

Independent Review of Swimming Pool Regulation

Final report – November 2015

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Glossary

Acronym	Full Title
AAC	Association of Accredited Certifiers
ACCC	Australian Competition and Consumer Commission
AIBS	Australian Institute of Building Surveyors
AS	Australian Standard
ASo	Alternative Solution (an approach under the Building Codes of Australia which does not follow the technical standard but achieves the performance requirement)
ASQA	Australian Skills Quality Authority
AQF	Australian Quality Framework
ABCB	Australian Building Code Board
BCA	Building Codes Australia
BPB	Building Professionals Board
CAAG	Cross Agency Advisory Group
CHW	The Children's Hospital Westmead
CPD	Continuing Professional Development
CPR	Cardiopulmonary resuscitation
CTCPER	The Centre for Trauma Care, Prevention, Education and Research
FACS	NSW Department of Family and Community Services
NCZ	Non-climbing zone
NSWCDRT	NSW Child Death Review Team
OCG	NSW Office of the Children's Guardian
OLG	Office of Local Government
PSA	Professional Services Association
PSC	Pool Safety Council
QBCC	Queensland Building and Construction Commission

Acronym	Full Title
QDC	Queensland Development Code
RLSS(A)	Royal Life Saving Society (Australia)
RTO	Registered Training Authority
SEPP	State Environmental Planning Policies
SPASA	Swimming Pools and Spa Association of NSW and ACT
WSAC	Water Safety Advisory Council

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Foreword

I commenced this review after spending a significant amount of time on the review of the Building Professionals Act. Despite the title, the Building Professionals Act required a comprehensive review of building regulation and certification in NSW as well as comparisons with other Australian jurisdictions and select overseas jurisdictions. In undertaking this review of swimming pool regulation in NSW, I have become familiar with the Swimming Pools Act 1992, related regulation and the newly created E1 pool certifier category.

When the Minister for Local Government, the Hon. Paul Toole MP invited me to undertake the independent review of Swimming Pool regulation in NSW it was a logical extension of my work reviewing building regulation and certification. A personal building project I undertook simultaneously involved the construction of an in ground swimming pool on a property near the Shoalhaven River and provided a practical case study to assist me with the review.

It has to be acknowledged that swimming pool regulation is complex and invokes strong responses from people involved in the sector. I would like to acknowledge a number of dedicated people who have assisted me in this review:

The Office of Local Government

- » Bobbi Brodie, Principal Policy Officer, Innovation and Development Group
- » Grant Astill
- » Keith Baxter
- » Helen Gustus

Building Professionals Board

- » Gabrielle Wallace
- » Jonathan Lynch
- » Melissa Savage

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In addition I would like to thank two people who are both passionate about swimming pool regulation and pool safety, and who have opposing views that enriched my research:

- » Bruce Begnell, Sutherland Council
- » Spiros Dassakis, of the Swimming Pool and Spa Association of NSW and the ACT.

Executive Summary

1.1 Purpose of review

The Swimming Pools Act 1992 underwent significant amendments in 2012. The NSW Government has commissioned a further review for two primary purposes:

- » To assess whether the regulatory framework for swimming pools can be simplified and improved to reduce child drownings and near drownings.
- » To assess whether the regulatory arrangements are adequate for the commencement of the sale and lease provisions or if further changes should be made in advance of the commencement date.

1.2 Approach taken in review

The review has followed a four stage process:

1.2.1 Stage 1: Review

This stage involved reviewing the relevant legislation and regulation, the various standards for swimming pools, past reviews of swimming pools regulation, documentation relating to the regulation process and a range of reports and papers relating to swimming pool safety. All material used in this review is listed in Appendix B.

A survey was undertaken of swimming pool regulation in all Australian jurisdictions to act as a benchmark for assessing the NSW approach and to identify useful approaches to swimming pool regulation. This survey is summarised in Chapter 7 and more detailed information is provided in Appendix C.

1.2.2 Stage 2: Obtaining stakeholder and community input

A number of meetings were held with key stakeholders during stage 2, and these are listed in Appendix D. Input from these meetings and feedback gathered during the review stage formed the basis for a Discussion Paper. The Discussion Paper was released for public response, along with an online questionnaire. The output from this consultation process was captured in detailed notes and considered alongside questionnaire responses and stakeholder submissions. The feedback received from the questionnaires and submissions is summarised in Chapter 8. Appendix F provides the responses to the questionnaire and Appendix G lists the submissions received.

1.2.3 Stage 3: Evaluation

The evaluation was undertaken at both a micro and macro level. The micro level assessment involved an analysis of each issue against the objectives of the swimming pool regulations and the principles of effectiveness, efficiency and equity. The results of the micro level assessment are provided in Chapter 9. The macro level assessment involved assessing the features of the swimming pool regulation system that applies in NSW against the principles of best regulatory practice, with the results set out

in Chapter 10. The work undertaken at this stage led onto the findings and recommendations that are set out in Chapter 11.

1.2.4 Stage 4: Implementation plan

The final stage involved producing an implementation plan that captured the necessary phasing, timing and interrelationships between the various recommendations. The plan is set out in Chapter 12.

1.3 Rationale for private swimming pool regulation

There was no state regulation of swimming pools in NSW until 1990. Prior to this, councils were responsible for swimming pools as part of their broader health and safety role. There were no state-wide standards for pool safety and pool barriers. The reason for the introduction and development of swimming pool regulation both in NSW and in other jurisdictions was the strong growth in the number of private swimming pools combined with an increase in the number of children aged less than five years of age involved in fatal or non-fatal drownings in private swimming pools.

Approximately 70 per cent of drowning deaths of children less than five years of age occur in private swimming pools. The majority of drowning deaths in private swimming pools are of children under five years of age¹. The introduction of swimming pool regulation has seen a decline in the absolute number of fatal and non-fatal drownings and a more significant decline as a proportion of the population of young children. Nevertheless in 2014-15 there were still six drowning deaths of young children in private swimming pools in NSW. Furthermore, for every one young child drowning death, studies have found that there are ten non-fatal drownings of young children. Further, 10 per cent of the non-fatal drownings result in permanent damage and 20 per cent result in some form of permanent brain damage or persistent disability.

The drowning rate² for young children in NSW is higher than either Western Australia or Queensland, the two most comparable states, when the level of private swimming pool ownership is taken into consideration. This comparison indicates that there is room to improve the child safety outcomes in NSW.

It is true that if adult supervision of young children was active and alert at all times then there would not be child drownings. However, pool safety requirements are necessary as the second line of defence if or when adult supervision is not active or where parents are not aware that a child has placed itself in a position of potential danger. As an example, a recent case of drowning that was the subject of a Coronial Inquest found adults had placed children in a house, unaware the children could reach and unlock the backdoor.

1.4 Key features of swimming pool regulation in NSW and other jurisdictions

Under the Swimming Pools Act 1992 pool owners are responsible for registering their pool and ensuring that the pool barrier requirements are met and maintained. In NSW the pool barrier standard is defined by the Australian Standard for Swimming Pools, AS 1926.

¹ For the purposes of interpreting fatal and non-fatal drowning data, young children refers to children less than five years of age

² The drowning rate is the number of deaths of young children expressed as a proportion per 100,000 young children

NSW maintains a central swimming pool register and in November 2015 there were approximately 325,000 registered pools. However, from information provided by councils who have used GPS technology to assess swimming pools in the area, it would appear that between 10 per cent and 20 per cent of pools are not registered. This does not take into account portable pools which appear to have a low level of registration and compliance. Portable pools that are capable of being filled with 300mm or more of water are required to have fencing but few appear to do so.

There are three Australian swimming pool barrier standards that apply in NSW. The application of which depends on the year the pool was constructed or upgraded. The standards are:

- » AS 1926-1986 applies to pre 1 August 1990 and pools up to and including 31 August 2008
- » AS 1926-2007 applies to pools constructed between 1 September 2008 and 30 April 2013
- » AS 1926-2012 is the current standard and applies from 1 May 2013 onwards.

Complicating the regulatory framework further, the legislative provisions and the Swimming Pools Regulation have changed over time and these can impact on the form of the standard that applies. Thus it is necessary when assessing a pool for compliance to determine when it was constructed or if it has been subject to major changes. With this information, the relevant standard, legislative or regulatory provision that will impact on the application of the standard can be determined.

There are also a number of statutory exemptions from the pool barrier requirements, these being for swimming pools constructed before 1 August 1990, or those constructed before 1 July 2010 and on small, large or waterfront properties. In addition councils under the Act and the Regulation can assess applications for exemption from the standard on a case by case basis where adherence to the standard is impractical or unreasonable or there is an available alternative solution that is effective. The Regulation explicitly recognises providing exemptions for persons with disabilities where the standard would restrict their access.

Councils perform the compliance and enforcement function which requires them to undertake at least a mandatory inspection program, involving inspections every three years for swimming pools in multi-unit residential buildings and swimming pools on tourist and visitor accommodation. Councils are also responsible for responding to complaints about pools. Councils can extend their program of inspection beyond the mandatory requirements but most do not. Councils are also required to promote awareness of the regulatory requirements and pool safety in their area. From 29 April 2016, all sale and leases of residential properties with swimming pools are planned to require a compliance certificate for the pool.

Broadly speaking, the approach in NSW is similar to other jurisdictions but there are differences, particularly with Queensland and Western Australia which appear to be the most active jurisdictions in pool safety. The most notable areas of difference between NSW and various other jurisdictions are as follows:

- » Only NSW and Queensland have sale and lease compliance certificate requirements
- » Only NSW, Queensland and the Northern Territory have a central swimming pool register
- » All jurisdictions other than Queensland have multiple pool barrier standards. Queensland has developed a state standard based on AS 1926-2007 which will apply to all pools from 30 November 2015.
- » Western Australia is unique in having a pool inspection regime whereby all private swimming pools are inspected every four years, as a minimum
- » Both Queensland and Western Australia have high quality and clear explanatory documents setting out pool safety requirements for pool owners and the community and also have detailed practice guides for pool inspections, which are lacking in NSW.

- » Most other jurisdictions give councils flexibility in setting fees for pool inspections which is not the case in NSW
- » Queensland has a number of arrangements that are worthy of consideration including:
 - > Allowing the transfer from vendor to purchaser of the obligation to obtain a pool compliance certificate for residential sale transactions
 - > Ability of suitable experienced certifiers to undertake minor repairs
 - > Reporting and follow up on children's pool immersion events.

1.5 Issues with current regulatory approach

The main issues with the current NSW regulatory approach are as follows:

- » Complex pool barrier standard requirements vary according to the date of construction of the pools as well as having associated issues such as:
 - > Unresolved issues with the interpretation of the current standard, AS 1926-2012
 - > Lack of documentation about safety requirements for pool owners and the community
 - > Absence of requirements for pool barrier installers to know the pool barrier standard
 - > Lack of a process for certifying that pool barrier material is fit for purpose.
- » Legislative exemptions from pool safety requirements that contribute to child drownings and an ineffective process that allows case by case consideration of exemptions by councils due to the absence of guidelines and a structured approach
- » Significant risks posed by portable pools with a low level of compliance with registration and fencing and lack of clarity about the definition of a spa
- » A state swimming pool register that:
 - > is difficult to operate
 - > does not capture all the necessary information
 - > has very limited reporting capability
 - > cannot be used for communicating with pool owners.
- » Need for greater clarity in role, responsibility, accountability and support for pool certifiers and revised training arrangements, including:
 - > Lack of documentation about the role and responsibilities of pool certifiers and pool inspectors, including what level of documentation is required for pool inspections
 - > No requirement for Continuing Professional Development for pool certifiers
 - > No requirement for council pool inspectors or A1 to A3 building certifiers doing pool certification work to be accredited in pool safety requirements
 - > Violation of the principle of competitive neutrality in fee setting between councils and private certifiers, with private certifiers setting market based fees but councils subject to a regulated fee that is not cost reflective
 - > Restrictive entry requirements for those wishing to be trained and accredited in pool certification, thus limiting the numbers able to offer the service
 - > Limited number of training organisations offering the pool certifier course, limiting access to training and competition

- > Absence of an audit program to assess the performance of certifiers and improve accountability
- > Limited requirements for private certifiers to follow up and seek to resolve non-compliance
- > Lack of support arrangements for pool certifiers including practice guide and help line
- » Uncertainty about whether the property market can accommodate the sale and lease provisions due to start on 29 April 2016 and what changes should be put in place in advance of commencement
- » The lack of an effective pool compliance approach, noting the shortcomings of the mandatory inspection program and upcoming sale and lease provision. Consideration ought to be applied to whether a comprehensive pool inspection approach as applies in Western Australia would be a more effective and efficient approach
- » Lack of adequate documentation provided by both pool certifiers and council pool inspectors about the reasons for non-compliance and identification of options to address the non-compliance.
- » Lack of an affordable and timely appeals mechanism for pool owners wishing to contest a pool non-compliance assessment. Currently, the only avenue of appeal is to the Land and Environment Court
- » Insufficient analysis of current information about child drownings, fatal and non-fatal. This includes the need for comprehensive coverage of non-fatal drownings and follow up by councils, as well as annual reporting on pool safety performance by the swimming pool regulator
- » Governance arrangements for swimming pool regulation does not align with building regulation in all jurisdictions, necessitating a legislative and regulation rewrite and for stakeholders to become more involved in development of regulations and pool safety
- » Lack of adequate funding available to councils to undertake their compliance, enforcement and education roles.

