



The New Zealand Master Pool Builder's Guild

Affiliated to the New Zealand Master Builder's Federation



November 2003

Special Report: Pool Fencing

A special General Meeting was called on Wednesday 29th October 2003 to address possible changes or “reinterpretations” to the FoSP 1987 (Fencing of Pool Act, 1987) proposed by some Auckland councils, namely Waitakere, North Shore, and Manukau – who’s employees are misapplying words of the Act and forcing pool customers to “ring fence” their pools. In some cases, retrospectively.

We have been told that there are pending Prosecutions brought by Waitakere City Council against its citizen/ratepayers, in which 21 pool owners will defend the interpretation of “Immediate Pool Area” as stated (but not defined) in the FoSP’87 Act where Waitakere have sought retrospective alterations to existing fencing that had previously been accepted and a Compliance Certificate issued. This case was to be heard in the District Court on February 20th 2004, but we understand this may be adjourned to allow legal argument in the High Court. We will follow this case with interest, and note that the Guild has been asked (by Waitakere City) to contribute opinion to the action by advising the Council its definition of “The immediate pool area” which is the primary dispute. (More about this definition later).

On behalf of the swimming pool trade in general, a small number of volunteer Guild Members have been addressing fencing issues at meetings with various Councils for some years: however it now seems that the issues are becoming so serious that pool builders who have hitherto shunned membership of the Guild are now keen to add their voices, in an attempt to gain recognition as a respected Pool Industry voice.

Obviously the outcome of these issues will affect the business of pool builders. Should the worst case scenario be forced on us – the “ring fencing” of every pool – it is bound to put customers (perhaps many) off having a pool constructed. This may be construed as a “Restraint of Trade” and possibly actionable against Councils and/or their staff who make illegal fencing decisions that are not supported by the FoSP Act. Attempting to reduce child drownings by restricting the number of pools being built is counterproductive, because it also restricts the number of children who will be exposed to safety around swimming pools, and swim-training at an early age!



Councils say they are pushing for stricter pool fencing rules, because they want to protect young children - “they want to reduce pool drowning” in the under 5 age group.

In fact, under-five drowning in home swimming pools have dramatically reduced over the years to the point that an under 5 child has a 10 times greater chance of being run over by a family member relative in their driveway. Children are more likely (20 times more) to be murdered by their parents, or severely beaten to the point of hospitalisation (200 times more likely) More people are accidentally shot while hunting than drown in home swimming pools, – the list goes on, but still the Council “do-gooders” (none of whom apparently have their own home swimming pools) attack our industry and attempt to take our livelihood away!

Council Staff continue to misread the situation - which make you wonder why they think are qualified to comment on the situation at all! They don’t seem to have the ability to separate fact from fallacy. They continually confuse a “swimming pool” with a “spa pool” and lump spa drownings in with swimming pools. This continual misunderstanding of the actual fact is then used against us, somehow “proving” that the inground swimming pool

is a threat to children. I personally feel that the spa pool is an area that should be looked at closely, with industry figures seemingly indicating 10,000 new sales per annum. I wonder what percentage of these spa pools are "child safe"? How many spa pools are there out in suburbia? A safe guess might indicate 80,000 to 100,000 - or more than one and a half times as many as inground pools!

The New Zealand Water Safety Council itself is under no illusions as to the reasons that children continue to drown in pools - despite sixteen years of a perfectly adequate law being passed (the following words are theirs!)

"In 1997 (10 years after the Act was introduced research was completed by the Injury Prevention Research Unit from Otago University that identified that there was **only 50% compliance with the Act** across the country. "

"Further analysis of the DrownBase information identified that three quarters (75%) of all home pool drowning for under 6 year olds were in pools that **did not comply with the Act** at the time of drowning (e.g. faulty gate, no fence, etc.)".

These figures include Spa AND swimming pools!

Why is it that Council Staff do not understand that the problem is NOT going to be solved by passing more stringent laws, by ENFORCING those in existence?

Excerpts from our web page: www.poolguild.org.nz

The 1987 Fencing Act has proven to be effective in reducing the number of "under 5's" child drowning in residential swimming pools and is quite clear in it's wording, that: (paraphrased)

"No territorial authority may modify the Act - either by making the requirements more restrictive, or less restrictive than the Act allows"

" A building or structure may form part of

the pool fence, providing any opening door is fitted with a latch greater than 1.5m from the floor"

" Doors in a building which forms part of the pool fence are exempted from the requirement to be self-closing and inwardly opening."

