

***Independent Review of Swimming Pool Barrier  
Requirements for Backyard Swimming Pools in  
NSW***

**The Real Estate Institute of New South Wales**

**Submission on the Discussion Paper**

**19 October 2015**

**To:**

Swimming Pools 2015 Review  
Office of Local Government  
**By e-mail:** [olg@olg.nsw.gov.au](mailto:olg@olg.nsw.gov.au)

## Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales (**REINSW**) and is in response to the Discussion Paper on the independent review of swimming pool barrier requirements for backyard swimming pools in New South Wales, prepared by Mr Michael Lambert and issued on 25 September 2015 (**Paper**).

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

REINSW supports, in principle, the Government's initiatives designed to minimise the risk of death and injury occurring in swimming pools. However, the safety of children must be ensured with a practical scheme for certification.

In the interests of consumer protection and for a complete capture of the market, REINSW strongly suggests that all pools should be inspected for compliance with an appropriate mechanism for policing it. However, if the Government decides to proceed with the sale and lease of a property with a pool as the trigger for compliance, then REINSW recommends a staged process whereby the lease provisions commence 12 months before the sale provisions. This staged commencement period would allow sufficient time for the market to adapt and necessary resources to become available.

Given that the commencement of the legislation has been deferred twice and is currently under review, there is a high level of confusion and uncertainty in the market about whether it will be amended or further delayed. Unfortunately, the market has lost faith and momentum with the implementation of the project. The delay removed potential work and business opportunities for pool inspectors and certifiers, reducing the resources available to carry out pool certifications. REINSW recommends that the Government make a clear announcement on the way forward as soon as possible to allow sufficient time to build resources and achieve compliance.

This Submission should be read in conjunction with the Paper as REINSW has chosen to comment only on specific questions, using the same numbering as that used in the Paper.

## Questionnaire

1. **Do you support the following possible approaches to a pool barrier standard:**
  - (a) **Control of when and if the State adopts a revised national standard;**
  - (b) **Provide ready access to pool professionals to the standard;**
  - (c) **Provide an easy to understand explanation for the general public?**

REINSW supports, in principle, the adoption of a national pool barrier standard, however, that national standard must appropriately respond to the specific needs and requirements of New South Wales.

**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?**

Please refer to REINSW's response to Question 1.

In addition, the Paper does not specify the length of the transition period for making existing pool barriers compliant if a new single standard was introduced into New South Wales. The Paper only describes what happened in Queensland when the single standard was introduced. That is, pool owners were given a 5-year transition period to upgrade to the new single standard unless they sold or leased their property within those 5 years, in which case the pool barrier had to be compliant with the new single standard at the time of sale or lease.

According to the Queensland Building and Construction Commission, only 60,000 of the 350,000 pools in Queensland have actually been inspected, despite:

- (a) the 5-year transition period; and
- (b) the requirement for all pools to comply by not later than 30 November 2015.

It is not uncommon for people to leave things to the last minute and REINSW believes that will inevitably happen in New South Wales if a single standard was introduced. Accordingly, REINSW recommends a shorter transition period be implemented in New South Wales to give more of an incentive to comply. That way, a greater percentage of pool owners will have compliant pool barriers sooner rather than later. REINSW suggests that a 3-year transition period is appropriate because that would align the cycle with the life cycle of a compliance certificate and it would give short-term pressure, generating more turnaround.

**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?**

REINSW supports, in principle, an advisory service in NSW which provides advice to the industry and pool owners across the State. REINSW sees the benefit of establishing an easily accessible advisory body and interpretation service to answer queries about the standard and how it should be applied.

**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?**

For efficiency purposes, REINSW supports the proposal for accredited pool certifiers being able to undertake minor and relatively simple repairs to a non-compliant pool. Pool owners would be spared the time and inconvenience of finding a suitable person to undertake the work and then arranging for the inspector to complete their assessment. REINSW welcomes an expedited process for compliance with minimum delay.