1.6 The way forward

Chapter 11 sets out in the findings and recommendations of this review. These can be summarised under ten groups of recommendations:

1. **Pool barrier standard:** clarify the current pool barrier standard and create clear documentation for pool owners. In time, move to a single standard or a simplified approach to standards
2. **Exemptions:** remove the legislative exemptions from the pool barrier requirements and at the same time give greater guidance and support to councils in assessing applications on a case by case basis
3. **Portable pools and spas:** ensure compliance of portable pools and spas through pre-registration at the point of sale, amend SEPP (Exempt and Complying Developments) to require certification and registration of portable pools and clarify the definition of spa pools
4. **Swimming pool register:** revamp the swimming pool register to capture all relevant information, provide useful reporting and act as a communications hub with pool owners
5. **Role, function, training and accountability of certifiers:** clarify and document the role and functions of pool certifiers and council pool inspectors. Enhance the training function and approach for pool certification by seeking for it to be recognised by ASQA and establish an audit program to enhance accountability
6. **Pool compliance certification:** proceed with an amended sale and lease provision on 29 April 2016. Amendments should include allowing transfer of the compliance certification

requirement under certain circumstances from vendor to purchaser, as well as a public awareness campaign. It is also proposed to assess on a cost benefit basis a four yearly inspection program of all private swimming pools based on the approach used in WA

7. **Compliance and enforcement:** require certifiers and councils to provide full details of non-compliance and how it can be addressed and make clear the responsibility of certifiers to seek to achieve compliance. Use councils as a last resort, enhance the penalties and establish a simple, timely and affordable appeals mechanism for pool owners
8. **Information, research and education:** expand reporting of non-fatal child drownings, with council follow up and require annual reporting by the swimming pool regulator. Operate at both the state and local level awareness and education programs regarding pool safety
9. **Improved governance:** transfer responsibility of swimming pool regulation and the *Swimming Pools Act 1992* (the Act) to the minister and agency responsible for building regulation and rewrite the Act and regulation to address a range of deficiencies. Establish a Pool Safety Council to advise the Government on pool safety with membership including all key external stakeholders as well as relevant government agencies
10. **Resourcing the function:** provide suitable flexibility for councils to undertake their role in swimming pool regulation and education by allowing councils to charge cost recovery fees for pool inspections and the ability to levy rate payers with pools. The NSW Government should explore the use of an annual charge on the swimming pool register to assist in funding its swimming pool regulation costs.

2 Part A: Introduction and approach

Part A sets out the purpose of the review which can be cross referenced with Appendix A as well as explaining the methodology that has been utilised in identifying and assessing the relevant issues.

2.1 Introduction and purpose of review

The *Swimming Pools Act 1992* has been reviewed and amended twice in the last few years, in 2009 and 2012. The driver for the changes to the Act and associated regulations has been to create safe pools for children, particularly those under five years of age who are very vulnerable if there is access to swimming pools without close supervision.

The 2012 amendments included, amongst other changes, a requirement for a swimming pool compliance certificate to accompany any sale or lease of a residential property with a pool. Originally this requirement was to commence on 29 April 2014 and has been deferred twice, once to 29 April 2015 and then to 29 April 2016.

The NSW Government has commissioned this review:

- » to assess whether the regulatory framework for swimming pools can be further simplified and improved to meet the fundamental objective of reducing child drownings and near drownings
- » to assess whether the regulatory arrangements are adequate for the commencement as planned of the sale and lease provisions or if further changes should be made in advance of the commencement date.

On 11 November 2015 there were 324,708 registered swimming pools in NSW. There is evidence that unregistered pools could account for a further 10 to 20 per cent. This excludes portable pools which are estimated by Swimming Pool and Spa Association of NSW and ACT to involve sales of 40,000 units per annum in NSW. In theory portable pools that meet the definition of a swimming pool are required to be registered but it is likely that a significant proportion of them are not.

Based on the pool numbers cited above at least one in ten dwellings have either a swimming pool or access to one³. What this means is that there is a relatively high presence of private swimming pools in the community and their presence poses safety issues that go beyond the owner of the pool and include neighbours and visitors.

From a review of the second reading speeches for the *Swimming Pools Act 1990*, the *Swimming Pools Act 1992* and the 2012 amendments it is very clear that the focus of the Act and the key objective is to protect young children from drowning in swimming pools.

The 1990 second reading speech stated that:

³ Based on the 2007 ABS Census it would appear that 12% of households in NSW have access to a private swimming pool

"The provisions of the Bill will provide greater protection for the most vulnerable and deserving members of our community-children under the age of five."⁴

This very same objective was reiterated in both the 1992 second reading speech and the 2012 second reading speech. The 2012 speech also introduced a concern about addressing non-compliance:

"The amendments are designed to address widespread concern about the high rate of non-compliance of swimming pool barriers with the Act's requirements."⁵

The Minister, in summing up, states that, "The proposals aim to ensure that:

- » Pool owners take responsibility for pool safety
- » Council has the right tools to make sure pool barriers are compliant
- » The Government provides the best possible legislative and policy framework to reduce drownings in backyard swimming pools"⁶

In summary, the NSW Government objectives for the legislation are to protect young children from the risk of drowning and to place proper accountability for pool safety on the pool owner.

2.2 Methodology for the review

The approach followed in this review involved a four stage process:

1. Review
2. Obtaining stakeholder and community input
3. Evaluation
4. Implementation

2.2.1 Review

The first stage involved collecting and assessing relevant information including:

- » Review the *Swimming Pools Act 1992* and associated second reading speech, together with the Regulation 2008 and review of the history of legislative and regulatory amendments
- » Investigating the previous reviews of the *Swimming Pools Act 1992* to identify and assess relevant issues
- » Review all relevant documentation relating to NSW swimming pools regulation, including the Swimming Pool Register, the draft practice guide for certifiers and council officers, the course criteria for the E1 swimming pool certifier training course and the Australian Standards for Swimming Pools which are AS 1926-1986, AS 1926-2007 and AS 1926-2012.

⁴ As quoted in NSW Parliament, Second Reading Speech of the Minister for Local Government in introducing the Swimming Pools Bill, 1992

⁵ NSW Parliament, Second Reading Speech of the Minister for Local Government in introducing the Swimming Pools Bill, 1992

⁶ NSW Parliament, Second Reading Speech of the Minister for Finance and Services in introducing the Swimming Pools Amendment Bill, 2012

- » Identify and review all relevant reports and studies relating to swimming pool safety including the Australian Water Safety Council Water Safety Strategy, the review of drowning and near drowning undertaken by the Centre for Trauma Care, Prevention, Education and Research and Kids Health, various other publications by Kids Health, reports from the NSW Child Death Review Team, various State Coroner's reports on child drownings and various publications from the Royal Life Saving Society. The documents considered as part of this review are listed in Appendix B
- » Survey of the practice in each Australian jurisdiction with respect to swimming pool barrier safety regulation. The survey information is presented in both Chapter 7 and Appendix C.

As part of information gathering the reviewer participated in an E1 training course conducted by CPD Training. This not only provided exposure to the content of the course and its delivery but also was very useful in assimilating information on the relevant swimming pool barrier standards.

2.2.2 Obtaining stakeholder and community input

In the second stage information was sought from key government and external stakeholders on the operation of the regulatory system, areas where improvements should occur and views on possible reforms that could address any perceived deficiencies. The steps involved in this process were:

- » Following the review of available information and reports, meetings were arranged with key external and internal stakeholders to identify and discuss the key issues. A list of these meetings is provided in Appendix D
- » Flowing from these discussions and further research a discussion paper was released for public comments between 24 September 2015 and 23 October 2015. The paper provided relevant background on the rationale for regulation in this area, an overview on fatal and non-fatal drowning trends for young children and an explanation about the approach to regulation in NSW. The paper set out the identified key issues and possible reforms to address these issues. The discussion paper was accompanied by a questionnaire that sought feedback on the identified reform options
- » The discussion paper and public hearings resulted in 126 questionnaires with numerous supporting documents being provided, plus an additional 26 submissions. The results are summarised in Chapter 8 while the tabulations of the responses from the questionnaire are provided in Appendix E and Appendix F lists the organisations that provided submissions

The key issues that had been identified in stage 1 were divided into the following categories:

- > Pool safety standards
- > Exemptions from pool barrier standards
- > The swimming pool register
- > The role, function, training, accreditation, accountability and fees for certification
- > Certification requirements
- > Compliance and enforcement
- > The role of supervision, education and training in pool safety
- > Clarity of the *Swimming Pools Act 1992* and Regulation and administrative responsibility for the Act
- > Resourcing the swimming pool safety function.

2.2.3 Evaluation

In the third stage of the review, after considering all the input, the identified issues were assessed against the following considerations:

- » The objectives of the *Swimming Pools Act 1992* as set out in the second reading speech
- » The practices followed in other jurisdictions assessed in terms of efficiency, effectiveness and appropriateness
- » The broad characteristics of best practice regulatory approach and the extent to which current practice may diverge from best practice. The principles of best practice regulatory approach are set out in Chapter 4.

Where available and relevant, cost benefit studies were also referred to.

From this evaluation process a series of findings and recommendations were made which are set out in Chapter 10.

2.2.4 Implementation

Finally, a process for staging the reforms was developed, noting that it is not possible or indeed desirable to implement the reforms all at once but instead in stages. The proposed implementation plan is set out in Chapter 12, identifying short term priorities medium and longer term actions.

3 Part B: Background

In Part B relevant information is presented to inform the reader about the rationale for regulation of private swimming pool safety, the history of swimming pool regulation in NSW, the current approach to swimming pool safety regulation in NSW and provides a comparison between the approach in NSW and other Australian jurisdictions.

In addition an outline is provided on the principles of good regulatory practice as a tool for assessing the current approach in NSW.

3.1 Why regulate private swimming pools?

3.1.1 Rationale for government regulation

Baby boomers may recall that, in the past, home swimming pools were less common and pool fencing even less so. This raises a question about why governments now impose safety regulation on private pools and is this regulation a manifestation of the “nanny state?”

The answer is simple and compelling. Both the number of private swimming pools has increased dramatically over time and there is clear evidence of the dangers posed by swimming pools, particularly to young children. Backyard swimming pools are the most common location for drowning deaths and injury of children less than five years. Approximately 70 per cent of drowning deaths of children less than five years of age occur in a backyard swimming pool and the majority of drowning deaths in private swimming pools involve children less than five years of age. While the number of child drownings in NSW in backyard swimming pools has declined both in absolute numbers and as a rate per 1000 of swimming pools (reflecting the substantial increase in the number of private swimming pools) and as a rate per 100,000 of the population of young children with the introduction of legislated pool safety requirements, the toll in terms of death and injury is still substantial and avoidable. Both Table 3.1 and Figure 3.1 overleaf provide an historic perspective on drownings and near drownings.