The Act DOES NOT NEED meddling with by ill-informed Council employees who seem to be out of touch with the "real world" of living in the 21st century with a modern life-style which includes swimming pools and pool-side barbecues - and the aesthetics of an indoor-outdoor flow to their living.

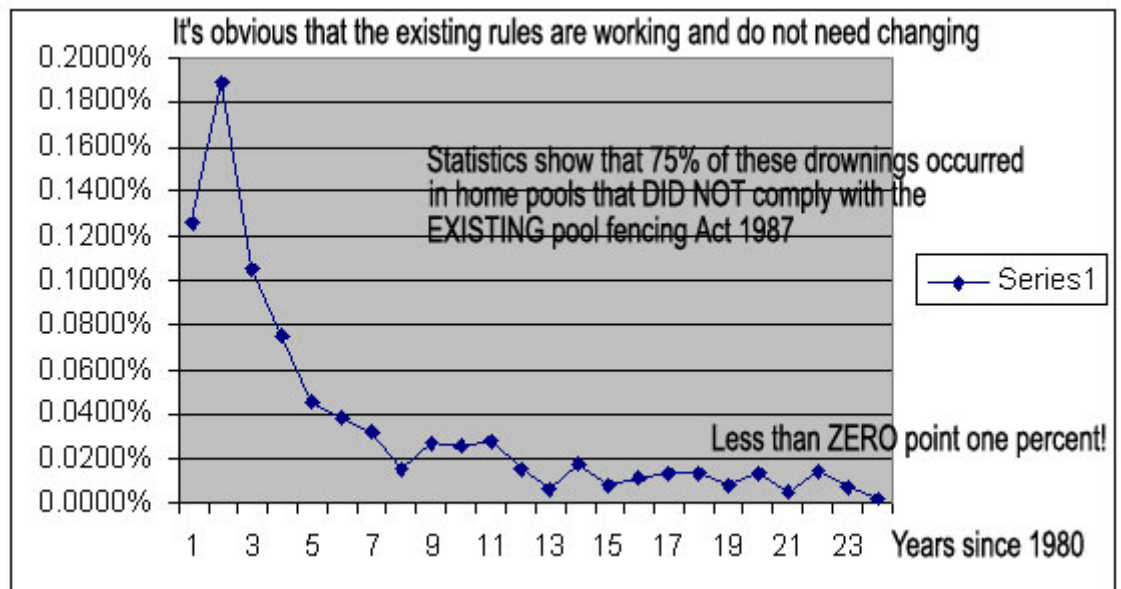
The BIA Can NOT modify the Pool Fencing Act - it is a Law adopted by an act of Parliament - and no Council employee (however POWERFUL they think they might be) can change the requirements of the Act!

The Fencing Act 1987 is well thought out, and has worked well over the 16 years since it's adoption.

There is no need to fiddle with it, and in fact it **specifically says** that Territorial Authorities (Councils) have NO RIGHTS to do so.

For some reason - **Intransigent council employees** (YOUR employees, in fact!) take it on themselves to fiddle with legislation that has been passed into New Zealand law by an Act of Parliament!

THEY HAVE NO RIGHT OR QUALIFICATION TO DO SO!



There will be a General Meeting held by Watercare later in the year. (November 21st) Make sure you attend, and make sure your RIGHTS are protected! Dates will be published in the Public Notices section of the Herald, when we know them.

In the meantime, if you live in one of these Council areas - keep an eye on certain employees who seem determined to create trouble and more expense for you!

**North Shore City
Manukau City
Waitakere City**

A recent meeting held by Watersafe invited all Auckland councils to attend a preliminary discussion on how to “tighten up the pool fencing laws”. WHY? The existing legislation works just fine, and **pool incidents are at an all-time low**. The requirements of the 1987 Act are perfectly sensible, and reflect the needs of the population without any modifications by council members. We are an Island nation, surrounded by beaches and water and with many lakes and ponds and both natural and council built waterways.

No-one wants the death of a child on their hands, but what about parental responsibility? If we are to “fence off” all hazards, life will become unbearable. Already, trees are banned from schoolyards on the grounds that school administrators refuse to take responsibility for any injury that may happen to a child that “fall out of the tree”! Better not to take the risk?