If this proposal were to proceed, REINSW recommends a definition of "minor repairs" be legislated and a requirement for the certifier to have the appropriate skills and competency to undertake such repair work.

**12. Do you support council inspectors and accredited pool certifiers being required to fully document each pool inspection, including photographs and supporting notes?**

REINSW supports, in principle, the proposal for inspectors and certifiers to fully document each pool inspection. If the inspector or certifier determines a pool to be compliant then they should issue the compliance certificate. However, if a pool fails the inspection and is determined to be non-compliant, the inspector or certifier should prepare a report which clearly details the reasons for non-compliance and the remedial action required to rectify the issues. A detailed document should eliminate the subjective nature of a determination and may be considered by the Land and Environment Court if the certification was ever disputed.

**13. Do you believe accredited pool certifiers should be required to undertake Continuing Professional Development?**

REINSW firmly believes in the maintenance of professional skills and that a program of Continuing Professional Development (**CPD**) should be a requirement for all accredited pool certifiers. That way, certifiers are unlikely to become complacent, prepare non-compliant reports and lack education on current and relevant standards, interpretations, technology and industry trends.

REINSW finds it concerning that council inspectors are not required to be trained and are deemed to satisfy competency without going through a competency program simply because they are council staff.

REINSW is concerned that an untrained inspector or certifier cannot be at the top of their field if they are not properly educated on legislative, industry and technical issues impacting their profession. Mistakes can happen and incorrect interpretations of standards may be applied. Continual education is paramount to remaining informed of relevant and current issues and changes.

Our research indicates that Pool Safety Inspectors (**PSI**) in Queensland must complete at least 6 CPD hours per annum. As part of the licence renewal process, a PSI must demonstrate those CPD hours, usually through a letter of completion from the training organisation. Failure to demonstrate completion of CPD hours results in the suspension of their PSI licence until such time as those requisite CPD hours are completed. For more information on Queensland's CPD program, refer to the Queensland Building and Construction Commission's CPD webpage at <http://www.qbcc.qld.gov.au/continuing-professional-development>.

From a CPD training content perspective, the training in Queensland has been the same each year and includes repetitive standard courses such as fencing components and legislative updates (if any). The Paper discusses report writing, however, REINSW is of the view that relevant and interesting courses need to be made available in New South Wales. To that end, REINSW recommends approval be given to courses outside the pool barrier inspection regime but only where relevant (for example, report writing courses, investigation courses, managing conflict courses and mediation courses). If REINSW's recommended approved courses are adopted, when those courses will be established and which entity will approve them needs to be considered. REINSW also recommends they be established as a matter of priority having regard to the fact that certification can take months before compliance is achieved, the availability of tradesmen and supplies and that trades close down over the festive season and new year period.

**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?**

In addition to REINSW's response to Question 13, REINSW believes that people who make determinations affecting the rights of others must be appropriately qualified, educated and experienced.

REINSW notes that council pool inspectors are not trained or accredited and are, therefore, not registered with the Building Professional Board. Consequently, they are not subject to the same codes of conduct, competency and professional standards that apply to accredited E1 certifiers. This creates a dichotomy governance model for pool certifiers which can promote behaviour by council inspectors that is substandard to the expectations of the community and the Building Professional Board, with no independent body to adjudicate.

Councils seem to be everyone's first port of call when a compliance issue arises. Despite pool inspectors not being trained, their decisions are included in legal documents (namely, a Notice of Intention to Give Direction and a Notice of Direction). REINSW considers it problematic that the current model permits untrained council inspectors, reviewers and management to make legally binding decisions. Therefore, the requirement to complete the E1 course should apply to both existing and future council pool inspectors and A1 to A3 building certifiers. There should be no exemptions for existing inspectors and certifiers. If the E1 course applied to all council pool inspectors and A1 to A3 certifiers, that would minimise undesired circumstances where, for example, certifiers fail to properly interpret the swimming pool standard or are negligent in exercising their duties.

