



Commissioner for  
Better Regulation  
Red Tape Commissioner

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29 July 2019

Mr Graeme Emonson  
Acting Deputy Secretary, Planning  
Department of Environment, Land, Water and Planning  
8 Nicholson St,  
EAST MELBOURNE VIC 3000

Dear Mr Emonson

### **REGULATORY IMPACT STATEMENT FOR BUILDING AMENDMENT (SWIMMING POOL AND SPA) REGULATIONS 2019**

I would like to thank staff at the Department of Environment, Land, Water and Planning ('the Department'), particularly [REDACTED], for working with our team on the preparation of the Regulatory Impact Statement (RIS) for the Building Amendment (Swimming Pool and Spa) Regulations 2019 (the proposed Regulations).

As you know, under section 10 of the *Subordinate Legislation Act 1994* (the SLA), the Commissioner for Better Regulation is required to provide independent advice on the adequacy of analysis provided in all RISs in Victoria. A RIS is deemed to be adequate when it contains analysis that is logical, draws on relevant evidence, is transparent about any assumptions made, and is proportionate to the proposal's expected effects. The RIS also needs to be clearly written so that it can be a suitable basis for public consultation.

I am pleased to advise that the final version of the RIS received by us on 28 July 2019 meets the adequacy requirements of the SLA.

#### **Background**

In September 2018, the Victorian Government amended the *Building Act 1993* (the Act) to establish a new regulatory scheme to reduce drownings of young children by increasing compliance with private swimming pool and spa barrier requirements. These amendments include a requirement for councils to establish and maintain a register of swimming pools and spas in their municipal area. The amendments also set out powers for councils to make regulations regarding various aspects of the scheme including:

- requirements for pool and spa owners to register their pool or spa with council;
- requirements for pool and spa owners to have their pool or spa barrier inspected;
- the issuing of certificates of pool and spa barrier compliance or (non-compliance) following an inspection; and
- requirements for the lodgement of these certificates with council.

The amendments to the Act become operational on 1 December 2019. Three broad intervention options to support these amendments are analysed in the RIS:

1. new regulations;

2. increased enforcement action under the existing regulations; and
3. non-regulatory actions – information campaigns.

The Department's preferred option is new regulations. In the RIS, the Department explains that without new regulations it is unlikely that the basic policy intent of the amendments to the Act could be achieved — councils would still be required by the Act to establish registers but pool and spa owners would not be compelled to register their pools and spas and there would be no means of recovering the registry costs from pool and spa owners. The Department also explains that new regulations are necessary to enable increased enforcement activity. It notes that the voluntary approach taken by the Victorian Building Authority since 2018 has not been taken up significantly.

In the RIS, the Department notes that the primary purpose of its proposed Regulations is to reduce the number of drownings of young children. The proposed Regulations seek to improve compliance with existing swimming pool and spa barrier standards. Existing penalties will remain in place under the proposed Regulations and new offences and penalties will be introduced (discussed in more detail below). The Department has estimated that the proposed Regulations have a total cost of \$399 million (NPV over 10 years from 2019). These costs include:

- \$345 million in costs to pool owners (comprised mostly of inspection costs and rectification costs to meet existing standards)
- \$54 million in costs to councils (councils will be able to charge new fees to recover costs).

The Department discusses its proposed Regulations in detail in the RIS around five key issues:

- registration requirements
- inspection and certification arrangements
- procedures for dealing with non-compliant barriers
- relocatable pools
- additional regulatory options considered.

### **Registration requirements**

The Department's preferred option includes making it mandatory for owners of pools and spas to apply to their council to have their pool or spa registered. In the RIS, the Department proposes that mandatory registration will ensure that councils have more comprehensive records of swimming pools and spas in their municipal areas. The Department examines specific design issues around:

- once registration has occurred, whether renewal of registration would be required. It concludes that this is not worthwhile because there is no obvious additional information required from owners;
- how much information owners should be required to provide for registration. The Department notes that under its preferred option it would only prescribe information necessary for the effective functioning of the scheme and that councils can request additional information; and
- how the date of construction should be determined — this then designates which barrier standard applies. The Department's preferred option is for councils rather than owners to determine the date of construction because councils can make an independent assessment and have access to the records required to make an accurate assessment.

### **Inspection and certification**

The Department considers two broad options for inspection and certification of swimming pool and spa barriers: mandatory self-assessments and mandatory professional inspections. Both options assume that mandatory registration requirements for owners are in place. The Department's preferred option is for mandatory professional inspections because this provides an independent assessment of barriers and the level of knowledge required to carry out a technically sound assessment.

The Department's preferred option involves a staged approach with three dates for when certificates of compliance are first required to be provided to councils. Certificates of compliance will be required for the oldest pools and spas first (certificates will be required by the end of October 2020 for those pools and spas built before July 1994). The Department's preferred option also involves reinspection every three years and establishing a new class of building inspector (pool safety) — building professionals that can currently certify a swimming pool or spa barrier (e.g. building inspectors and surveyors) will continue to be allowed to certify barriers.

### **Procedures for dealing with non-compliant barriers**

The options presented to address non-compliance assume the preferred options for registration requirements and inspection and certification requirements being in place.