If you believe in statistics, think about these:

“An average of 20 children (all ages up to 10) drown each year. Five of these occur in pools OR SPA POOLS”.

(therefore THREE TIMES AS MANY drown in non-swimming or spa pool accidents)

“Using Watersafe statistics, the 75% of drownings occur in non-compliant pools OR SPA POOLS, 3.5 drownings occur on NON COMPLIANT POOLS, and the remaining 1.5 in compliant pools OR SPA POOLS.” (Vigilance!)

YEAR	TOTAL Pool DROWNING	TOTAL NUMBER OF POOLS*	As%	Drownings in Fenced Pool
1980	9	7,183	0.1253%	2
1981	17	9,033	0.1882%	4
1982	12	11,399	0.1053%	3
1983	10	13,399	0.0749%	2
1984	7	15,520	0.0451%	2
1985	7	18,380	0.0381%	2
1986	7	21,730	0.0322%	1
1987	4	25,580	0.0156%	2
1988	8	29,440	0.0272%	2
1989	8	31,140	0.0257%	2
1990	9	32,265	0.0279%	1
1991	5	32,891	0.0152%	2
1992	2	33,286	0.0060%	1
1993	6	33,831	0.0177%	0
1994	3	34,486	0.0087%	1
1995	4	35,305	0.1130%	1
1996	5	36,116	0.0138%	1
1997	5	37,031	0.0135%	0
1998	3	37,891	0.0079%	1
1999	5	38,751	0.0129%	1
2000	2	40,021	0.0050%	0
2001	6	41,298	0.0145%	1
2002	3	42,978	0.0070%	1
2003	1	45,058	0.0022%	0

(They do not even have an ACTUAL statistic for swimming pools - just swimming pools AND spa pools)

“At \$100 per meter, pool fence is not cheap ... if all 45,000 pools in New Zealand were fenced correctly, this would have cost the home owners about \$210,000,000 (Two Hundred & Ten Million Dollars) - so this is not to be taken lightly.

(By allowing the Building and some Boundary Fences to be included in the pool fence, the cost of compliance is reduced to the ratepayer - thus encouraging compliance)

Compared to the “other ways” we kill our children, WHY are Councils focussing on tightening the existing laws? There must be far more important areas of child safety for them to concentrate on!

It seems apparent from talking with Council fencing staff, that hardly any (if any at all) apparently have a home swimming pool themselves. They focus on the “Jail-house” mentality of completely surrounding the pool with a fence. No access for kids. No access for anyone ... in fact why don't we ban pools altogether, and that will definitely solve the problem.

NO WAY!

The 21st Century Kiwi life-style revolves around a combination of indoor/outdoor activities, and a home swimming pool fills the bill perfectly.



An “Ideally Fenced” swimming pool?

No-one wants a jailhouse in their back yard. People like the easy flow of patio-to-pool living - sitting, relaxing, eating, even watching the cricket by their pool. The therapeutic benefits help to compensate for the crazy life most of us have to face each day - especially in Auckland traffic. Open any Property Press magazine - week after week of beautiful "life-style" properties - and hardly a pool fence in sight. This is what THE PEOPLE want. People who can afford the life-style, that is. This (apparently) does not include Council workers on Council pay packets - otherwise why would they try to enforce rules that they would not put up with themselves (if they had the chance!)

We agree that even one child drowning in a pool is "one too many" however Council time would be better spent ensuring EXISTING pool owner's compliance with the 1987 Act - rather than "be seen to be doing something" by adding additional and unnecessary fencing restrictions in an area that can be demonstrated to be working well! We must assume that they (Council staff) are unfamiliar with these statistics, and justifying their salary by adding ratepayer burdens based on their "gut feelings" rather than complicating the matter with "facts

The statistical information (above) was supplied by Brendon Ward, who may not necessarily agree with the conclusions we have reached:

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Mobile 027-478 1836

www.watersafety.org.nz

30-Oct-97
METRO
Pool owners face court over fencing

CHRIS DANIELS
 Pool owners may face a fine or a court case if they do not ensure their swimming pools are properly fenced, Auckland Council has warned.
 Ross Coonan, building control manager at the Whangarei District Council, said a register of all swimming pools was no longer kept up to date because of a lack of staff.
 The Water Safety Council's survey of swimming pool fences published this year found that of the 39,000 pools in New Zealand, half were not properly fenced.
 Councils could be prosecuted if they do not enforce the laws, struggling to cope with the growing number of pools and the associated costs.