To further support REINSW's view that A1 to A3 certifiers should be required to complete the E1 course, Table 7.8 of the *Independent Review of the Building Professionals Act 2005 (Draft Report August 2015) (Draft Report 2015)* prepared by Michael Lambert illustrates that approximately 31% of valid complaints made against certifiers were for "failure to ensure regulatory requirements for issue of certificate". The Draft Report 2015 can be found at: <http://bpb.nsw.gov.au/sites/default/files/public/Information%20sheets%20%26%20practice%20advice/Draft%20Review%20of%20the%20Building%20Professionals%20Act%202005%20-%2021%20August%202015.pdf>. The Draft Report 2015 includes a proposal at page 15, namely, to ensure proper accountability and responsibility so that the NSW certification system works effectively. That proposal primarily targets builders and private certifiers. To optimise the effectiveness of the proposal, there should be an accountability and responsibility requirement applicable to council officers, existing certifiers and any person involved in the assessment and/or decision-making process (including reviews) of swimming pool barrier compliance, whether they work in a council or privately. REINSW believes the solution is a requirement for certifiers to be E1 accredited.

**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?**

Please refer to REINSW's response to Question 14.

Further, as Question 15 is written, it appears the proposal requires knowledge of both building and swimming pools, not just one or the other. REINSW queries whether that then limits the E1 accreditation to pool builders? REINSW does not consider that should be the case and is of the view that no prior knowledge is required on the Building Code of Australia (BCA) or AS1926. That knowledge can be obtained through adequate and proper training.

Regard must be had to the role of the E1 certifier. They are not engaged to ensure council consent has been obtained for the erection of the fence (if one is required), rather they assess whether the swimming pool barrier is compliant with the *Swimming Pools Act 1992* (NSW) (Act) and Regulations, Part 3.9.3 of the BCA and the relevant edition AS1926. For instance, under AS1926.1 (2012) glass barriers must be installed in accordance with AS1288. Unless the E1 certifier is accredited to assess glass (and accreditation is issued by the Australian Glass and Glazing Association), it is likely that the E1 certifier will either rely on a report prepared by an external glass expert or certify the barrier to be compliant without undertaking a technical assessment in accordance with AS1288 (whether that be because they are unskilled in glass barriers or are unaware that the standard exists).

REINSW is uncertain whether a “building skills” module can be incorporated into the E1 training program, but recommends that it should be included. That module could train on basic building skills for the installation of a fence and the signs of demise, such as stress fractures and barriers that are surface mounted versus counter lever mounted. Incorporating such a training module can open up the E1 candidature pool to include persons outside the construction or pool industry. In turn, that will increase the number of actively engaged E1 certifiers whilst ensuring that these E1 certifiers have a basic knowledge of building relevant to pool barriers. Another advantage is that it could create job opportunities for the unemployed. However, whilst the module would be beneficial the question remains whether it can be developed and rolled out between now and 29 April 2016. Perhaps the task of developing the module’s syllabus could be allocated to the Master Builders Association having regard to the building skill set that should be included.

REINSW has been advised that in order to obtain a PSI licence in Queensland, the candidate simply needs to provide the following:

- a Statement of Attainment in Swimming Pool Safety inspections issued by Australian Skills Quality Authority (ASQA); course code 31005QLD (not required for licensed building certifiers);
- evidence of passing the pool safety inspector test (not required for licensed building certifiers);
- a passport style photograph;
- proof of identity (for example, a certified copy of their driver’s licence or passport);
- evidence of professional indemnity insurance (namely, a certificate of currency/schedule of insurance); and
- payment of \$534.80 (\$356.90 being the application fee and \$177.90 being the licence fee).

