

**Submission to the Consultation Regulatory
Impact Statement on family day care
residences with swimming pools, spas and
water features in Western Australia**

Family Day Care Australia



General Comments

Family Day Care Australia (FDCA) welcomes the opportunity to provide feedback on the various policy options developed by the WA Department of Communities to address the recommendations made by Coroner Sarah Linton, following an inquest into the tragic drowning of Lachlan James Mitchell at his family day care service on 9 November 2015. We also appreciate the consultative approach taken by the Department of Communities to date, including consideration of feedback in our previous submission, provided in August 2018.

Family day care is a long established and vitally important element of Australia's early childhood education and care (ECEC) system. For many families the 'home-based' and 'family like' environment make family day care their option of choice, for many families, it is their only choice.

As the national peak body for family day care, FDCA's role is to represent, support and [promote family day care services and educators to ensure the strength and continued growth of the sector in Australia, to support high quality learning and developmental outcomes for children and to meet the needs of families. FDCA represents a national membership of 13,948 educators and 520 approved family day care services. Approximately 1,222 or 8.8% of our educator members and 39 or 7.5% of service members operate in WA, with 41% of these educator members operating in locations situated within the five highest levels of socio-economic disadvantage (levels 1-5) as designated by the Australian Bureau of Statistics¹.

FDCA acknowledges the paramount importance of child safety in ECEC and supports measures to ensure children are safe within family day care settings. While we recognise that, following Lachlan's death, maintaining the status quo is not an option and that policies and procedures introduced to address the Coroner's recommendations will likely lead to regulatory changes affecting the family day care sector in WA, we strongly maintain that any change should not unduly impact on the sector's continued viability and the rights of children, parents and educators. We acknowledge the challenges associated with such a task and trust the feedback provided herein assists in developing an appropriate and balanced response.

In summary, FDCA's position is that options that ban homes with swimming pools, spas and other water hazards from family day care, affecting either current or future educators, as per Recommendations 1 and 2, are not the answer. FDCA's internal membership data shows that there is currently a natural attrition rate of family day care educators of around 20-25% per annum. Measures that further impact on services' ability to replenish their supply of educators will ultimately reduce the number of available educators and impinge on the viability of the family day care sector across the state. FDCA maintains that a tiered, multi-level framework (please see figure 1 on page 3) would be a more effective and balanced response to mitigating the risk of a child drowning while attending family day care. Key elements might include:

¹ FDCA Family Day Care Sector Profile, December 2018, accessed at <https://www.familydaycare.com.au/representing-you/sector-profile> on 8 May 2019.

- increased discretionary powers ascribed to the WA regulatory authority as well as family day care services, such as spot checks;
- development of a water safety best practice guidance framework for family day care services and educators in WA. Such a framework might include:
 - o Mandatory additional safety controls to be implemented by the educator, for example: additional measures to restrict access to the pool / water hazard area, motion sensor alarms, pool cover etc; and
 - o targeted education and training of relevant staff and educators on pool safety, water safety awareness for toddlers and also compulsory CPR training for educators conducting family day care from a residence with a pool or other water hazards.