In the period 1999-2000 to 2008-09 – before the introduction of the requirement for compulsory four sided fencing of residential swimming pools – average child drowning deaths in pools and near drownings were 5.5 and 49.5 respectively. In the period from 2009-2010 to 2014-15 the annual drownings and near drownings were 5.0 and 29.4 respectively (the near drownings were only for the period to 2013-14). There has been only a modest decline in the average (9 per cent) annual drownings but a more significant drop of 40.6 per cent in non-fatal drownings. This would appear to indicate that the strengthened pool safety requirements have had a positive impact but that drownings and near drownings still pose a significant safety challenge.

What needs to be stressed is the level of near drownings and the personal and societal cost involved. In the five year period to 2013-14 near drownings occurred at a rate of 6 to 1 compared to drownings. However a more recent study indicates that the ratio could be as high as 10 to 1⁷. Many of the near drownings involve severe long term injury which imposes emotional and financial costs on

⁷ The Centre for Trauma Care, Prevention, Education and Research and Kids Health, The NSW study of drowning and near drowning (0-16), The Children’s Hospital at Westmead, 2015

families and society. Studies indicate that 10 per cent of non-fatal drownings result in permanent brain damage⁸. Other studies of near drownings across Australia found that 20.3 per cent of near drownings resulted in some form of permanent brain damage or persistent disability⁹.

⁸ Ross, F et al, Children Under 5 Years Presenting to Paediatricians with Near Drowning, Journal of Paediatricians and Child Health, 2003, pp 446-450; W R Pitt and K P Balandra, Childhood Drowning and Near Drowning in Brisbane: The Contribution of Domestic Swimming Pools, Medical Journal of Australia, 1991, pp 661-663

⁹ R Kreisfield and G Henley, Deaths and hospitalisations due to drownings, Australia 1999/2000 to 2003/2004, Australian Institute of Health and Welfare, 2008

Table 1 Drowning and near drowning among children less than 5 years of age in NSW 1987-2014 (Kids Health, CHW)

Fin Year	Year	Death	Deaths in Pools	Nr Drown	Nr Drown in Pools	% of Drown in pools	% of Near Drown in pools
1986-87	1987	25					
1987-88	1988	25					
1988-89	1989	25					
1989-90	1990	23					
1990-91	1991	14					
1991-92	1992	22					
1992-93	1993	11					
1993-94	1994	15					
1994-95	1995	15					
1995-96	1996	7					
1996-97	1997	17	10			58.82%	
1997-98	1998	18	4			22.22%	
1998-99	1999	16	7			43.75%	
1999-00	2000	14	5		33	35.71%	
2000-01	2001	7	2		56	28.57%	
2001-02	2002	13	5		58	38.46%	
2002-03	2003	9	4		54	44.44%	

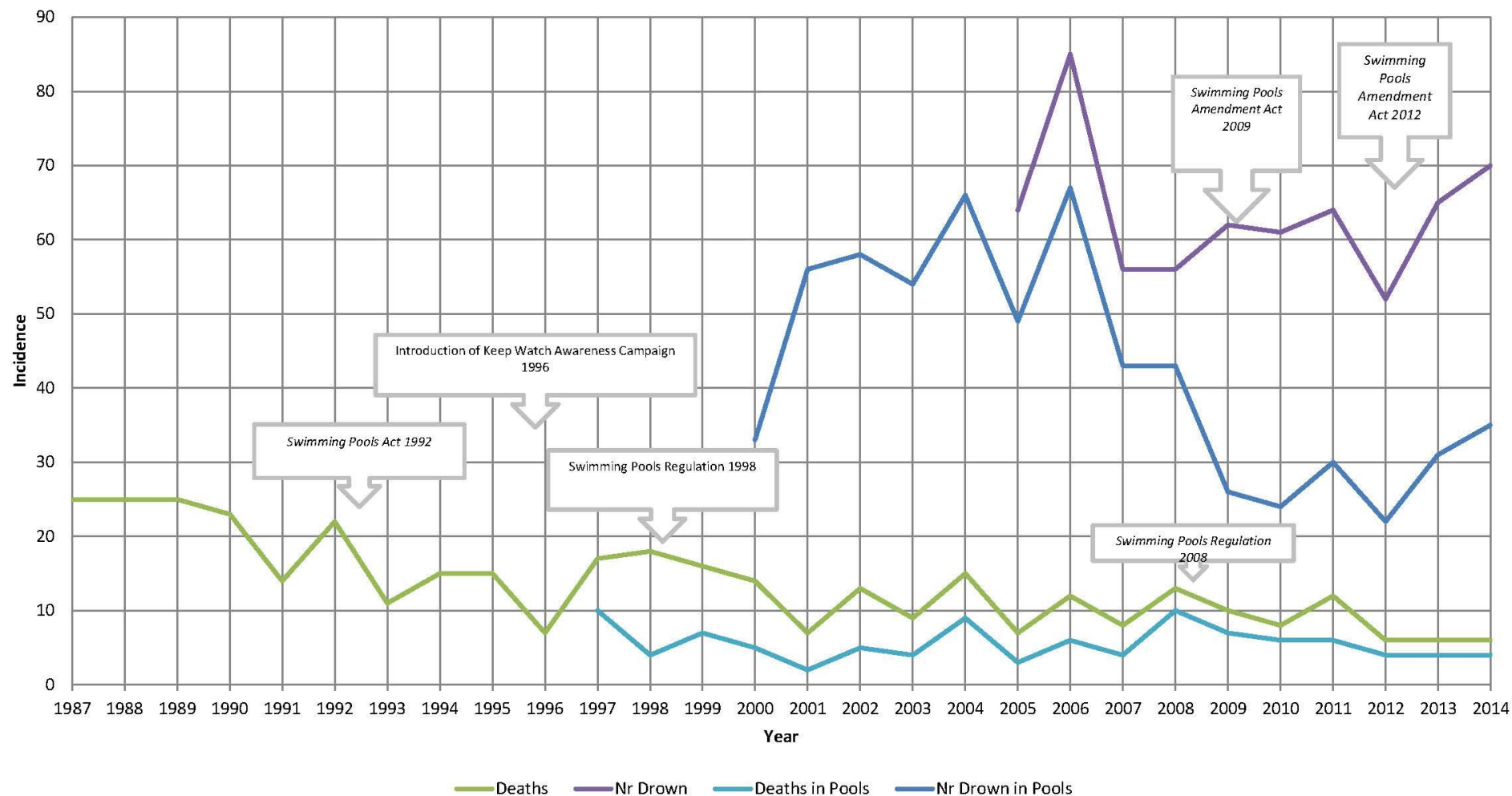
Fin Year	Year	Death	Deaths in Pools	Nr Drown	Nr Drown in Pools	% of Drown in pools	% of Near Drown in pools
2003-04	2004	15	9		66	60.00%	
2004-05	2005	7	3	64	49	42.86%	76.56%
2005-06	2006	12	6	85	67	50.00%	78.82%
2006-07	2007	8	4	56	43	50.00%	76.79%
2007-08	2008	13	10	56	43	76.92%	76.79%
2008-09	2009	10	7	62	26	70.00%	41.94%
2009-10	2010	8	6	61	24	75.00%	39.34%
2010-11	2011	12	6	64	30	50.00%	46.88%
2011-12	2012	6	4	52	22	66.67%	42.31%
2012-13	2013	6	4	65	31	66.67%	47.69%
2013-14	2014	8	6	70	35	66.67%	50.00%
2014-15	2015						

Deaths = Chief Health Officer's Report, Royal Life Saving Society NSW Drowning Reports

Nr Drown = Ministry of Health hospitalisation data

Note: Drowning death statistics in swimming pools are not available prior to 1997 and near drowning hospitalisation statistics are not available prior to 2000

Drowning and near drowning among children 0-4yrs in swimming pools in NSW



The primary and best protection against drowning and near drowning of young children is responsible and active adult supervision, with the pool barrier acting as a secondary protection. It is true that all cases of child drowning and near drowning involve some level of failure of supervision which can range from no supervision to a momentary parental distraction. However, this is not an argument against pool safety protection such as pool fencing. Nearly all cases of child drowning are also associated with defects in pool safety. Pool safety barriers act as a second line of defence when supervision is not fully effective. Common factors leading to pools being non-compliant with pool safety requirements include:

- » Gates that do not latch or self-close
- » Climbable objects within close proximity to the pool barrier
- » Excess space under the fence
- » Faults with the location or shielding of the gate latch
- » Inadequate CPR signage
- » Pool fences less than 1.2m high or the latch being less than 1.5m high
- » Incorrect vertical or horizontal spacing of fence that provides sufficient room for a child's entry

The Report on the 2009 Review of the *Swimming Pools Act 1992* addressed the issue of establishing a case for government intervention in pool safety, utilising three criteria:

1. Effectiveness
2. Efficiency
3. Equity

Identifying a problem and a possible solution is not sufficient to justify government action. The proposed government action must be shown to be effective and that the proposed solution will have a material impact on the problem and is superior to alternative solutions. The review examined a range of studies that compared the effectiveness of four sided and three sided pool barriers. All studies found that there was a significantly higher risk of drownings and near drownings with three sided barriers relative to four sided barriers. The overall assessment was that three sided pool barriers had a risk factor 2.88 times higher than four sided pool barriers. This finding may correlate with another factor such as the conscientiousness of the property owner with respect to pool safety. A highly conscientious owner could both select the highest standard pool barriers and undertake the most effective supervision. However, as noted earlier, it only takes a moment's distraction for pool immersion of a child to occur and an effective pool barrier acts as an important secondary protection mechanism.

Efficiency refers to whether the benefits of the proposed solution exceed the costs involved. In a case such as pool safety this involves what many consider the distasteful practice of ascribing a value to human life and to long term injury. The 2009 review of the *Swimming Pools Act 1992* included a cost benefit study assessing the benefits and costs of three versus four sided pool fencing and reached the conclusion that the results did not support substantial additional resources being applied to swimming pool safety. However, it is noted that the study applied a conservative value of life at \$2.5million and used the ratio of near drownings to fatal drownings of 6:1 which is less than what is indicated by the latest data. A more recent cost benefit study undertaken by the Samuel Morris Foundation and Kids Health assesses the costs and benefits of periodic inspections of all pools over a four year cycle found a strong economic case for further investment in swimming pool safety. This matter is addressed further in chapter 9.

The third criterion used is equity which is concerned not with whether the regulatory action should proceed but what is the most equitable distribution of the costs involved. The choice in this case is between the pool owners and the more general community which can be those living in the immediate community, local ratepayers, or the broader community – the taxpayers. Given that the

installation of a pool creates the risk, there is a strong case for the pool owner to be held responsible for the costs of the safety measures specific to the pool. It could be argued that for pool owners with no children it is inequitable that they have to bear the cost of safety provisions. However, there is the possibility that there could be visitors with children but more generally there is the risk regarding children of neighbours and children in the neighbourhood more generally.

Beyond the costs of safety provision attached to the pool is the cost of safety awareness and education campaigns which need to be funded by the community.

3.2 Australian Water Safety Strategy 2016-2020¹⁰

The Australian Water Safety strategy seeks to address all drownings, for all ages, in all circumstances, not just young children in private swimming pools. The strategy has a broad objective of reducing the drowning rate (expressed as a rate per head of population) by half by 2020 compared to 2008. In regard to drownings and near drownings of children less than five it notes that these predominantly occur in private swimming pools. It lists the following strategies to reduce drownings and near drownings for children under five years:

- » Strengthening child drowning prevention programs that increase awareness of the critical role of adult supervision, the importance of pool fencing and the promotion of water and CPR familiarisation
- » Ensuring compliance and enforcement of four sided pool fencing
- » Promoting community wide rescue and CPR skills
- » Focusing attention on the full burden of child drowning, including non-fatal drowning.