Points to ponder

- Not every home has "under 5" children living there.
- Not every home has "under 5's" visiting at any time, or is ever likely to.
- Some townhouses have small yards, so a fence between the house and pool is impractical
- Disallowing a boundary fence as part of the pool fence, will mean two fences in your back yard, one inside the other. This is "stupid"!
- When the 1987 Act was introduced, there were less than 6,000 pools in the Auckland Region
- In 2003, there are now 39,000 pools in the same area, but mishaps in pools have reduced by 98%
- Responsible parents (mothers especially) watch their kids like hawks!
- More under 5's are killed on driveways and other accidents than drown in home pools!
- Bicycle accidents kill and injure more children than anything else, yet helmet laws go unnoticed and unenforced by Councils - too "racially sensitive" to enforce in South Auckland?
- Hundreds of children are injured (or killed) when unrestrained (no seat belts) in car accidents!
- Some pool accidents have occurred while there are other children and adults present
- In a country with so much water everywhere, not one Council sponsors early swimming lessons!
- With Government cuts to Education, many schools do not have, or maintain a swimming pool
- Many fenced pools are located next to unfenced hazards such as creeks, dams, storm-water outlets. In order to be consistent, these should also be fenced?
- Fencing off a pool that is near a patio is visually unattractive and would not appeal to adult families
- Restricting a bbq's in the pool area runs counter to the population's acceptance of a poolside BBQ
- Excessive fencing laws may reduce vigilance by misleading parents to believe their children are "safe" - rather than keeping a careful watch at all times.
- Swimming Lessons (called "drown proofing in less PC times) are available from 18 months of age
- By the age of 3 all New Zealand children SHOULD BE ABLE TO SWIM
- If they "really" want to save lives, make SWIMMING LESSONS COMPULSORY for all children



NZMPBG Meeting of Members & Interested parties
Wednesday 29th October 2003
The Commerce Club, Remuera Auckland

MINUTES
SPECIAL MEETING ON FENCING ISSUES

Present:

John Honore' (President) - Executive Pools Ltd
John Poole - Austral Distributors
Ron Dixon (Treasurer) - Concrete Pools Limited
Grant Walls - Total Pool & Spa (Whangerei)
Iain Dymock - Pro-Pools
Bruce Bothwell - Advanced Pools
Ken G Teale - John Streeter Freedom Pools
David Bates - Classic Pools
Neil Runciman - Frontier Pools
Kevin Julian - Creative Environments
Steve Budden - Poolrite Wholesale
Larry Ogden (Secretary) - Cascade Swimming Pools

Apologies:

Rodney Williams - Paeroa Pool & Spa
Andrew Newitt - PoolCorp Cascade (Tauranga)
Carlos Morgan - Morgan Pools
Mike Coghlan - Cascade Pools
John Sutherland - Aquatech Industries
Neil Faber - Northland Pool & Spa (Whangerei)
Geoff Bonham - Leisuretime Industries

Guests:

Ben Sharp, Jeremy & Walter (Classic Pools)
Interest in attending from North Shore City Council was expressed, and they were invited to come, but were unable to attend when they discovered the meeting was to be held after normal working hours.

>From: Clarke McKinney
>[mailto:Clarke.McKinney@northshorecity.govt.nz]
>Sent: Wednesday, 15 October 2003 1:35 p.m.
>Subject: swimmin pool planning rules in North Shore City

>Hi Larry

>We would like to know if you would be interested in
>having a town planner from North Shore City Council
>speak briefly at your meeting regarding swimming pool
>planning rules in our district plan? If so, please
>advise of the starting time of this meeting, which is
>not mentioned in the attached email.

>Regards
>Clarke McKinney
>Building Process Review Project Team Leader

>North Shore City Council
>Phone 486-8400 extn 8064

Although invited to attend, no other Council responded to our emails inviting them.

>Hi Larry

>The planner that had indicated an interest to speak at
>this meeting has advised that he did not realise that
>it would be an evening event and therefore he is
>unable to make it at that time. Perhaps another time.

>Best Regards
>Clarke McKinney

It was unfortunate that the Planner was unable to attend, as it would have given us first-hand insight into the thoughts of (the North Shore City) Councils.