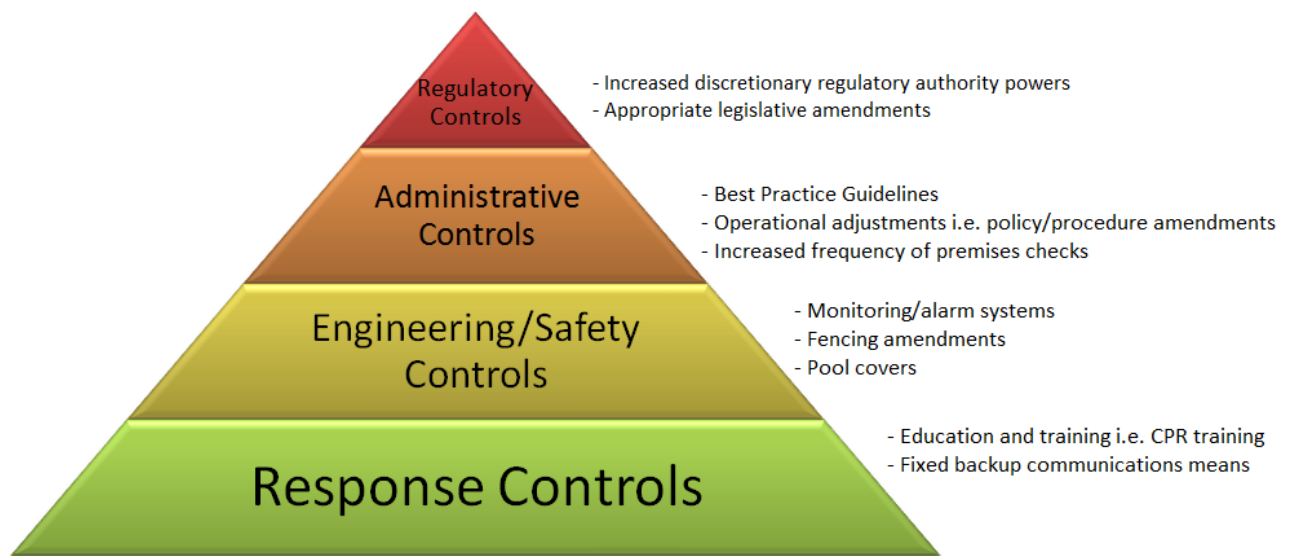


Figure 1: Multi-faceted pool/spa/water hazards safety framework for family day care in WA

As the Consultation Regulatory Impact Statement (CRIS) highlights, research into drowning deaths of toddlers conducted by Royal Life Saving Australia, shows that there are usually a number of contributing factors to incidences of toddler drowning including lack of direct supervision; lack of appropriate barriers to swimming pools or other water hazards; non-compliance of safety barrier requirements such as propping open a pool gate or climbable objects placed in the proximity of the pool or water hazard; and lack of water safety awareness on the part of the supervising adult and/or the child. These findings point to the need for a multi-level policy response so that if one line of defence fails, other prevention measures will be actively working to prevent a child from drowning.

FDCA remains very willing to work with our WA members and the relevant authorities in WA to formalise and promote risk management and safety controls in the development of best practice guidelines, which can be used by the Department of Communities and services in training staff and educators. FDCA is well placed to play a key role in facilitating this process, due to our extensive membership of both educators and services in WA, and we are also able to assist in promotion and awareness raising of the outputs of this exercise through our various member communications.

Impact on rights

It is FDCA's position that any blanket ban on pools, spas and water features in the residences of family day care educators, either current or future, would trespass unduly on personal rights and liberties. Article 11(2)(c) of the Convention on the Elimination of All Forms of Discrimination against Women states that in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities. Any form of ban on pools, spas and/or water features will restrict the network of child care facilities available to parents, and as such will unreasonably impact on parents' effective right to work.

Similarly, such a measure would also unreasonably impact on family day care educators' businesses, effectively rendering them unviable, which again is an undue trespass on the rights of existing and potential future educators to work, the vast majority of whom are women.

Family day care presents an ideal career opportunity for many Australian women and is a particularly suitable career path for women that may not have significant levels of experience in other occupational fields. Recent research² commissioned by FDCA indicates that 21% of educators were not previously employed prior to becoming a family day care educator. Measures that restrict workforce participation, or entry into the family day care workforce in the first instance, for the cohort of women that have a pool, spa or water feature at their residence represents a significant impact.

Again, the limitation upon both the rights of parents or educators to work is unreasonable. FDCA believes that there are clear regulatory solutions that do not unduly trespass on the rights of families to access a network of suitable child care facilities and on the rights of women, both parents or educators, to work.

