 14(2) clarifies that a pool owner is not responsible to undertake additional work on a pool fence as a result of the actions of the owner or occupier of adjoining land causing a complying fence to no longer comply. For example, if an adjoining owner or occupier places an object against the pool fence so as to provide a foothold for a young child, the pool owner is not required to construct a new fence or change existing fencing to correct the problem.

New Section 15 (Resuscitation sign for outdoor swimming pool)

Section 15 Inserts a new provision that requires a resuscitation sign to be installed near new outdoor swimming pools.

Subsection 15(1) applies to an outdoor swimming pool on residential land if the pool is constructed after the commencement of this section.

Subsection 15(2) requires the owner of the pool to display a resuscitation sign complying with the requirements for a resuscitation sign prescribed under a regulation and in the way prescribed under a regulation.

Subsection 15(3) defines a resuscitation sign.

New Section 16 (replacing fencing)

Section 16 requires a pool owner who demolishes, removes or allows a fence to fall into such a state of disrepair as to not make it practicable to

repair the fence, to install a new fence complying with the current fencing standard specified in the Regulation.

For the new fence, the owner must ensure a building certifier has given a certificate in the approved form stating that the fence complies with the pool fencing requirements under the Act as soon as is practicable. Before the new fence is constructed, a development approval must be obtained.

It would not be necessary to construct a new fence where the existing fence is maintained and kept in good condition

New Section 16A (Warning sign required before constructing outdoor swimming pool)

Subsection 16A(1) clarifies that the section only applies to outdoor swimming pools on residential land.

Subsection 16A(2)(a) requires a warning sign to be displayed on the site before construction starts. The contents of the sign and the manner in which it is displayed will be prescribed in a Regulation.

Subsection 16A(2)(b) requires the warning sign to be displayed until a complying pool fence has been constructed and a building certifier certifies that the fencing complies with the fencing requirements of the Act.

Subsection 16A(3) places an obligation on the pool owner, the pool builder, or both the pool owner and the pool builder to comply with section 16A.

New section 16B (Constructing outdoor swimming pool)

Subsection 16B (1) applies to a person who is the pool owner of a swimming pool that has been constructed or who will be the pool owner of a swimming pool that is in the process of being constructed, that has not yet been filled with water to a depth greater than 300mm. **This is different to section 14 which applies to existing swimming pools that have been filled with water.**

Subsection 16B (2) requires the pool owner mentioned in sub clause 16B (1) to ensure the pool has a fence, complying with the standards, constructed around the pool before it is filled with water to a depth exceeding 300mm. However, the pool owner has a defence for not having a complying fence around the pool if the pool owner has a reasonable excuse for not doing so. For example, a reasonable excuse may be if, as a result of

a flood or torrential rain, the pool became filled with water to a depth exceeding 300mm.

Subsection 16B (2) also requires the pool owner to ensure that a building certifier has given the pool owner a certificate stating that the fence complying with the standard has been constructed around the pool.

New Section 16C (Application for exemption from fencing)

Subsection 16C (1) allows the owner of an existing pool or the owner of a pool under construction to apply to the local government for an exemption of the pool fencing standards.

Subsection 16C (2) requires the local government to decide the application for an exemption within 5 business days after the application is made.

Subsection 16C (3) specifies that a local government can only grant an exemption to the swimming pool standards in cases where it would be physically impracticable for the person who is an occupier of the land to access the pool, because that person has a physical disability. For example, it may be appropriate to grant an exemption to allow an access gate to open into the pool area if it is not possible for a person with a disability to enter to pool area if a gate complying with the fencing standards is installed.

Subsection 16C (4) allows the local government to request medical evidence that supports a person's claims that they have a disability that would make it physically impracticable to access the pool.

Subsection 16C (5) allows the local government to impose conditions it considers necessary or desirable to prevent a young child accessing the pool. It would not be appropriate to allow no fencing if a person with a disability occupies the property. The fencing standards would still apply to the part of the fence that is not exempted.

In addition, any other conditions the local government considers appropriate to ensure young children living at the property or visiting the property are protected and prevented from entering the pool unaccompanied may be imposed by the local government.

New Section 16D (Steps to be taken after application decided)

Subsection 16D (1) requires the local government to give written notice of its decision on an application for an exemption as soon as practicable after making its decision.

Subsection 16D (2) requires the notice to state:

- reasons for the decision;
- advice on appeal rights; and
- the time in which to make the appeal.

Subsection 16D (3) clarifies that the part of a fence that is not the subject of the exemption application must still comply with the pool fence standards.

Subsection 16D (4) requires the pool fence to be converted back to a fence that complies with the pool fence standard if the applicant ceases to be the pool owner, the person who was given the exemption no longer occupies the land or it has become physically impracticable for the person who was granted the exemption to access the pool.

Subsection 16D (5) places an obligation on the person to comply with each condition attached to the exemption.

New section 16E (Revocation of exemption)

Subsection 16E (1) applies if pursuant to 16D of the Act:

- The pool owner of an existing pool is given an exemption of the fencing standards; or
- The pool owner of a proposed pool is given an exemption of the fencing standards.