After an introduction by Secretary Larry Ogden - mainly regarding his dismay that after Ten Years of existence, and numerous forays into Council meetings to discuss various issues, there seems to be no great awareness on the part of Council staff of the existence of the New Zealand Master Pool Builders Guild. Members were urged to check out the Guild's web pages, and to contribute to the swimming pool industry as much as possible - not just at times like these, where Councils seem to run rough-shod over the pool trade - seemingly without any recourse to members of an established industry such as this.

President John Honore' commenced the meeting by reminding those present that this special meeting was convened as a result of the activities of the Waitakere City Council in malicious prosecutions of their law-abiding ratepayers because they had "a change of heart" and decided that what was acceptable in the past, was now not acceptable. Predictably this has caused a revolt amongst the rate-paying pool owners, who have banded together (currently 21 householders) to fight the Council over the definition of the term "The Immediate Pool Area" as mentioned in the FoPA'87 Act.

Determination of the pool area is enshrined in that 1987 Act, with the words "**to be determined in a reasonable manner**", but Waitakere seem by all accounts to be particularly unreasonable in attempting to enforce a change in their interpretation of these words, and the persuing otherwise perfectly law abiding ratepayers with a civil law suit because they resent having to spend more money (possibly thousands of Dollars) on re-fencing their property in a slightly different manner because of this change of heart on Council's part.

This change of heart seems even more unreasonable, when the Council can come up with no hard evidence showing that the existing Act is in any way deficient, or ineffective in providing the solution to child access to pools that it was designed to do.

This is hardly surprising, as many Councils are now re-thinking exemptions of “**Hard Latchable Covers**” of spa pools from fencing regulations, even though there have been **no accidental drownings in any spa pool** so fitted, since they were introduced in 1995. Not One!

Who are these people, and why are they doing this? What’s their motivation?

The thrust of today’s meeting is to offer an open forum to swimming pool industry members, so that they may contribute to this discussion, which is intended to result in an acceptable definition of “the immediate pool area” that may remove any ambiguities, and allow Councils to decide on what is acceptable in respect of safe, secure pool fencing of residential swimming pools.

Open Discussion followed:

Responsibilities

An immediate thread was opened relating to “**responsibility**” over any drowning death in a home pool. It was suggested that OSH (Occupational Safety & Health) might hold that any Council who issued a Building Approval for a residential swimming pool which showed pool fencing as part of the Approval - might be liable for negligent death under law, if the fence proved not to be a deterrent to a child who subsequently drowned.

Following this thread, the meeting discussed issues of responsibility. For example what if the pool was “**ring fenced**” but someone left the gate open? Could this person be charged with “negligence causing death” - in which case the “ring fencing” did not prove to be a deterrent? It follows from this that **no amount of protection is sufficient**, if the safety features are ignored (like making sure the self-closing gate is latched).

If Council accepts the responsibility of approving a pool fence, what happens with the passing of time? Is there some future time when a perfectly servicable pool fence becomes compromised - old age, broken hinges, rusty return springs, foliage growing up next to a fence - the list is endless. So in effect - have Councils accepted a “forever - or for the life of the pool” approach to accepting responsibility for these fences?

Water Safety Council already tells us that 75% of drownings occur in “uncompliant” pools - pools that are either unfenced from new, or have become deficient over the years. In this case, shouldn’t Council be held liable for any drownings in these pools, by neglecting their “duty of care” over their ratepayers children?

This line of thought resulted in lateral thinking over responsibility issues: The onus of responsibility should be removed from the territorial authority, and vested in the pool owner! (David Bates)

Building Approvals issued must be conditional on the receipt by Council of a signed declaration by the proposed pool owner that he/she accepts full responsibility for the care/maintenance and on-going operation of the pool fence. In the event of any house sale, a Caveat would be entered onto the Certificate of Title or appropriate document that any new owner must re-sign the release form, or remove (empty etc.) the pool.

As for determining the “immediate pool area”, perhaps there could be two levels of Approvals: *(Neil Runciman)*

GRADE ONE

The pool is “ring fenced” at a distance of 2.0m to 3.0 from the water. This Grade assures all interested parties that the maximum protection possible has been installed and no indemnity to Council is required. Any negligence resulting in injury or death would then be dealt with under existing laws of “duty of care”. This is the “no fault version, and a number of pool customers go to this extent with pool fencing already.