REINSW believes that a building professional background should not be required as a prerequisite and is of the view that the number of candidates who complete the E1 course would increase if the following is taken into account:

- It appears that the Queensland PSI model is a proven success and could be implemented into New South Wales.
- Table 7.8 of the Draft Report 2015 illustrates that 31% of valid complaints made against existing A1 to A3 building certifiers were for “failure to ensure regulatory requirements for issue of certificate”.
- The risk of an inadequate swimming pool barrier is homogenous and does not discriminate across jurisdictions.
- The risk-reward trade-off indicates that the provision of E1 certification services has a low priority for existing A1 to A4 certifiers and is more likely to be undertaken incidentally as part of a bundled project, rather than as an independent job. A1 to A4 certifiers can make more money doing other work with which they can charge more. The real number of those 142 A1 to A3 certifiers who have registered their interest in undertaking pool certification work and those actively inspecting swimming pool barriers may be far less. Consequently, this may impact the level of market serviceability by the certifiers as 29 April 2016 approaches.
- The establishment of a cottage industry that can provide employment to persons within and outside of the building and/or pool industries. There is the potential to reskill people and reduce unemployment.

**16. Do you believe there is merit in having the E1 pool certification training course recognised by the national vocational training regulator, ASQA?**

REINSW is of the view that there cannot be a national training scheme unless you have a national and harmonised training environment where the training appropriately responds to the particular regulatory, climatic and cultural challenges in each respective State and Territory.

Having said that, REINSW supports, in principle, the E1 pool certification training course being recognised by ASQA for the following reasons:

- (a) ASQA is an independent body resourced by the skilled assessors of a registered training organisation;
- (b) ASQA's trainers must be approved;
- (c) the level of assessment would be raised to a tertiary level; and
- (d) there would be increased credibility with the Government and pool industry, which seems to have been lost in the market.

**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?**

REINSW believes that those involved in building works should be appropriately trained, qualified and regulated at all times. They should have the requisite skills, knowledge and competency to assess swimming pool barrier compliance.

There was a proposal in the Department of Fair Trading (NSW) *Regulatory Impact Statement Home Building Regulation 2014 (July 2014)* paper to deregulate the fencing industry with respect to wood and metal fencing. Most pool barriers are made from wood or metal so such deregulation would decrease the skills, knowledge and competency to construct or install a fence and would contribute to swimming pool barrier non-compliance. REINSW suggests that people who undertake pool barrier installation work should be required to undertake the necessary training to be E1 accredited. Currently, there does not seem to be any mechanism available to monitor that training or accreditation and REINSW is interested to know how that will be carried out.

**18. Do you believe the following support and accountability mechanisms would be helpful for E1 certifiers and the operation of the certification system:**

- (a) Helpline
- (b) Peer Review Panel
- (c) Practice Guide
- (d) Audit Program

Please refer to REINSW's response to Question 14.

**20. Which do you believe is the most appropriate course of action for commencing the sale and lease provisions:**

- (a) Defer commencement say six months to a quieter period of the property year;
- (b) Commence the lease provision as planned and the sale provision six months later; or
- (c) Commence sale and lease provisions as planned, with or without flexibility in timing of the compliance certificate?

**Please provide reasons for your view.**

REINSW believes that all pools should be inspected for compliance and not just those situated on properties to be sold or leased.

However, if the Government decides to proceed with the requirement for a compliance certificate to be issued prior to any sale or lease of a property with a swimming pool or spa, then REINSW considers the most practical way to implement that requirement is to stage it so that the rental market must comply followed by the sales market 12 months later.



REINSW is of the view that staging the commencement of the sale and lease provisions will result in a smoother and easier transition period with a reduced impact on the industry and its resources. If the lease provisions applied to the rental market 12 months before the sale provisions applied to the sales market then that would provide sufficient time for resources to be improved, including an increased number of certifiers and inspectors.