The Department's preferred option is to require action to be taken when a barrier is found to be non-compliant and for inspectors to take responsibility for overseeing rectification of minor non-compliance, rather than all non-compliance being reported to councils for enforcement action. It argues that this option will reduce the burden on councils and provide for more efficient rectification of minor non-compliance matters. Its preferred option involves:

- inspectors being allowed to provide owners with a maximum of 20 business days to address minor issues of non-compliance. Otherwise a certificate of barrier non-compliance must be issued and council will investigate;
- a certificate of barrier non-compliance being issued immediately for four matters (gate unable to be locked, gate unable to be completely closed, part of the barrier is missing, or part of the barrier is less than one metre high). The Department notes that prescribing these four matters, rather than giving inspectors discretion, ensures that the most serious non-compliance is referred straight to council, so enforcement action can be taken to bring the barrier into compliance;
- inspectors issuing a certificate of non-compliance for any non-compliance that poses a significant and immediate risk to life or safety. Inspectors must lodge certificates of non-compliance with the relevant council, so that it can take appropriate action, including issuing an emergency order;
- creating the ability for councils to issue barrier improvement notices, requiring owners to provide a certificate of barrier compliance within a specified period (not less than 14 days), and introducing infringement penalties of two penalty units (\$330 in 2019-20); and
- an exemption from building permit requirements for the replacement of part of a barrier.

### **Relocatable pools**

The Department notes that relocatable pools present a range of unique policy and regulatory challenges. In the RIS, the Department explores options to improve the regulation of relocatable pools while maintaining the existing requirement for relocatable pools with a depth greater than 30 cm to have a barrier.

Its preferred option includes:

- exempting owners from building permit requirements for constructing or erecting a relocatable pool;
- changing building permit requirements for barriers around relocatable pools. There are two types of barriers for relocatable pools: permanent barriers and relocatable barriers. Under these changes a building permit would be required for permanent barriers but not for relocatable barriers. The Department notes that there are currently only a small number of compliant relocatable barriers on the market;
- requiring registration for a prescribed set of relocatable pools — relocatable pools that are erected for three or more consecutive days; and
- requiring certification of barriers within a prescribed period. The Department has given councils discretion to set this period with a maximum of 30 days.

### **Additional regulatory options considered**

In the RIS, the Department discusses two additional regulatory options it considered but rejected.

- The Department rejected mandating CPR signage on pool barriers because of insufficient evidence that this option would mean more people administer CPR or do it more effectively and therefore reduce the risk of drownings; and
- The Department rejected permitting lockable spa lids as an alternative to safety barriers as there is a lack of certainty about the safety of these lids.

### **Fees and penalties**

As part of the RIS, the Department explores options for setting fees. It explores setting uniform fees across councils or setting maximum fees that councils can charge for services related to the regulatory framework for swimming pool and spa barriers. The Department's preferred option is to set maximum fees that councils can charge. These maximum fees (in 2018-19 amounts) are:

- Fee for registration — \$37
- Fee for lodgement of compliant barrier certificate — \$20
- Fee for lodgement of non-complaint barrier certificate — \$385

The Department notes that the much higher fee for lodgement of a non-compliant barrier certificate (than for a compliant barrier certificate) will act as an incentive for owners to comply with requirements. The Department also notes that there is additional work (and costs) for councils to follow up on non-compliant barrier certificates.

There are existing barrier requirements for pools and spas (in the current Regulations). These requirements are enforced by councils and non-compliance may attract a penalty of up to 50 penalty units (\$8,261 in 2019-20). These existing requirements and penalties will remain in place under the proposed Regulations.

The proposed Regulations introduce new offences and penalties. It will be an offence for:

- an owner of land upon which a pool or spa is located not to register the pool or spa within the required timeframe.
- an owner not to provide a certificate of barrier compliance by the date required by council.
- an owner not to pay the required lodgement fee at the time of lodging a certificate.

- an owner to not comply with a barrier improvement notice.

All these offences are subject to a maximum penalty of 10 penalty units (\$1,652 in 2019-20). All offences will also be prescribed infringement offences subject to a fine of two penalty units (\$330 in 2019-20).

### **Implementation and evaluation**

In the RIS, the Department notes that it will work closely with stakeholders including councils, water safety organisations and child safety organisations, during the implementation of the proposed Regulations to monitor the success of implementation and gather data on how effective the Regulations have been in their primary objective of reducing drownings among young children.

The proposals discussed in the RIS will be implemented through amending the Building Regulations 2018. These regulations will sunset in 2028, so swimming pool and spa barrier regulations will be reviewed in 2028 as part of the remaking of the Building Regulations.

In addition to this review, the Department notes that it intends that a review of the implementation of the proposed Regulations will be carried out by the end of 2021. The Department is also required to conduct a formal midterm evaluation of the proposed Regulations within five years, in accordance with requirements in the *Victorian Guide to Regulation*.

Should you wish to discuss any issues raised in this letter, please do not hesitate to contact my office on (03) 9092 5800.

Yours sincerely



Anna Cronin

**Commissioner for Better Regulation**