The Royal Life Saving Society produces an annual report on drownings for Australia¹¹. In total across all age groups for Australia there were 271 fatal drownings in 2014-2015, of which 100 or 37 per cent occurred in NSW. There were 26 drowning deaths nationally of children aged less than five years of which 14 were in swimming pools and NSW accounted for six of these deaths or 50 per cent.

3.3 Profile of pool drownings of young children

Nationally, there has been a modest decline in the rate of drownings, expressed as a rate per 100,000 population, declining as a rate per 100,000 of the population from 0.5 in 1999/2000 to 0.4 in 2013.

Drowning data for young children has been provided by the Royal Life Saving Society Australia from the Royal Life Saving National Fatal Drowning Database. The data has been presented both in terms of actual number of young children drowning in private swimming pools over that period as well as a drowning rate expressing the number of drownings as the number of the drownings per 100,000 of children aged under five years over that same period. The drowning rate enables a comparison on a like basis across jurisdictions. The data is provided below in Table 3.2

¹⁰ Australian Water Safety Council, Australian Water Safety Strategy 2016-2020

¹¹ Royal Life Saving Society Australia, National Drowning Report, 2015

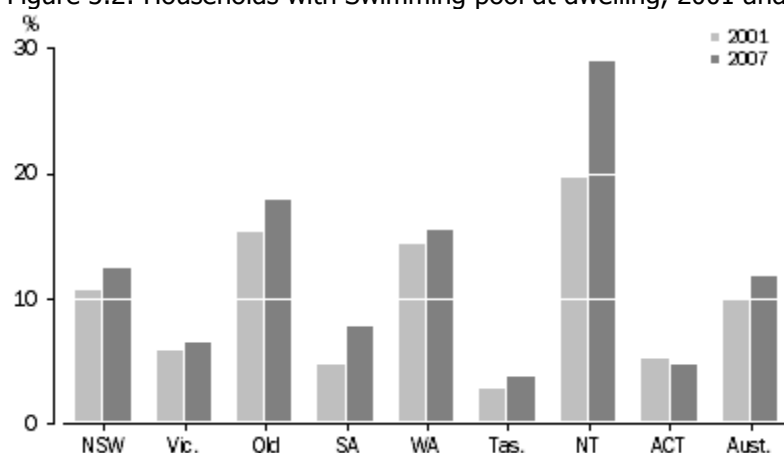
Table 2 3.2: Young children drowning rates per 100,000 for the period 2005-06 to 2014-15

Jurisdiction	Number of young child drownings 2005-06 to 2014-15	Drowning rate per 100,000 population for period 2005-06 to 2014-15
NSW	63	1.36
Victoria	13	0.38
Queensland	45	1.53
Western Australia	17	1.14
South Australia	9	0.94
Tasmania	2	0.64
ACT	0	0.0
Northern Territory	4	2.17

Source: RLSSA from the RLS National Fatal Drowning Database

What is noticeable about the drowning rates is the substantial variation between jurisdictions. The zero drowning rate in the ACT reflects the small numbers of population involved. The second noticeable feature is that the drowning rate broadly increases from jurisdictions in the south to the north. The reason for this correlation between longitude and drowning rate reflects the level of demand for swimming pools and the level of swimming pool use. This can be seen from Figure 3.2 below where data on the proportions of households owning swimming pools is presented by jurisdiction.

Figure 3.2: Households with Swimming pool at dwelling, 2001 and 2007



Source: ABS 2001 and 2007 census

It would appear that the variations between jurisdictions in child drowning rates reflects to a significant extent both the availability of swimming pools and the period over which the pools are used. The NT, where over 30 per cent of households have a swimming pool and presumably using those pools for most of the year, has a child drowning rate of 2.17. In contrast, Victoria, where about six per cent of households own pools and probably use them in the summer months, has a drowning rate of 0.38.

NSW is near the national average on both households owning pools and child drowning rates. On this normalised basis both Western Australia and Queensland appear to perform better in minimising child

drownings than NSW. Western Australia has a drowning rate 16 per cent lower than NSW but has a higher proportion of the population owning pools (15 per cent versus 12 per cent). Queensland has a drowning rate 12 per cent higher than NSW but has a far higher frequency of pools (18 per cent of households owning pools in Queensland versus 12 per cent in NSW) and will likely use them for a longer portion of the year.

The NSW Child Death Review Team (NSWCERT), part of the NSW Ombudsman, undertakes an annual review of all children's deaths by cause, with one part covering drowning deaths¹².

Predominantly it is young children, children aged less than five years, who drown in private swimming pools, with six drowning deaths in 2014-15. Each of these drownings involved inadequate barriers, with the weak link in most cases being the gate and latch. All involved the absence or diversion of attention of adult supervision.

The NSWCERT has undertaken an analysis of child drowning deaths over the period 2007 to 2014,¹³ as a report for this review, updating the analysis that they did for the period 2007-2011 for the 2012 Swimming Pools Act review. Over the period 54 children drowned in 53 private swimming pools, with 46 or 87 per cent being children under the age of five. Refer to Table 3.3 for the distribution by type of pool associated with child death.

Table 3 3.3: Type of private pool associated with NSW child death drownings, 2007-14

Type of pool	Number of pools Total (total expressed as a percentage)
In ground	35(67)
Above ground:	7(13)
Portable	
Inflatable/wading	4(8)
Permanent installation	2(4)
Partially in ground	2(4)
Unknown	1
Total	53(100)

Source: NSWCERT September 2015

In ground pools were 67 per cent of the total. Ten of the fifteen above ground pools could be identified as portable pools or 19 per cent of all the pools. Most of the children (70 per cent) died in the home swimming pool. Ten of the pools were private or social housing rental properties.

Interestingly, 15 – or 28 per cent – of the pools were exempt from the general standards (which will be discussed in greater detail in chapter 6), ten because they were built before 1990 and five were on large properties. Of these fifteen pools two were unfenced, one did not have fence defects and the others all had fence defects.

There was a high incidence of pool fence defects, with defective gates and latches being the main problem, including gates that were propped open. In total for 45 (87 per cent) of the pools there was

¹² At the time of writing this paper the latest report was for 2013, NSW Child Death Review Team, Annual Report 2013

¹³ NSW Child Death Review Team, NSW Ombudsman, Drowning deaths of children (private swimming pools), 2007-2014, September 2015

either no barrier or the existing barrier was defective. Thirteen (25 per cent) of the fifty-two pools for which information was available were unfenced, with ten of these being portable pools. The identified swimming pool barrier defects are summarised below in Table 3.4. Of the thirty-two fenced pools summarised in the table below, a gate or faulty gate lock was the most likely point of access to the pool by the child in twenty-one cases or 66 per cent of the deaths.

Table 4 3.4: Identified swimming pool barrier faults for fenced pools

Fault	Number of pools with fault (and number expressed as a percentage of total)
Gate propped open	4(4.8)
Gate not self-latching /latch broken	30(36.1)
Fence in poor state of repair	13(15.7)
Climbable objects within NCZ	13(15.7)
Gaps in gate or fence too great	10(12.0)
Handholds or footholds present	5(6.0)
Where house forms a barrier, window or door not secure	4(4.8)
Fence too low	4(4.8)
Total	83(100.0)

Source: NSWCDRT, September 2015

All drownings were in the absence of active adult supervision. The majority were reported unsupervised for ten minutes or less. In all cases the gate or fence was a contributing factor, though in four of the cases the gate was propped open.

3.4 NSW Child Death Review Annual Reports

As noted earlier in this chapter, the NSW Child Death Review Team (NSWCDRT) produces an annual report reviewing all child deaths in NSW and this report includes a chapter on drowning deaths including drowning deaths in swimming pools. As part of the report it includes recommendations on swimming pool drownings. A summary of the recommendations from the latest report, the 2014 report, together with the NSW Government response are set out below in Table 3.5.

Table 5 3.5: NSW Child Death Review Team 2014 Recommendations on Swimming Pool Drowning

Summary recommendation	Summary NSW Government response	Relation to recommendations in this review
10. OLG to progress analysis of data and other information relating to compliance with the 2012 amendments to the <i>Swimming Pools Act 1992</i> including number of pools registered that are inspected, proportion non-compliant and main defects and actions taken by owners. Also to report on challenges in implementing the amendments and how to address these. Notes the announced review of swimming pool regulation.	Swimming pools register needs enhancements to report the sought information on compliance. OLG will continue to provide updates on the implementation's challenges.	Addressed in regard to proposals to enhance the swimming pool register (see section 9.4)
11. OLG to advise on how it will publicly report on swimming pool compliance activity across NSW.	As per the response on recommendation 10.	
12. FACS, Office of the Children's Guardian (OCG) and OLG to develop arrangements to facilitate identification by FACS, OSG and designated other agencies of premises with swimming pools where children reside and provide this information to OLG/local councils to enable checking of registration and for inspection purposes.	Recommendation supported and will be led by OLG	Included within the proposals for improvement of the swimming pool register, specifically to identify and record risk factors such as children present at pool location.
13. FACS should advise on adequacy of current risk assessment processes and actions to reduce risk of child drownings.	FACS is continuing to strengthen its procedures and will promote pool safety.	Noted in the report as action that is in train and supported by the review
14. OCG to advise on adequacy of risk assessment and other processes of designated agencies for identifying risks to young children and any proposed actions to reduce drowning risks	OCG accredits and monitors agencies in NSW involved in child care and protection and accredits and monitors these agencies against standards for the care environment. Has recently created a single standard that covers statutory out of home care and adoption and will cover the Carers' Register.	Noted in the report as action that is in train and supported by the review

3.5 Study of non-fatal child drownings

The Centre for Trauma Care, Prevention, Education and Research (CTCPR) and Kids Health have undertaken a study of non-fatal drownings of children¹⁴. The personal and community burden is not limited to drowning deaths but also includes non-fatal drownings. The study found that in the period 2013 to 2014 there were 35 non-fatal drownings and four drowning deaths of children under the age of five, which indicates that the ratio of non-fatal drownings to drowning deaths could be of the order of 10 to 1, which is significantly higher than previous information had indicated. It should be noted that while there is systematic recording of child deaths by drowning this is not the case with non-fatal drownings.

CTCPR data indicates that about 20 per cent of non-fatal drownings resulted in some form of long term behavioural and learning impairment and about 10 per cent of cases resulted in a severe neurological deficit.

3.6 NSW State Coroner's Court Report

In April 2010 the NSW Deputy State Coroner produced a report based on a review of eight cases of child drowning¹⁵. The report set out a series of recommendations which this review will be examining. The recommendations and what action has been taken subsequent to the report are summarised in Table 3.6.