REINSW's research indicates that it is more profitable for builders and developers to focus their time and energy on reducing the housing shortage in New South Wales as opposed to inspecting pools. Councils' fees for pool certifications are capped at \$250, leaving little incentive for them to undertake inspections and devote time to certifications. Their resources are inadequate to service the demand for pool certifications in advance of 29 April 2016.

Further, A1 to A3 and A4 certifiers are more likely to prioritise and invest their time in preparing building inspection reports and pest inspection reports where they can charge thousands of dollars. The unit price per hour is lower for pool certification work and there is no risk trade-off with carrying out that type of work. Whilst the Paper boasts 142 A1 to A3 certifiers who have registered their interest in undertaking pool certification work, those certifiers are likely to treat it as low priority, preferring to carry out other more profitable types of work and presenting a resourcing issue having regard to the compliance deadline of 29 April 2016. To add to the shortage of A1 to A3 certifiers available for pool certifications, REINSW's research indicates that there were 700 people in Queensland qualified to service the market whereas there are only 79 E1 certifiers in New South Wales. REINSW believes that the effects of this resourcing issue can be minimised with a 12 month postponement of the commencement of the sale provisions. That postponement would also minimise the risk of people selling or leasing their properties illegally because of the shortage of inspectors and certifiers available, which would ultimately damage the real estate market.

In any event, REINSW would like to see the Government announce its decision as soon as possible. The sooner the market is aware of what they need to do, the sooner they can arrange for pools to be inspected and certificates to be issued, particularly if pools need to be compliant by 29 April 2016. REINSW believes that if the market is not given sufficient warning, there will likely be significant delays in sale and lease transactions as well as an unsettling market disruption come 29 April 2016.

**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 with the council to have an enforcement role to ensure this occurs?**

There are many reasons why a vendor may not wish to carry out remedial work required for a compliance certificate to be issued, including a lack of affordability, lack of care and interest in the finished product or because they are leaving the property and do not want to incur additional expenditure.

REINSW agrees, in principle, with the concept of purchasers being responsible for non-compliant pools on the basis that a sale should not be significantly delayed or withdrawn because a compliance certificate has not been issued. REINSW supports a mechanism which minimises significant delays in sale transactions.

REINSW has been advised that the Queensland model requires a pool safety inspector to issue a "Pool Safety Nonconformity Notice" (Form 26) to the pool owner who may appeal the inspector's findings. The notice identifies the pool owner, inspected pool's location, pool type, reasons for the pool being non-compliant, remediation action required, the date of the Notice and the inspector's name. To prevent "opinion shopping" of compliance, a pool owner must

use the same inspector throughout the process up to certification or apply to have the inspector changed which requires show cause for removal.

Under the New South Wales regime, s22E of the Act stipulates the minimum content of the certifier's notice of non-compliance. One is that a warning that a copy of the non-compliance notice will be forwarded to the local authority for the area in which the swimming pool is situated:

- (a) immediately, if the accredited certifier is of the opinion that the swimming pool poses a significant risk to public safety; or
- (b) 6 weeks after the date of inspection (or such other time as may be prescribed by the regulations) if a certificate of compliance is not issued for the swimming pool before that time.

Further, an accredited certifier who issues a notice in respect of a swimming pool must forward a copy of the notice to the local authority for the area in which the swimming pool is situated:

- (i) immediately, if the accredited certifier is of the opinion that the swimming pool poses a significant risk to public safety; or
- (ii) within 5 days after the end of the period specified in (b) above, in any other case.

REINSW recognises that the challenges of the New South Wales model are as follows:

- 6 weeks is too short to remediate for various reasons, one being that the pool owner may have financial constraints;
- escalation is to an administrator with limited resources and personnel not required by law to be competent in this field; and
- given council's opaqueness in decision-making and inability to assist pool owners, Council intervention has created a combative culture and not one that advocates a collaboration for solution or with speed to market.