If the local government is satisfied that the decision:

- Was based on a false or misleading particular given by the applicant; or
- The applicant stops being the pool owner for the pool; or
- The person because of whom the exemption was granted is no longer an occupier of the land; or
- It is no longer physically impracticable for the person because of whom the exemption was granted to access the pool; or

- If the exemption was subject to conditions—the applicant has contravened a condition.

Subsection 16E (2) applies if *Subclause 16E (1)* is applicable. The local government must issue a show cause notice inviting the applicant to show cause why the decision should not be revoked.

Subsection 16E (3) allows the local government to issue a revocation notice, which must be in writing, revoking the decision previously given after considering the response to a show cause notice.

Subsection 16E (4) specifies the detail that a revocation notice must contain. This includes a requirement for the applicant to ensure that a pool fence complying with *Subclause 14(1)* is installed and the day in which the fence must be installed.

Subsection 16E (5) specifies the maximum penalty that applies for a failure to comply with the revocation notice.

Subsection 16E (6) provides that a failure to comply with a revocation notice is also a failure to perform work under the *Local Government Act 1993* (LGA) section 1066. This means, if the owner or occupier of land or a structure fails, or both the owner and occupier fail, to perform work required to be performed under the LGA, a local government may, by its employees or agents, enter the land or structure and perform the work.

Amendment of s 17 (Advice as to compliance)

Clause 7 amends the existing section 17 of the Act.

Subclause (1) amends existing sub section 17(1) by replacing “owner” with “pool owner (as defined in 12V of the Act) of an outdoor swimming pool”. “Pool owner” is applicable only to Part 3 of the Act. “Owner” is a definition that applies to other parts of the Act, excluding Part 3.

Subclause (2) amends existing sub sections 17(2)(b), 3(b) and (4) by replacing “owner” with “pool owner”. “Pool owner” is applicable only to Part 3 of the Act. “Owner” is a definition that applies to other parts of the Act, excluding Part 3.

Amendment of section 19 (Apportionment of cost of constructing dividing fence)

Clause 8 amends existing section 19 by changing the words “constructed or installed” in subsection (1) to “constructed”. This is because “installed”

is now included in the new definition of “construct” in the proposed new section 12T.

Amendment of s 20 (Appeals about swimming pool fencing)

Clause 9 amends existing sub section 20(1) by clarifying that the owner of an existing outdoor swimming pool or the person who will be the owner of an outdoor swimming pool that is yet to be constructed or that is in the process of being constructed, may appeal to a tribunal under the *Integrated Planning Act 1997*. The appeal can be against a decision or lack of a decision in the prescribed time, by a local government or a private certifier about fencing around a pool.

Insertion of new pt 7, div 1, hdg

Clause 10 inserts a new heading ‘*Division 1—Transitional provisions for Local Government Act 1993*’.

Insertion of new pt 7, div 2, hdg

Clause 11 inserts a new heading ‘*Division 2—Transitional provisions for Building and Integrated Planning Amendment Act 1998*’.

Replacement of section 59 (Lawfully constructed swimming pool fences protected)

Clause 12 deletes existing section 59 and inserts a new heading ‘*Division 3—Transitional provisions for Building Amendment Act 2003*’ and new transitional provisions 59 and 58A to 58C.

New section 58A (Definitions for div 3)

Section 58A inserts new definitions of “**amending Act**”, “**commencing day**” and “**unamended Act**” for the purposes of Division 3.

New section 58B (Existing exemption from fencing swimming pool)

Subsection (1) clarifies that section 58B applies to an exemption given under the Act before it was amended by the *Building Amendment Act 2003* provided the exemption was not previously revoked.

Subsection (2) clarifies that the previously given exemption is still valid

Subsection (3) clarifies that any conditions attached to the exemption still apply.

New section 58C (Undecided application for exemption from fencing swimming pool)

Subsection (1) clarifies that section 59B applies where an application for an exemption has been made before the commencement of the *Building Amendment Act 2003* and the application has not been decided by the local government.

Subsection (2) provides that the unamended Act continues to apply to the application. This has the effect of the application being treated as if the unamended Act was still in force. It will mean that the applicant must comply with any conditions attached to the exemption imposed under the unamended Act. It will also provide the applicant with the same rights of appeal against a decision of the local government about the application;

New Section 58D (When resuscitation sign for outdoor swimming pool not required)

Section 58D inserts a new transitional provision that clarifies that a resuscitation sign is not required if the work on the pool started before the commencing day, or approval to carry out construction of the pool was given before the commencing day, or an application to allow the construction of the pool and fence was made before the commencing day.

New section 59 (Revocation of decisions or previous variations)

Section 59 applies to exemptions given under section 15 of the unamended Act and to a variation given under section 30M as in force immediately before the commencement of the *Building and Integrated Planning Amendment Act 1998*, part 2.

Section 59 requires decisions on exemptions or variations made under section 16 of the unamended Act before the commencement of the *Building Amendment Act 2003* to be treated as if the unamended Act had not been amended.

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