Table 6 3.6: 2010 NSW Coroner's report recommendations and subsequent actions

Recommendation	Action taken to date	Relation to recommendations in this review
<u>Minister responsible for the Swimming Pools Act</u>		
1. Continuing media campaign highlighting need for active supervision of young children around water	There were media campaigns conducted following the passage of the 2012 amendments to the <i>Swimming Pools Act</i> and councils are required to develop and implement programs on pool safety for their local community. The Royal Life Saving Society was contracted to support councils in their programs with the design and development of educational material. There has not been a regular series of media programs	Proposed as part of a public awareness and education program at both the State and local levels
2. Media campaign on need for approval of new swimming pools, the need for regular maintenance of pool barriers and the need to not prop open pool gates	These messages were included in the media program referred to in item 1 above	As above
3. Consideration be given to developing a central register of	The requirement for a swimming pool register was established under the 2012	Proposed that the register be

¹⁴ The Centre for Trauma Care, Prevention, Education and Research and Kids Health, The NSW study of drowning and near drowning (0-16), The Children's Hospital at Westmead, 2015

¹⁵ NSW State Coroners' Court Report into child drownings, April 2010

Recommendation	Action taken to date	Relation to recommendations in this review
private swimming pools and developing a plan for regular review of all private swimming pools	amendments to the <i>Swimming Pools Act</i> . The register was operational on 29 April 2013 and all pool owners were required to have them registered by no later than 29 October 2013	significantly enhanced to make a more effective compliance tool.
4. Consideration be given to removal of all exemptions with respect to pool barriers	Exemptions were removed for all new properties from 1 October 2012 under the 2012 amendments to the <i>Swimming Pools Act</i> . However, past exemptions continue to apply	Proposed that all existing exemptions be phased out
<u>Minister responsible for Residential Tenancies Act</u>		
5. Owners of properties with pools and subject to residential tenancy be obliged to take all reasonable action to ensure the pool is compliant and warrant compliance at commencement of each tenancy agreement	Under the 2012 amendments to the <i>Swimming Pools Act</i> a sale and lease provision was established that required all sold and leased properties with a swimming pool to have a compliance certificate as part of the transaction documentation. This was initially to commence on 29 April 2014 but has twice been deferred to commence on 29 April 2015 and now 4 April 2016	Proposed that the sale and lease provisions commence as planned
<u>Fair Trading Minister</u>		
6. Purchasers of above ground swimming pools be advised at point of sale of their obligations under the <i>Swimming Pools Act 1992</i> 7. Sellers of above ground pools advise the relevant local government authority of the delivery of an above ground pool to a house in the area	Fair Trading has advised that the response at the time of the Coronial review was as follows: <ul style="list-style-type: none"> » Advice will be prepared for the Government regarding feasible options for implementing this recommendation, including threshold issues regarding the types of above ground pools to be covered by any regulation. The advice will need to be developed in consultation with the Minister for Local Government, owing to the interaction between the <i>Fair Trading Act</i> and the <i>Swimming Pools Act 1992</i> » In addition, in 1998 the NSW Products Safety Committee developed product safety guidelines around the safety of inflatable pools which included warning labels to alert pool owners of the potential drowning hazard, the need for water purification and the need to store pools safely when not in use » Fair Trading recently updated the guidelines and produced two fact sheets to reinforce the water safety 	The key issue, which was not addressed in the 2012 amendments to the <i>Swimming Pools Act</i> , is creating a mechanism to ensure compliance with the regulatory requirements which, for a portable pool that can be filled with a depth of 300mm or greater are to register the pool and have pool fencing in place. Both logic and evidence indicate that there is in fact a low level of compliance and that a significant proportion of child drowning deaths occur in portable pools

Recommendation	Action taken to date	Relation to recommendations in this review
	<p>message. There has been a very high level of compliance with the guidelines since their introduction. A product safety campaign over the 2009/2010 Christmas period found an almost 100 per cent compliance rate</p> <ul style="list-style-type: none"> » Given the recently agreed national approach to consistent product safety laws, the Minister for Fair Trading has also approached her Commonwealth counterpart about making these guidelines mandatory » Fair Trading will continue its compliance activities in the lead up to summer. » A Cross Agency Working Group was subsequently convened to develop a coordinated response to the Coroners recommendations, including those above and other recommendations. The Working Group also considered related recommendations handed down by the Deputy Coroner in May 2011 regarding a further drowning. Subsequent public consultation was held on potential reforms to improve swimming pool safety resulting in the enactment of Swimming Pools Amendment Act 2012 and related reforms 	
<u>Attorney General</u>		
<p>8. Consideration be given to the enactment of a criminal offence where a person dies as a result of the negligence of a third party with respect to the maintenance or use of a private swimming pool</p>	<p>The matter has been the subject of correspondence between the Attorney General and the Minister for Local Government with the Minister for Local Government proposing that the matter be reconsidered in the light of the Government's decisions on this report</p>	<p>Proposed that the Attorney General decide on this recommendation based on legal policy considerations, noting that it may have a favourable impact on compliance</p>

Additionally, the NSW Coronial Inquest into the death of Sebastian Yeomans¹⁶ made a number of recommendations, some of which repeat recommendations from the 2010 inquiry. The death involved a child entering the backyard of a neighbour through a defective boundary fence which also constituted part of the pool barrier, and drowning in the pool. The recommendations are summarised in Table 3.7 below, together with advice on whether and how addressed in this report.

Table 7 3.7: Recommendations from the 2015 Coronial Inquest into the death of Sebastian Yeomans

Recommendations from the 2015 Coronial Inquest	Relation to recommendations in this review
<u>To the minister responsible for the Swimming Pools Act</u>	
Consideration be given to increasing the maximum penalties applicable to breaches of the safety requirements of the <i>Swimming Pools Act</i>	Supported as part of the recommendations aimed at enhancing compliance and enforcement
<u>To the Attorney General</u>	
Consideration be given to the enactment of a criminal offence where a person dies as a result of the negligence of a third party with respect to the maintenance or use of a private swimming pool.	Proposed that the Attorney General decide on this recommendation based on legal policy considerations, noting that it may have a favourable impact on compliance.
<u>To Armidale Dumaresq Council</u>	
Consideration be given to allocating sufficient staff to properly implement all aspects of its swimming pools inspection program	<i>Note: the responses below are generalised to refer to all councils not just the specific council referenced in the inquest.</i> The report proposes that greater funding flexibility be provided to councils to enable them to effectively undertake their compliance role. It also proposed that either periodic inspection occur of all pools or current individual council risk based inspection programs be expanded and made more consistent across all councils
Consideration be given to changing its website to include a statement under the section "Pool Fencing" indicating that constructing and maintaining a boundary fence that forms part of a pool fence is the responsibility of the pool owner	This is best addressed in the proposed pool safety guide for pool owners which, when developed, should be made available on the swimming pool register site
Consideration be given to supplying each swimming pool inspector with a device to record digital photographs as part of the implementation of the inspection program, and that such photographs be stored with the corresponding inspection record	Proposed that all pool certifiers and council pool inspectors take digital photographs of all pool inspections and these be filed with the inspection records

¹⁶ NSW State Coronial Inquest into the death of Sebastien Yeomans, Armidale Local Court, April 2015

Recommendations from the 2015 Coronial Inquest	Relation to recommendations in this review
Consideration be given to consulting with Hannah's Foundation in relation to the production of pool safety information to be sent to swimming pool owners	The RLSSA has a role with assisting and supporting councils in their pool safety awareness and education programs and it is proposed that these programs continue at both the state and local level

3.7 Conclusion

There is a clear and convincing case supporting the regulation of safety features of private swimming pools, directed at achieving safety for young children who are at or near a swimming pool. The approach of both active adult supervision and four sided pool barriers appears to be an effective approach, creating both active protection (child supervision) and passive protection (pool barriers). Both the active and passive protection elements are essential. Cost benefit analysis would appear to indicate that regulated pool safety barriers are economically efficient, generating benefits in excess of costs. Given that the safety risk is created by the presence of swimming pools, it is equitable that the greater part of the costs associated with the safety program are borne by pool owners.

There continues to be a significant and fully avoidable number of child drowning deaths and non-fatal drownings in private swimming pools, with the latter having long term negative health impacts in a significant proportion of cases. NSW's rate of child drowning deaths is at the high end of the range compared with other jurisdictions.

The key common factors with child fatal and non-fatal drownings in swimming pools are either the absence or the distraction of parental supervision, combined with defective pool barriers, most typically with deficient gates and latches.

The recommendations of the NSWCDRT and the 2010 and 2015 Coronial reports into child drownings have been taken into account in this review.

4 Good practice regulatory principles

4.1 Introduction

This chapter draws upon various Australian and overseas guides to establish what constitutes best practice regulation to develop a set of best practice regulatory principles that will be used in Chapter 10 to assess the current swimming pool safety regulatory approach at a macro level.

4.2 Derivation of principles

There are numerous guides to best practice regulation, including:

- » Council of Australian Governments, Best Practice Regulation: A function for Ministerial Councils and National Standard Setting Bodies, October 2007
- » OECD Recommendations of the Council on Regulatory Policy and Governance, 2012
- » OECD Best Practice Principles for Improving Regulatory Enforcement and Inspection, August 2013
- » Guide to Better Regulation, NSW Department of Premier and Cabinet, November 2009
- » New Zealand Treasury, Best Practice Regulation: Principles and Assessment, February 2015
- » IPART, Reforming licensing in NSW, Regulatory Review Issues Paper, October 2012.

These various guides and others have been drawn on to produce a set of regulatory best practice principles which are set out in Table 4.1. These have been set at a relatively high level. While regard has been given to all the above documents, particular attention has been given to the New Zealand Treasury document. The New Zealand Treasury set of principles has been used to assess all New Zealand regulatory schemes and hence has been tested on a wide range of regulatory schemes.

The principles have been divided into two parts: part one sets out what are termed 'prior principles', which are the requirements or preconditions for establishing the case for regulation. Part two is 'design principles', setting out the broad features or characteristics which regulatory systems should follow.

Table 8 4.1: Best Practice Regulatory Principles

Attribute	Principle	Desired characteristics
Part 1: prior principles		
Scoping	A case for action should be established and all feasible options assessed, including all non-regulatory options	<ul style="list-style-type: none">» Define and assess the problem» Identify and assess all feasible options to address the problem
Net benefit maximisation	The approach that generates	<ul style="list-style-type: none">» The assessment of net

Attribute	Principle	Desired characteristics
	greatest net benefit for the community should be selected	benefits is fully transparent and accountable
Consultation	Full and effective consultation with all affected stakeholders during the regulatory design stage and throughout the regulatory cycle	<ul style="list-style-type: none"> » All relevant stakeholders are identified and the input obtained and assessed » Feedback is provided to stakeholders and the opportunity provided to comment on the draft approach
Part 2: design principles		
Scoping	Every effort should be made to utilise market mechanisms and incentives and to avoid distorting the economy and markets	<ul style="list-style-type: none"> » The impact of the regulatory regime on the economy and markets is assessed and every effort taken to minimise adverse economic impacts
Proportional	The scope and burden of regulatory rules and their enforcement should be proportional to the benefits that are expected to be generated	<ul style="list-style-type: none"> » Risk based, cost benefit framework is utilised for rule making and enforcement
Flexible and adaptable	The regulated entities have the scope to adopt least cost and most innovative approaches to meet their regulatory obligations and the regulatory system has the capacity to evolve and refine its approach over time	<ul style="list-style-type: none"> » Regulatory approach is performance based and is administered in a responsive and flexible manner » Non-regulatory approaches such as self-regulation are used wherever possible » Feedback systems are in place to assess how the system is operating and the approach is adjusted in the light of available evidence of what approaches are effective. » The system is fully up to date with technological and market change and societal expectations
Certain and predictable	Regulatory entities have certainty and clarity about their obligations and there is predictability and consistency in the action of the regulator	<ul style="list-style-type: none"> » Clear and available information and advice for regulated parties » Clear and transparent decision making criteria with certainty and consistency of process and outcomes
Transparent, accountable and evidence based	The development and implementation of regulatory rules and enforcement should	<ul style="list-style-type: none"> » All regulated entities and stakeholders have full

Attribute	Principle	Desired characteristics
	be evidence based and fully transparent	information on the regulatory system » Regulators justify decisions and are subject to public scrutiny
Capable regulators	The regulator must have the right resources, skills and systems to operate an efficient and effective regulatory approach	» The capacity of the system against demands on it is regularly assessed and resources are adjusted accordingly » Skills and knowledge of the regulator and its agents is upgraded on an ongoing basis
Outcomes focused	The performance of the regulatory system should be assessed against the objectives set for the system and based on measurable outcomes	» Regular reporting of outcomes and against objectives

4.3 Conclusions

The principles developed in this chapter will provide the framework for assessing the overall regulatory framework. This will be presented in Chapter 10, after consideration has been given to the features of swimming pool regulation (Chapter 6), its relation to swimming pool regulation in other jurisdictions (Chapter 7), the feedback received from the public hearings and responses to the Discussion Paper (Chapter 8) and the detailed assessment of all the identified key issues (Chapter 9).