FDCA requests that the Regulation Impact Statement explore the human rights implications of any proposed regulatory measures as to whether they are compatible with the rights and freedoms recognised in the seven core international human rights treaties to which Australia is a party, in particular, the Convention on the Elimination of All Forms of Discrimination against Women.

² In the latter half of 2018, FDCA commissioned *Survey Matters*, an independent research firm, to conduct a survey of FDCA educators in order to establish a socio-demographic profile of family day care educators. The sample size for the research is 1288.

1. Feedback on Recommendation 1

Recommendation 1 -

Amend the relevant legislation in WA to **exclude homes** with a swimming pool, outdoor spa or jacuzzi from being used to operate a FDC service where children under the age of five are admitted to care, which should come into effect immediately.

Option	Support	Don't Support	Comments
Option 1.1 Status Quo/No further change	<input type="checkbox"/>	X (see comments)	<p>FDCA notes that there have already been changes made both in policy and practice as a result of Lachlan's death in 2015, specifically the addition of a condition placed on all WA family day care service approvals stating:</p> <p><i>'The approved provider must ensure that, where there is a swimming pool, spa or other water feature at the residence of an educator who is registered with the service, the educator must be directly supervising and physically in proximity to any child in their care who is near the swimming pool, spa or other water feature.'</i></p> <p>A breach of this condition is subject to a penalty of \$50,000.</p> <p>As a result of this additional condition and the workshop with providers, FDCWA and the WA Education and Care Regulatory Unit in January 2016, the current policies and practices of family day care services and educators have been strengthened as outlined in the CRIS (p.9). As we highlighted in our feedback on the Coroner's recommendations in August 2018, many educators have already invested substantially in additional safety equipment, such as pool alarms, and improved / secondary pool barriers.</p> <p>Nevertheless, FDCA concedes that the status quo is not likely to be an option that will be accepted by the community and we have therefore provided some suggestions on other options in our feedback to the CRIS (see below).</p>
Option 1.2 Ban FDC for children under 5 at homes with water hazard/s, with a transition period	<input type="checkbox"/>	X	<p>FDCA does not support options that ban homes with swimming pools and other water hazards from family day care, affecting current or future educators.</p> <p>We note that Option 1.2 makes provision for currently enrolled children to stay in the care of a family day care educator operating from residence with a swimming pool or water hazard, but would</p>

			<p>prevent new enrolments of children under 5 from being accepted, with a transition period applying.</p> <p>As the CRIS points out, the majority of children in family day care are under 5 years of age. Options restricting family day care educators' care of children under 5 in the future would therefore unreasonably restrict the income of family day care educators and jeopardise their business, even if a transition period were implemented.</p> <p>As a result there would be significant and far-reaching impacts for the family day care sector in WA, including decreased viability of family day care as a career option for ECEC students / ECEC qualified professionals; and decreased child care options for parents with children under 5, especially in non-metro areas, where, according to data from the WA Education and Care Regulatory Unit (ECRU) data, 21% of family day care premises currently have a pool or spa.</p> <p>There is already a natural attrition rate for educators of about 20-25% which services must plan for. Implementation of Option 1.2 would therefore become an additional impact on services' ability to replenish their supply of educators, effectively reducing the number of available educators, thereby crippling the family day care sector in WA over time, despite the proposed transition period. FDCA is aware that family day care is sometimes the only option for families in regional, rural and remote areas. In some mining towns there is already a 12-18 month waiting list for child care places in family day care.</p> <p>Most significantly, as outlined in our General Comments above, a ban on pools, spas and water hazards would unduly impact on the rights of parents and educators to work and as such engages the Convention on the Elimination of All Forms of Discrimination against Women.</p>
<p>Option 1.3 Allow FDC educators with water hazards to operate.</p>		<p>X</p>	<p>As per our comments above, FDCA does not support options that ban homes with swimming pools and other water hazards from family day care, either now or in the future.</p> <p>We note that, while Option 1.3 would allow current family day care educators (named on a register) to operate from a specified residence with a pool or water hazard and to continue to care for children under 5 years of age, it would <i>not apply</i> to new educators from a specified date as well as "new, temporary or existing educators" who buy a residence with a pool or water hazard from an</p>