GRADE TWO

The pool area - as determined by the current (or new) pool owner, and may contain any reasonable amount of pool-related equipment, such as a barbeque, sun lounger chairs, a poolside breakfast table & chairs set, grass area for towel sunbathing etc. A Grade Two exemption would have to be approved by Council conditionally on the basis of a signed release of responsibility by the current occupier of the property, and on the strict condition that if the property changes hands, the new occupier also signs an updated release.

This places the responsibility for the installation and upkeep of the pool fence squarely in the hands of the home occupier, and could therefore apply to rental properties as well. A Grade Two rating would suit the numerous pool owners who want a “flow” from house to pool. These are the many homes you will see every week in such publications as Property Press.

(Note:

The recent judgement by BIA “clarifying” the Fencing Act 1991 (sought by the Thames Coromandel Local Authority seeking a determination under Section 6 of the FoSP’87 Act over a lockable spa pool cover) reported the Judge as saying “Don’t show me these Property Press photos .. the fact that numerous people do not adhere to the Law does not make any difference” (paraphrased) This is the same thinking that keeps the speed limit at 50 kph, even though traffic surveys in Auckland find the average speeds more like 60 kph (or 20 kph if you are on the motorways) - “don’t tell me what the people want, they don’t know what’s good for them”! It is enshrined in law that such determinations are based on specific cases - yet many Councils are referring to this judgement - illegally - in disallowing hard covers for spa pools!

The Existing Act

The Fencing of Swimming Pools Act 1987

Secretary Larry Ogden was President of the New Zealand Swimming Pool Association in 1976 when the issue of pool drownings became a point of discussion. By then,

installed pools in (mainly Auckland) New Zealand had reached more than 1,000 and mishaps were starting to occur. Larry worked closely with Plunket in formulating a position on pool safety, and attended many discussion groups on deciding what was the preferred solution. Many pool companies recommended pool fencing from 1976 onwards, but there were no Council requirements to do so. When, in 1987 the Minister from Wainuiamata (Wgtn) finally tabled the Act, it was as a result of years of consultation and discussion with many groups and interested parties on what the ideal situation would be.

It was Plunket's position in those days that a pool fence would be a major advance in protecting children, but the predominant area of improvement would be in sponsoring children in "swim-safe" classes, and in particular the "drown-proofing classes" (noe not PC enough to say) held at the Panmure heated pools in the 1970's and early 1980's. Larry Ogden argued this position in the media with the Minister prior to the passing of the Act, but his (I consider erroneous) position was that "children under 6 cannot be taught to swim"! (*My own son Julian, could ride a mini trail bike at 5, and swim 100 yards at 3 1/2 years old - Larry*)

Nevertheless, the Act was passed, and by 1991 pool related child drownings in fenced pools had dropped to two in 1988 an 89, then one in 1990 , then zero in 1991.

Since 1991 a total of 8 drownings have occurred in compliant pools (an average of .72 annually)

The resounding question from the meeting was:

The Act is working ... why is there a perceived need to change it?

What's Waitakere's Problem?

The nub of the lawsuits in train from Waitakete against its rate-payers is related to the interpretation of:

"The immediate pool area"

The Act says that pool-related activities may occur inside a designated "immediate pool area" Such activities may include (but not restricted to):

- Swimming (obviously)
- Sunbathing in a Poolside Lounger Chair
- Sunbathing on a towel on an adjacent grassy area
- Poolside Bar-b-queing (a Kiwi tradition)
- Breakfasting (or dining) poolside
- Relaxing with a good book
- Socialising with friends by the pool
- Pool Parties for the grown-ups
- Kid's pool parties

The Act specifically says that the "immediat pool area" should allow these activities, and the size of the pool area "shall be determined in a reasonable manner".

The meeting considered other items that could/should be considered a "pool related item" and these may include (but not necessarily restricted to)

- A Pool changing shed - possibly containing a toilet
- A Filtration box housing the pool equipment
- An outdoor shower
- Lawn area for sunbathing
- A paved Patio Area for table, chairs & sun umbrella
- An outdoor fireplace
- A Barbeque area
- Outdoor Lighting
- Plantings and trees for shade
- Decking (paving gets hot on little feet)
- Patio Furniture
- Sun Loungers

In other words, the "Pool Area" is an outdoor entertainment area that involves family activites such as socialising with the children and friends, eating, relaxing and generally "living the Kiwi lifestyle".

Outdoor living is ingrained in the Kiwi mentality. We are an outdoor people, and the kind of restrictions suggested by some Councils is completely contrary to the kind of