5 History of private swimming pool regulation in NSW

5.1 Introduction and pre 1992 Swimming Pools Act history

Up until 1990 each local government council set its own pool requirements and as a consequence they varied across the state. The general approach followed was to provide protection for access to swimming pools from adjoining properties and from public access with, in general, no restrictions or protection for those residents on the property with the pool, though some councils adopted the requirements of AS 1926-1976 which required pool gates to be self-locking and latching. There was a power in Section 28C of the *Local Government Act (Amendment Act 1972)* under which a council could direct a pool owner to enclose the pool or the land on which the pool is located if it were considered the pool was dangerous to human life.

This changed in 1990 with the introduction of the *Swimming Pools Act 1990* which was introduced on 1 August 1990 and set state-wide requirements for swimming pools. The Act recognised AS 1926-1986 which required that outdoor pools were required to be surrounded by a fence that complies with the standard. All pools were required to be upgraded to the standard within two years of the commencement of the Act.

Public concern was raised about the requirement to raise all pool barriers to the new standard and in particular it was argued that there were special requirements which justified in certain cases a deviation from the pool standard. This resulted in the repeal of the *Swimming Pools Act 1990* and its replacement by the *Swimming Pools Act 1992* which introduced pool barrier exemptions under sections 8, 9 and 10.

5.2 Swimming Pools Act 1992 and associated Regulations

The *Swimming Pools Act 1992* and the associated Swimming Pools Regulation 1992 applied the AS 1926-1986 pool barrier safety standards. It requires all new pools to have a child resistant barrier to surround the pool with the general requirement to separate the pool from any residential building and adjoining land. The Regulation provided requirements for doors and windows on properties with pools. A wall of a residential building could be treated as part of the barrier provided the walls contain no doors or windows with access to the pool. Pools constructed before 1 August 1990 and pools on small properties (less than 230 square metres) were exempt provided access was restricted through child proof doors and windows. Large properties (two hectares or more) and waterfront properties were exempt from the requirement for pool barriers.

All existing swimming pools were required to be upgraded to comply with AS 1926-1986 by 31 December 1992.

The Swimming Pools Regulation 1998 replaced the 1992 Regulation with minor content change and retaining AS 1926-1986. NSW did not take up AS 1926.1-1993. In turn this Regulation was replaced by the Swimming Pools Regulation 2008 within which AS1926.1-2007 was adopted from 1 September

2008. There was a new clause 23 saving previous 1998 Regulation and AS 1926-1986 under which an existing pool that was compliant with the previous standard was taken to be compliant with the current standard.

5.3 Swimming Pools Amendment Act 2009

A review of the *Swimming Pools Act 1992* was initiated in 2006 at the request of the NSW Water Safety Advisory Council which had identified research that indicated that the risk of a toddler drowning or near drowning in a pool is related to the type of barrier employed around the pool, with a self-standing four sided barrier having a much lower probability of a drowning or near drowning than a three sided barrier. A discussion paper was released in August 2006¹⁷ followed by a final report in August 2008¹⁸. This resulted in the *Swimming Pools Amendment Act 2009* which had the objective to achieve a consistent and high standard of four sided pool barrier for newly constructed pools, remove automatic exemptions with respect to small, large and waterfront properties in regard to any pools constructed from 1 July 2010 onward, and required councils to investigate complaints in a reasonable timeframe. The changes also authorised councils to carry out barrier rectification works where there was a significant risk to public safety. The amendments came into effect on 1 July 2010.

The Swimming Pools Regulation 2008 was amended on 1 September 2008 to call up as the pool barrier standard, AS 1926.1-2007, Swimming Pool Safety, Part 1: Safety barriers for swimming pool.

From 3 September 2010, under an amendment to the *Environment Planning and Assessment Act 1979*, final inspections of a swimming pool have to be completed as soon as practical after a permanent barrier has been erected.

On 1 May 2011 the Swimming Pools Regulation 2008 was further amended by the Swimming Pools Amendment Regulation 2011 to replace certain references to the Australian Standard 1926.1-2007 with references to the Building Codes of Australia (BCA). The BCA in turn refers to the Standard.

5.4 Swimming Pools Amendment Act 2012

Following a number of fatal drownings the NSW Deputy State Coroner, the NSW Child Death Review Team (part of the NSW Ombudsman's Office) and various pool safety advocates called for a further strengthening of the *Swimming Pools Act 1992*. This led to the release of a Discussion Paper¹⁹ in November 2011, followed by a final report²⁰ in May 2012. This was followed by the enactment of the *Swimming Pools Amendment Act 2012* which took effect from 29 October 2012, apart from the sale and lease provision. The main amendments were as follows:

- » Established a state wide swimming pool register and required all pools to be registered by their owners by 29 October 2013
- » Required councils to develop and implement both a risk based inspection program and consumer education program as well as conduct mandatory periodic inspections of pools associated with multi user accommodation, tourist and visitor accommodation, to commence by 29 October 2013
- » The mandatory inspections of tourist and multi occupancy premises with swimming pools were required to take place every three years

¹⁷ Department of Local Government, Review of the Swimming Pools Act 1992: Discussion Paper, August 2006

¹⁸ Department of Local Government, Review of the Swimming Pools Act 1992, August 2008

¹⁹ Division of Local Government, Department of Premier and Cabinet, Swimming Pools Act 1992 Review, Discussion Paper, November 2011

²⁰ Division of Local Government, Department of Premier and Cabinet, Swimming Pools Act Review Discussion Paper Report, May 2012

- » Amended the *Building Professionals Act* to establish a new class of certifier, the E1 pool barrier certifier, and required the Building Professionals Board to accredit and oversee this class of certifier
- » Amended the conveyancing and residential leasing legislation to require vendors and landlords to have a valid compliance certificate for any property with a swimming pool, with the compliance certificate to remain valid for three years
- » Confirmed that sections 8, 9 and 10 exemptions cease if a barrier is erected to direct access to the swimming pool from any residential building
- » Provided councils with right of entry to properties where there was reasonable expectation that the pool on the property was non-compliant
- » Exempted owners of new swimming pools from the need for a compliance certificate for a period of three years where a valid occupational certificate had been issued.

The Swimming Pool Register was required to be available for use on 29 April 2013. Pool owners were required to have a compliance certificate before sale or lease of their property from 29 April 2014 but this was extended first to 29 April 2015 and then to 29 April 2016.

In June 2013 the ACCC released a mandatory standard, Consumer Goods (Portable Swimming Pools) Safety Standard 2013, which prescribed a warning label that was required to be placed on portable swimming pools sold by retailers, commencing 30 March 2014.

The next chapter provides greater detail on the current legislative and regulatory framework for swimming pool safety in NSW.

5.5 Conclusions

There has been a significant trend towards greater State Government involvement in private swimming pool regulation and to creating a self-contained swimming pool barrier. The other major legislative trend has been towards a more formal compliance and enforcement regime.

6 The approach to private swimming pool regulation in NSW

6.1 Introduction

As can be observed from the previous chapter there has been a trend towards more exacting pool safety regulation and this trend can also be observed in other jurisdictions.

Swimming pool regulation falls under the responsibility of the Minister for Local Government and is administered by the Office of Local Government.

The accreditation and oversight of swimming pool certifiers is the responsibility of the Building Professionals Board which is located in the NSW Finance, Services and Property portfolio.

The regulatory structure is set out in the *Swimming Pools Act 1992* and the Swimming Pools Regulation 2008 (as amended) in regard to safety requirements for swimming pools and in the *Building Professionals Act* in respect to the accreditation and oversight of accredited pool certifiers.

6.2 Swimming Pools Act and Regulation and standards

What is important to understand is that there have been a number of versions of the Swimming Pools Act and Regulation as well as different versions of the Australian Standard for swimming pool barriers, AS 1926, and that each of these governs pools constructed at certain times. An overview of the various versions of the Swimming Pools Act and Regulation and the Australian pool barrier standard are set out in Table 6.1 below:

Table 9 6.1: History of NSW swimming pool legislations, regulations and pool barrier standards

Pool Build Date	Act	Regulation	Australian Standard	Legislative exemptions
Pre 1 August 1990	Comply with <i>Swimming Pools Act 1992</i>	Comply with <i>Swimming Pools Regulation 1992</i>	AS 1926-1986	Pools exempted from the standard under section 8 and small, large and waterfront pools also given exemption

Pool Build Date	Act	Regulation	Australian Standard	Legislative exemptions
1 August 1990 to before 1 September 1998	<i>Swimming Pools Act 1992</i>	Swimming Pools Regulation 1992 Doors and window requirements for a building wall barrier in the regulation	AS 1926-1986	Exemptions to the standards under sections 8, 9 and 10 for small, large and waterfront properties
1 September 1998 to before 1 September 2008	<i>Swimming Pools Act 1992</i>	Swimming Pools Regulation 1998 Wall, door and window requirements in regulation.	AS 1926-1986	Exemptions to the standards under sections 8, 9 and 10 for small, large and waterfront properties
1 September 2008 to 1 July 2010	<i>Swimming Pools Act 1992</i>	Swimming Pools regulation 2008, commenced 1 September 2008 and amended on 9 April 2010	AS1926.1 – 2007 (1/9/08 – 1/5/13) Door and window requirements in the Australian Standard. Clause 23 savings clause for 1998 regulation and AS 1986.	Exemptions to the standards under sections 8, 9 and 10 for small, large and waterfront properties
1 July 2010 to end April 2013	<i>Swimming Pools Act 1992</i> and <i>Amendment Act 2010</i> (1/7/2010) & 2012 (29/10/2012)	Swimming Pools regulation 2008, amended 1 May 2011, with prescribed standards reference changed to the BCA	AS 1926.1 – 2007 Act ends section 8, 9 and 10 exemptions going forward from 1 July 2010.	Ending of exemptions under sections 8, 9 and 10.
1 May 2013 onward	<i>Swimming Pools Act 1992</i>	Swimming Pools Regulation 2008	AS 1926.1-2012	No exemptions for new pools other than under section 22 of the Act

In order to assess a swimming pool it is necessary to know when it was constructed and to confirm that it is compliant with the relevant standard that applied to a pool constructed on that date and confirm that there were no major modifications to the pool. If it is compliant with the standards relevant to the date at which it was approved then it is possible to read off from the table the legislative, regulatory and barrier standards that apply to the pool.

Set out below are the key legislative provisions in the current Act:

Scope

The legislation covers all indoor and outdoor pools on residential properties, including moveable dwellings, tourist and visitor accommodation. What is important to note is the definition of a swimming pool which is any structure, excavation or vessel that is capable of being filled to a depth greater than 300mm and is solely or principally for aquatic activity and includes a spa pool but not a spa bath. The other important thing to note is that there is a separate definition for a pool barrier

which is “a fence or a wall and includes (a) any gate or door set in a fence or wall and (b) any other structure or thing declared by the regulations to be a barrier for the purposes of this Act”. What is particularly important to note is that the definition of swimming pool and barrier are separate and distinct which has significant implications later in Section 6.3 when the swimming pool standard is examined.

Duties and responsibilities of local government authorities

Local government councils are to:

- » take steps to ensure that they are notified or aware of all swimming pools in the area (S5a)²¹
- » promote awareness of the regulatory requirements and pool safety in its area (S5b)
- » investigate complaints concerning pool safety and breaches of the Act (S5c)
- » develop and implement a program of pool inspections in the area which must include a mandatory pool inspection program, inspecting multi residential units, and tourist and visitor accommodation with swimming pools at least every three years (S22B)
- » inspect pools at the owner’s request (S22C)
- » report on pool inspections in the annual report (S22F (2))
- » order compliance actions be taken after issuing a notice of intent to issue an order (though the notice can be dispensed with if safety is an immediate issue) (S23)
- » provide exemptions from barrier requirements where application of the standard is impracticable or unreasonable (S22)
- » undertake work to correct non-compliance where it is necessary as a matter of urgency (S23A)
- » Councils have powers of entry and can charge a capped fee for inspections.