			<p>educator named on the register.</p> <p>As for Options 1.2 above and 2.1 below, this option would significantly impact the future viability of the family day care sector in WA as outlined above, for example by:</p> <ul style="list-style-type: none"> - causing difficulty (on top of dealing with the natural attrition rate) in recruiting new or relief educators, as there is a high prevalence of premises in WA with pools or other water hazards, and therefore the cohort of potential new educators would shrink considerably. This would in turn lead to a likely reduction in supply of family day care which would impact on existing and future families in finding comparable education and care. This is likely to be a greater issue in regional and remote areas of WA. - creating adverse labour market impacts by limiting the career choices of ECEC students and recent entrants to the ECEC sector and restricting movement across the sector as well as movement from other states.
Option 1.4 Discretionary power of regulator	X** (Note: support is predicated on this option being applicable to both current and future educators as per our comments).	<input type="checkbox"/>	<p>**While we do not support Options 1.1, 1.2 and 1.3, FDCA recognises that legislated regulatory changes will be a likely component of the policy options to address the Coroner's recommendations. In appreciation of this fact and also the consultative approach taken to date by the WA Department of Communities, FDCA offers <i>qualified</i> support for Option 1.4, as long as it applies to <i>both</i> existing and new educators alike. If implemented in this way, this option could also address Recommendation 2, as noted below.</p> <p>We would also expect that the following would accompany such an approach:</p> <ul style="list-style-type: none"> - close consultation with the family day care sector in WA, FDCWA and FDCA , including on the draft additional amendments to legislation; - some additional safety controls as are outlined in Options 3.2 and 3.5 below as well as development of best practice guidance materials and targeted education and training of relevant staff and educators to complement the increase in the regulator's powers. For example, existing and future educators operating from a residence with a pool or other water hazard could be required to complete mandatory CPR training, or be required to undertake a refresher approval process. - a review of the additional discretionary

			<p>powers and additional safety controls and education initiatives a year after enshrining in legislation to ensure there are no unintended outcomes of the change on the viability of family day care sector.</p> <p>To ensure satisfactory implementation, this option will require significant lead in time to allow for regulatory guidance material to be developed, communication and awareness-raising strategies to be developed and implemented to support the family day care sector. Such an approach would also necessitate the training of relevant staff at the Department and the ECRU.</p> <p>As per our General Comments above, FDCA remains very keen to work with our WA members, FDCWA and the relevant authorities in WA to formalise and promote risk management and safety controls in the development of best practice guidelines which can be used by the Department of Communities and services in training staff and educators. We are also able to assist in promotion and awareness raising of same through our member communications.</p>
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2. Feedback on Recommendation 2

Recommendation 2:

Amend the relevant legislation in WA to **exclude new FDC educators** from being approved to operate a FDC from a home with a swimming pool, outdoor spa or jacuzzi.

Option	Support	Don't Support	Comments
Option 1 Status Quo/No further change	<input type="checkbox"/>	X	See our comments for 1.1 above.
Option 2.1 Ban new FDC educators at homes with water hazard/s, except people in the application process	<input type="checkbox"/>	X	<p>As for Option 1.2, and 1.3 above, Option 2.1 would impact the future viability of the family day care sector in WA , for example by:</p> <ul style="list-style-type: none"> - causing difficulty in recruiting new educators and relief educators (on top of dealing with the natural attrition rate), leading to a likely reduction in supply of family day care which would impact on existing and future families in finding comparable education and care. This is likely to be a greater issue in non-metro areas of WA. - Creating adverse labour market impacts by limiting the career choices of new entrants to the ECEC sector and restricting movement across the sector and state and from other states. According to recent research undertaken by FDCA, new and future family day care educators increasingly include a significant proportion of ECEC professionals coming from other child care settings. <p>Again, as outlined in our General Comments above, a ban on pools, spas and water hazards would unduly impact on the rights of parents and educators to work and, as such, engages the Convention on the Elimination of All Forms of Discrimination against Women.</p>
Option 2.2 Ban new FDC educators at homes with water hazard/s, except educators transferring to another service	<input type="checkbox"/>	X	Although the impact of this option may be potentially slightly less than for option 2.1, FDCA does not support it for the same reasons outlined against Option 2.1 above.