Therefore, REINSW proposes the following alternative compliance monitoring model for consideration:

- New South Wales to implement the Queensland Form 26 model.
- Where a pool owner cannot implement remediation within the prescribed period (that is, 6 weeks), they must agree with the certifier on a remediation plan and timetable of events. As part of the certifier updating the NSW Swimming Pool Register, the certifier should include the remediation plan and timetable. To monitor compliance, the certifier should conduct periodical inspections at agreed dates or progress points with the outcomes being published on the NSW Swimming Pool Register.
- Expand the remediation timeframe from 6 weeks to at least 12 weeks or, under a periodically monitored remediation plan, to 24 weeks.

- A Non-Compliance Notice should not be escalated directly to Council. Council can obtain the relevant information from the NSW Swimming Pool Register during their pre-inspection work under their swimming pool barrier inspection program.
- The NSW Swimming Pool Register shows certificates of registration and compliance and has capacity to capture inspection results, the latter which are not publicly available. That veil should be removed to ensure transparency on the pool's inspection history. That way, a purchaser or prospective tenant could review the register and obtain pertinent information as part of their due diligence.

**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?**

In the interests of consumer protection, REINSW strongly supports a pool inspection system that offers a more effective way to achieve compliance than the current sale and lease compliance arrangements. REINSW welcomes a procedure that completely captures the market. To that end and to minimise deaths and injuries in pools, it is REINSW's view that a far better solution is for all pools to be inspected for compliance and an appropriate mechanism for policing compliance be implemented.

Whilst the sale or lease of a property with a pool acts as a trigger for compliance, those triggers potentially allow many pools to remain non-compliant indefinitely if a property with a pool is not sold or leased, posing a significant threat to child safety and consumer protection.

REINSW is concerned that the safety of consumers, particularly vulnerable children, will be at risk despite the commencement of the sale and lease provisions. There will continue to be many non-compliant pools not required to be inspected because the property they are situated on is not sold or leased. The trigger for compliance may never be activated, for instance, if people inherit properties to live in. Therefore, the requirement for all pools to be certified for compliance is likely to capture the market and promote child safety in pools.

**23. Which approach would you believe is the most appropriate way to inspect pools?**

- (a) 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
- (b) an expanded and more consistent risk based inspection program undertaken by councils
- (c) other (please specify in comment)

Please refer to REINSW's response to Question 22.

- 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?**

Please refer to REINSW's response to Question 12.

- 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?**

For efficiency purposes and where possible, REINSW supports uniform processes across New South Wales.

## **Conclusion**

The proposals in the Paper have significant impacts on councils, certifiers, real estate agents, conveyancers, swimming pool owners and the real estate market in New South Wales. Whilst REINSW welcomes initiatives designed to elevate the issue of children's safety, which is paramount, the way forward needs to be carefully considered by Government so that there is a practical scheme implemented for pool certifications and inspections.

REINSW's preferred approach is for all pools to be compliant. However, if the Government proceeds with the sale and lease arrangements then it needs to consider the time it takes for pool owners to obtain quotes from certifiers, materials to be ordered and contractors to be arranged to carry out remediation works as well as arranging for the certifier or inspector to return to complete their assessment. The facts are that 95% of pools fail their first compliance assessment and it takes an average of three inspections to achieve compliance. With all that in mind and having regard to the limited number of certifiers currently available in New South Wales, the timing of conveyancing and leasing transactions will be severely delayed if the sale and lease arrangements commence on 29 April 2016, impacting detrimentally on the market.

REINSW believes the way to minimise these effects is to commence the lease provisions as planned on 29 April 2016 but to defer the sale provisions by 12 months. That will give sufficient time and resources to implement the amendments made to the Act back in 2012.

The result needs to be a smooth transition which takes into account the interests of the various stakeholders involved.

REINSW appreciates the opportunity to provide this Submission and would be pleased to discuss it further, if required.

Yours faithfully



**Tim McKibbin**  
Chief Executive Officer  
The Real Estate Institute of New South Wales