Role and responsibilities of accredited pool certifiers

Accredited pool certifiers have the following roles and responsibilities:

- » Must maintain their accreditation by undertaking continual professional development, having professional indemnity insurance, adhering to the standard of conduct and paying the accreditation fees
- » Inspect pools at the request of owner, applying the barrier standards and the legislation and regulations, issuing a compliance certificate where compliant (S22D) or a written notice where non-compliant (S22E)
- » Forward the non-compliance notice to the council immediately if the pool poses a significant danger or within six weeks if the non-compliance not rectified (S22E (f))

Responsibilities of pool owners

Pool owners are required to:

- » register their pool on the state pool register (30B)
- » provide a valid compliance certificate for the pool before being able to sell or lease a property with a pool (taking effect from 29 April 2016)
- » determine the location of the pool barrier, consistent with the barrier standards
- » ensure that the pool barrier requirements are met and maintained (S7 (1))

²¹ Reference is the relevant section of the Act, with S5a being section 5a

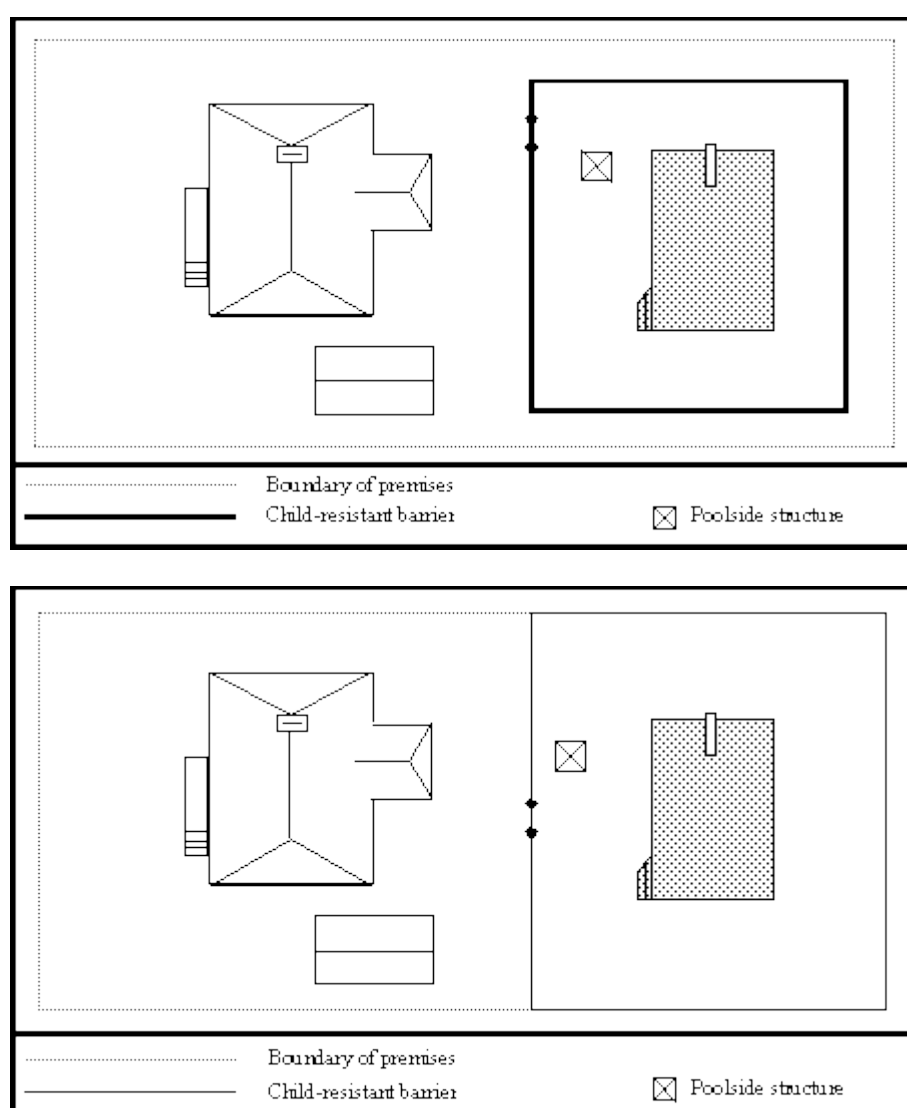
Pool barrier requirements

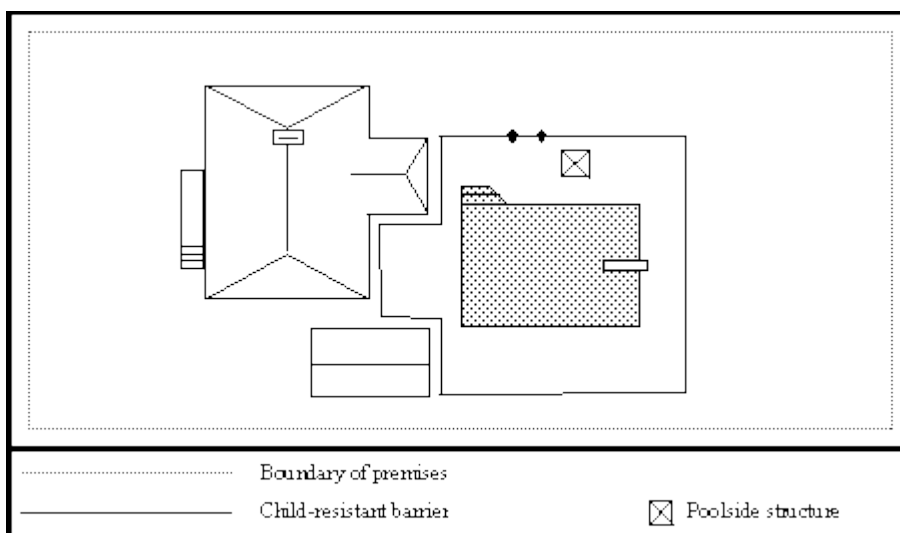
The pool barrier requirements are as follows:

- » Outdoor pools must be surrounded by a child resistant barrier separating the pool from any residential building and be in accordance with the standards set out in the regulation (S6,7,11,12). House walls can be used as a barrier if it contains no opening (S19). These provisions effectively override the standard which does apply for a wall with doors and windows to be part of the barrier provided the doors and windows meet certain criteria
- » Indoor pools must conform to the standards set out in the regulation (S14)
- » Barriers must be maintained in good repair (S15) and access kept securely closed (S17)
- » Warning signs with required information must be prominently displayed (S17)

Set out in Figure 6.1 below are examples of compliant pool fencing layout.

Figure 6.1: Examples of compliant pool barriers





Pool barrier exemptions

The following exemptions are provided for:

- » Swimming pools constructed before 1 August 1990 or on small properties (less than 230 square metres) and built before 1 July 2010 do not have to have barriers separate from the residential buildings so long as access to the pool from the building is in accordance with the relevant standard (S8)
- » Large properties (two hectares or more) and waterfront properties with pools installed before 1 July 2010 do not require barriers provided there are restricted means of access from the house
- » Moveable dwellings and tourist and visitor accommodation built before 1 May 2013 do not require barriers immediately around the pool and are not subject to the exclusions of structures within the pool area (S13)
- » Spa pools are subject to their own regulations (S20) and require a lockable cover
- » Councils can grant exemptions to barrier requirements where they are impractical or unreasonable (S22).

The exemptions are not unconditional but require the standard to be maintained. If it is not maintained then the exemption ceases. Similarly if upgrades are made to the pool and the pool area these can require the pool to meet the current standards.

Register of swimming pools

A central register has been established and maintained by the Office of Local Government (S30A) with a requirement for all pools to be registered by no later than 29 October 2013. Registered pools are issued with a certificate of registration (S30C) and authorised persons are provided access to the register (S30E).

Sale and lease requirements

All residential properties sold or leased in NSW after 29 April 2016 with a swimming pool (was originally 2014 and then deferred to 2015) are required to have a valid compliance certificate issued by an accredited certifier or council (S22D). The compliance certificate has a currency of three years.

Appeals and orders

Appeals against decisions of local authorities are directed to the Land and Environment Court (S26). Local authorities may also bring proceedings in the Land and Environment Court for an order to achieve compliance or address a breach of the Act (S30).

The next chapter provides an overview of the swimming pool regulatory approaches in other states and territories.

6.3 Swimming pool barrier standards

Standards Australia is responsible for the development of Australian Standards, which set out required standards for materials, products and systems, amongst other matters. Standards Australia is a non-government organisation which is charged by the Commonwealth with the responsibility to develop and maintain Australia's need for contemporary, internationally aligned standards. This process is undertaken through a series of technical committees. Standards Australia set out the specifications and procedures designed to ensure products, services and systems are safe, reliable and consistently perform the way they were intended to.

There are a large number of standards that have been developed for the building and construction sector and include the characteristics of building materials and products, processes (for example, residential slabs and footings, scaffolding, inspections of buildings etc.), measures (accuracy in building construction) and requirements (wind loads for housing, safety in house design and building sustainability). These standards are applied through being referenced in the National Construction Code (NCC) or State and Territory regulations.

The standards are marketed by SAL Global, which was the commercial arm of Standards Australia before being sold off in 2003. As such the standards are copyright protected and there is a commercial charge for accessing them.

The relevant Australian Standard for swimming pool safety is AS 1926 with part 1, 1926.1 covering safety barriers for swimming pools part 2, 1926.2 covering the location of swimming pool safety barriers and part 3 covering water reticulation. As noted above, the standard is protected by copyright and hence cannot be reproduced in this report. A useful overview of the standard and relevant NSW fencing law can be located on the website of the Swimming Pools and Spa Association of NSW and ACT²².

A technical committee is charged by Standards Australia with the task of writing, reviewing and rewriting each standard. There is a technical committee with that responsibility for AS 1926. The standard is under ongoing review and changes over time. The first version of the standard to apply in NSW, at the time of the introduction of the *Swimming Pools Act 1990*, replaced by the *Swimming Pools Act 1992*, was AS 1926-1986. Since that time two other standards have been applied in NSW, AS 1926-2007 and AS 1926-2012. There were two additional AS 1926 produced over that period but neither were applied in NSW.

The way the standard is applied or varied for NSW is through the Swimming Pools Regulation which allows for the calling up of the Building Codes of Australia (BCA) which references the standard. As such NSW can determine when or if it calls up the latest standard. It can also choose to vary the application of the standard in NSW by making variations to the BCA or through the Regulation which has the effect of over-riding or varying the application of the standard in NSW.

The version of the *Swimming Pools Act* and Regulation and the barrier standard that applies to a particular pool depends on when the pool was constructed. This is summarised in Table 5.1 in the previous Chapter. In effect there are three versions of the barrier standard that apply in NSW:

- » AS 1926-1986, which applies to all pools constructed before 1 August 1990 up to 31 August 2008
- » AS1926-2007 which applies to all pools constructed on or after 1 September 2007 up to 30 April 2013

²² spasa.org.au/for-consumers/fencing-lawsnsw

» AS1926-2012 which applies to all pools constructed on or after 1 May 2013.

The standards are performance based, with broad performance requirements set out for each standard. If the technical requirements of the standard are applied then the application is deemed to satisfy the performance requirement. Provision is also made for alternative solutions which do not follow the technical standard but seek to achieve the same or better performance outcome. The Australian Building Code Board (ABCB) is seeking to encourage greater uptake of alternative solutions as a way to improve efficiency and generate innovation. To this end it has embarked on a program of quantification of performance standards to assist developers of alternative solutions in assessing their solutions in an objective manner.

The standard needs to be read in conjunction with the relevant *Swimming Pools Act* and Regulation as these can modify the application of the standard. It should be noted that the historic standard continues to apply provided that the pool remains compliant and is not subject to major upgrade. In the event that a pool becomes non-compliant or is subject to major upgrade, the latest version of the standard will apply. Therefore, if a pool constructed in 1998 was found to be non-compliant with AS 1926-1986, it would be required to be upgraded to comply with AS 1926-2012.