Alternative Option/s – Recommendation 2

FDCA notes that Recommendation 2 is not intended to be a stand-alone measure and operates alongside the other three recommendations. As we have outlined above, we do not support banning family day care educators from operating from residences with a swimming pool or other water hazard, either now or into the future under any circumstances.

Our alternative option to Recommendation 2 is an amended version of Option 1.4 as per our comments above, that is to empower the ECRU to have the discretion to grant approval for an existing family day care educator or a new family day care educator to operate from their residence with a swimming pool or a hazard, and continue to enrol children under 5, in consideration of a range of factors, as outlined on p.32 of the Consultation RIS.

This could be supported by legislated adherence to a best practice framework which services and educators with pools or other water hazards would need to demonstrate compliance with, accompanied by an appropriate sanction if they do not. Spot checks by the regulator and service could also be considered.

We would also expect that such an approach would be accompanied by:

- close consultation with the family day care sector in WA, FDCWA and FDCA , including on the draft additional amendments to legislation;
- development of a water safety best practice guidance framework for family day care services and educators in WA. Such a framework might include additional safety controls similar to those outlined in Options 3.2 and 3.5 below. These might include:
 - o mandatory additional safety controls to be implemented by the educator, for example, additional measures to restrict access to the pool / water hazard area, motion sensor alarms, pool cover etc; and
 - o targeted education and training of relevant staff and educators on pool safety, water safety awareness for toddlers and also compulsory CPR training for educators conducting family day care from a residence with a pool or other water hazards.
- a review of the additional discretionary powers and additional safety controls and education initiatives a year after enshrining in legislation to ensure there are no unintended outcomes of these measures on the viability of family day care sector in WA, especially in non-metro areas.

Although this approach would require additional resources on the part of the ECRU and the service, importantly it would limit the impact on the viability on the family day care sector, while at the same time strengthening child safety and risk management.

3. Feedback on Recommendation 3

Recommendation 3:

Amend the relevant legislation in WA to require that where an existing FDC educator operates a FDC service from a home with a swimming pool, outdoor spa or jacuzzi (which will only be for children over the age of five years) the approved provider must **physically inspect the property monthly** to ensure that the safety barrier to the water hazard is functioning effectively and there are no climbable hazards in proximity to the fencing. The need for direct supervision in proximity to the water hazard must also be reiterated to the educator during each inspection.

Option	Support	Don't Support	Comments
Option 3.1 Status Quo/No further change	<input type="checkbox"/>	X	As per our comments above, FDCA agrees that the status quo is not an option. This will not be acceptable to the community and is not an appropriate response given the seriousness of the incident.
Option 3.2 Monthly inspections by the approved provider	X** (This support is predicated on support for our qualified version of Option 1.4 and our alternative option to Recommendation 2 above).	<input type="checkbox"/>	<p>** FDCA notes that the CRIS states that Recommendation 3 is not intended to be a stand-alone measure and is designed to operate alongside the other Recommendations.</p> <p>As we have outlined above, we do not support measures banning family day care educators caring for children under 5 from operating from residences with a swimming pool or water hazard which would affect current or future educators.</p> <p>However, FDCA offers in principle agreement for Option 3.2, predicated on support of our qualified version of Option 1.4 and our alternative option to Recommendation 2 above.</p> <p>We would also recommend that Option 3.2 be delivered in combination with Option 3.5. However, we do highlight there may be issues with monthly inspections in regional and remote areas where educators are located across wide geographical areas. Consideration needs to be given to this and consultation with services in these areas is essential to explore feasible options.</p> <p>For both these options to be effective however, they must be accompanied by regulatory guidance material and targeted education and training of educators and</p>

			service staff and implemented with a transition period attached. As we have indicated in various places above, FDCA is well placed to assist in the development of best practice guidelines on operating a family day care from a premises where there is a pool or other water hazard.
Option 3.3 Suitably qualified third-party organisation conduct monthly inspections of educator's pools	<input type="checkbox"/>	X	<p>Monthly inspections should be conducted by the family day care service to which the educator is attached. This is in line with services' obligations under National Law to ensure educators remain compliant. Furthermore, outsourcing this function is not feasible in practice as it is likely to be very expensive and costs would be passed onto the service and ultimately families, impacting negatively on the sector's viability over time.</p> <p>Nevertheless, FDCA concedes that in some instances a suitably qualified third party provider may be the only solution, for example in some regional or remote areas.</p>
Option 3.4 Appropriate, qualified organisation provides training	<input type="checkbox"/>	X	As for Option 3.3, training and support of educators is the responsibility of family day care services to ensure educators remain compliant. However services do access relevant expertise if required.
Option 3.5 Additional safety improvements	X	<input type="checkbox"/>	<p>FDCA supports additional safety measures, enshrined in legislation, as long as they are reasonable in their requirements and accompanied by targeted education and training measures as noted above. A minimum set of safety measures needs to be agreed and there should be a requirement to link these to a service's risk assessment, working closely with the regulator and informed by best practice guidelines. There also needs to be consideration of locality. For example double gating a pool in regional / remote areas of the state are not likely to be feasible or affordable.</p> <p>In FDCA's previous submission we noted that the following additional measures are already being undertaken by a significant proportion of educators and/or services in WA and including the below. Perhaps these could be used as a guide to developing the minimum additional safety measures:</p>

			<ul style="list-style-type: none"> • Monthly visits or spot checks by the service to ensure pool access is restricted and controls are in place; • Double fencing and double gating pool area; • Higher fencing than required e.g. 1.8 metres; • Motion sensor alarms on the self-latching, self-closing gate and within pool area; • Security surveillance cameras on the outside play and pool areas; and/or • Childproof pool covers on pools. <p>Financial support to WA educators should be considered to offset the additional costs that a number of these measures would result in.</p> <p>The WA Department of Communities should also explore whether some of these safety measures (such as motion sensor alarms or higher fencing for example) should also apply to residents in the wider WA community who have pool or water hazards, given the high number of drowning incidents in WA.</p>
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4. Feedback on Recommendation 4

Recommendation 4:

Require all FDC educators to have a **fixed landline** installed at their premises so that it is available to contact emergency services in the case of an emergency.

Option	Support	Don't Support	Comments
Option 4.1 Status Quo/No further change	<input type="checkbox"/>	X	See our comments above. FDCA agrees that the status quo is not an option. This will not be acceptable to the community and is not an appropriate response given the seriousness of the incident.
Option 4.2 require all family day care educators to have a fixed landline installed at their premises	<input type="checkbox"/>	X	The CRIS notes that in some parts of WA access to a landline is not even a possibility. Therefore we do not support this option.
Option 4.3 require all FDC educators to have at least one telephone or similar means of communication that is kept in a fixed location as a back-up in case of emergency.	X	<input type="checkbox"/>	<p>We note that this option applies to all family day care educators, regardless of whether the premises has a pool or water hazard or not.</p> <p>FDCA concedes that some form of backup communication could mitigate the risk of not getting emergency assistance as soon as possible, in the rare instances where the educator's mobile is not able to be accessed or is not functioning.</p> <p>FDCA offers in principle support for option 4.3 over 4.2 as it would likely be more feasible and more easily implemented, given land lines in some parts of WA are not possible.</p> <p>However, financial support to educators should be considered to offset additional costs for those who reside in areas without access to landline telephone networks.</p>