NSW has used variations to the BCA to establish two differences to AS 1926-2012 when it is applied in NSW, these being:

- » The clear distinction made in the *Swimming Pools Act 1992* between swimming pool and barrier has been used to reject clause 2.5.3, which allows out-of-ground walls that comply with the requirements of a barrier to be considered an effective barrier. The NSW position is that the Act creates a clear distinction between pool and barrier and thus this needs to apply to any standard that applies in NSW
- » Based on historic practice, the standard requiring a spa pool with water depth of 300mm or greater must be fenced has been changed to provide spa owners with the choice of a pool fence or a lockable lid which is capable of being operated by one person.

A third variation is effected through the Act. Under the standard a wall of a residential building can be used as a barrier even if it has doors or windows, provided it meets certain conditions. In the case of a window, where the height from the sill of the lowest panel is less than 1800mm the window must have a child-resistant openable portion of the window. For doors in a wall there are requirements for child-resistant door sets. In contrast, Section 7 of the *Swimming Pools Act 1992* requires that the pool is surrounded by a child resistant barrier that separates the pool from any residential building. However, Section 19 contradicts this by stating that the house wall may be used as part of the pool barrier provided the wall contains no opening through which access may be obtained to the pool.

Set out below in Table 6.2 is a summary of the key features of each of the three relevant standards for NSW.

Table 10 6.2: Summary of key features of the three AS 1926 standards

Standard	Key features
AS 1986: applies to pre 1/8/1990 to 31/8/2008	<ul style="list-style-type: none"> » Pool has to be protected by a fence of at least 1.2m high » 1200mm radius span clearance (non-climb zone-NCZ) from any object from the top of the barrier » Minimum 1100mm from bottom horizon to top of barrier » Gate to open out from the pool and automatically close » Latch release 1500mm or higher above ground or where less than 1500mm, latch to be on the inside and necessary to reach over a height of greater than 1.2m and for the latch to be shielded » Wall of residential building can be used as part of barrier subject to restrictions on any windows or doors in the wall (over-ridden in NSW by the Act) » Horizontal members of the barrier at least 900mm apart » Maximum 100mm from bottom of fence to ground » Vertical members to be spaced maximum of 100mm apart » Perforated fence material such as mesh must be at least 1.8m in height
AS 2007: applies to 1/9/2008 to 30/4/2013	<p>Variations from AS 1986 were as follows:</p> <ul style="list-style-type: none"> » Reduction in NCZ from 1200mm to 900mm » 900mm outside NCZ located anywhere within the vertical face of the barrier » 300mm inside NCZ located anywhere within the vertical face of the barrier » Removal of 1100mm restriction from highest lower horizontal to top of the barrier » Introduction of use of boundary fence as barrier provided not less than 1800mm with NCZ on pool side » 1800mm minimum height/distance in relation to window, retaining wall and balconies » 900mm NCZ located at top of barrier with no restriction under NCZ » 900mm NCZ not applicable to windows, deck/balcony, retaining walls etc. » Includes requirements for child resistant openable portion of window and child resistant doorset where the window or door is in the wall of the house used as a pool barrier » Balcony can project from the barrier wall into the pool area where the distance from the base of the balcony to the ground is not less than 1.8m » Above ground pool can use the wall of the pool as a barrier if it complies with the barrier standard » Fencing using percolated material with apertures smaller than 13mm can be not less than 1200mm in height. Those between 13mm and 100mm must be 1.8m in height.
AS 2012 applies from 1/5/2013 on	<p>Variations from AS 2007 were as follows:</p> <ul style="list-style-type: none"> » Creation of four measures of NCZ-NCZ1 being the vertical 900mm plane on outside of barrier; NCZ2 being a radius of 900mm from top of NCZ1 down on the outside of the barrier; NCZ3 is a radius of 900mm on the outside of the barrier up from the top of NCZ2; and NCZ4 is a

Standard	Key features
	<p>rectangular space on the inside 900mm high and 300mm deep</p> <ul style="list-style-type: none"> » Introduces glass barriers » Inclusion of 500mm setback to barrier » Removal of 1400mm from highest lower horizontal to latch release » Internal barrier not less than 1800mm do not require a NCZ and can be climbable on either side » Removal of how to consider balcony over pool area » Requirement for gate units to be supplied as complete sets

The changes from AS 1986 to AS 2012 have been evolutionary rather than substantial. There are a number of aspects of the latest standard that require clarification. This is addressed in Section 9.1 of Chapter 9.

6.4 Conclusion

The major relevant regulatory features that distinguish NSW from other jurisdictions are as follows:

- » Statutory exemptions that apply to large, small and water front properties with swimming pools
- » Variation from the standard in respect to not allowing out-of-ground walls as a pool barrier
- » Variation from the standard which allows for a lockable lid for spa pools
- » Variation from the standard, restricting the use of a residential wall as part of a pool barrier.

Most jurisdictions have multiple standards that apply, depending on when the pool was constructed, like NSW, with the major exception being Queensland.

7 The approach to swimming pool regulation in other states and territories

7.1 Introduction

All Australian States and Territories have in place some form of swimming pool safety regulation. A survey of the practice in each Australian State has been undertaken. This is summarised in Section 7.2 with details provided in tabular form in Appendix C.

In section 7.3 two alternative models are considered in greater detail as they provide alternatives to the current NSW approach, these being the approaches that apply in Queensland and Western Australia. Queensland has a single state based barrier standard combined with the requirement of sale/lease pool certification, while Western Australia has both a single barrier standard and a periodic inspection of all residential swimming pools (notably, from 1 May 2016 there will be two standards in place AS 1926-1993 and AS 1926-2012, with the latter applying to all new pools).

7.2 Overview of states and territories

It is useful to compare and contrast the approaches that apply to private swimming pool regulation across the jurisdictions as it enables the identification and assessment of different approaches that may enhance the approach that applies in NSW, as well as being able to provide clear case studies and real life assessments of alternative models. Set out below is an overview of the systems applying in each jurisdiction, segmented by the main features of the regulatory models.

Governance

Governance is the ministerial, legislative and administrative arrangements relating to the swimming pool regulation scheme. In nearly all jurisdictions swimming pool regulation is covered under the building legislation, with the only exceptions being separate swimming pools legislation in NSW, South Australia and the Northern Territory. The Minister responsible for swimming pool regulation and the responsible agency for administering it is the agency responsible for building regulation, with the sole exception being NSW.

There used to be a Pool Safety Council in place in Queensland until 2014 and an equivalent Committee in NSW was abolished in 2009. There is not an equivalent mechanism to involve external and internal stakeholders in any of the jurisdictions at present.

Pool standard

The pool standard AS 1926-2012 is in place as the standard in NSW, Victoria, South Australia, Tasmania and the ACT. In these jurisdictions the standard is called up by the BCA and in a number of cases there are local variations effected under legislation, including in NSW.

In Western Australia and the Northern Territory AS 1926-1993 is in place, however Western Australia is moving to AS 1926-2012 by May 2016 for new pools. Queensland has its own standard in place which is a modified version of AS 1926-2007 combined with a state standard QDC MP 3.4.

All jurisdictions other than Queensland have in place multiple standards in the sense that as new standards have been adopted existing pools conforming to the then current standard have been allowed to maintain conformity with the relevant past standard. In Queensland pool owners had until 30 November 2015 to comply with the latest standard or earlier if the property is sold or leased.

Exemptions from the standard

There are two categories of exemptions to the national standard:

- » Those that are effected through the BCA as a variation to the standard as it applies in a particular jurisdiction
- » Legislative exemptions to the application of the legislation.

In NSW there are two cases of the first category of variation and that is, first, NSW spas are provided with an alternative to pool fencing which is in the standard and that is to have a lockable lid for a spa pool which is capable of being operated by one person and which is required to be locked when the spa is not in use and, second, not allowing an out of ground wall of a pool to be treated as a pool barrier. There is also the legislative variation in regard to placing restrictions on a residential wall acting as a barrier.

None of these variations apply in other jurisdictions where fencing is required for spa pools, the out of ground wall of a pool can be used as a barrier if it meets the requirements of a barrier and walls with windows and doors that meet the standard can be used as a barrier.

There are also exemptions applying to particular types of properties with pools in a number of jurisdictions. These apply in NSW (historic exemptions for small, large and waterfront properties), Tasmania (pools built before 1 November 1994), the ACT (pools built before 1970) and the Northern Territory (pools built prior to 1 January 2003 and pools on small and large properties). In addition local councils have the power in NSW, Queensland and Western Australia to approve exemptions from the standard and regulations on a case by case basis.

Certification of compliance

New pools are inspected in each jurisdiction and, in all jurisdictions other than Victoria, are certified for compliance with regulatory requirements. In Victoria they are certified for being completed.

Certificates of compliance are required for properties with pools at the time of sale or lease in NSW, Queensland and the Northern Territory. While not a formal requirement for a sale or lease all properties with pools in Western Australia are required to be inspected and have a certificate of compliance.

Signage requirements

Signage setting out pool safety and CPR are required in NSW and Queensland only.

Swimming pool register

There is a central swimming pool register in NSW, Queensland and the Northern Territory. In Western Australia each council maintains a register of all swimming pools in its area, given that local councils are responsible for managing the swimming pool inspection program.

Pool compliance inspections

There is a wide range of practice in this area. Victoria, Queensland, South Australia, Tasmania, the ACT and the Northern Territory do not have a pool inspection regime for existing pools.

In contrast Western Australia has an inspection regime conducted by local government whereby all pools are inspected each four years for compliance. The program is conducted by the local council

and uses a combination of council officers and contracted parties. This will be discussed in greater detail in the following section.

NSW sits between these two polar cases in having a pool inspection regime whereby local councils are required to develop and implement a pool inspection regime for their local area which must include mandatory three yearly inspections of visitor and tourist accommodation as well as multi-occupancy properties. There is a variation in approach between councils with some undertaking an inspection of all pools over a three to five year period but most only having the mandatory inspection plus inspections when complaints or compliance issues are raised.

The next two sections focus on Queensland and Western Australia, given that they represent two alternative models to the approach followed in NSW. Queensland has a model which NSW drew upon; having an approach involving both a state register and a requirement for pool compliance certificates for any residential property sale or lease. Western Australia differs with an approach involving the inspection of all pools over a four year cycle with the inspection, compliance and registration devolved to local government.

7.3 Queensland regulatory model

The legislation for swimming pool regulation is in the *Building Act 1975*, with operational responsibility with the Queensland Building and Construction Commission (QBCC) and policy responsibility with Building Codes Queensland.

Up until 2010 Queensland had eleven different pool barrier standards applying, depending upon when the pool was constructed or installed. Amendments to the scheme were introduced in 2009 which applied to all residential swimming pools, with a requirement to comply by 30 November 2015 or earlier if a property with a swimming pool was being sold or leased. The scheme applies to all residential buildings including motels, hotels, resorts and hostels. At the time of the introduction of the new scheme all existing exemptions were abolished.

The new scheme was introduced in two stages:

Stage 1 commenced on 1 December 2009 and applied mostly to new residential outdoor pools and had the following features:

- » A new safety standard for swimming pools
- » Regulation of temporary fencing for pools
- » Mandatory final inspection for new pools
- » Requirement for CPR signage conforming to the ARC's guidelines

Stage 2 commenced 1 December 2010 and applied mostly to existing pools and included the following:

- » Replacement of the eleven standards with the new standard, with the requirement for all pools to comply by not later than 30 November 2015
- » Training and licensing framework for pool safety inspectors
- » Establishment of a Pool Safety Council
- » Inclusion in pool safety laws of class 3 and 4 buildings (i.e. BCA classes 3 and 4 which includes hotels, motels, caretaker residences and hostels) as well as mobile homes, caravan parks and homestay pools
- » Sale and lease compliance requirements with all sales and leases of residential buildings with pools to require pool safety certificates which are valid for one year for shared pools and two years for non-shared pools

- » All regulated pools to be included in a state based pool register
- » Fencing required for portable pools and spas deeper than 300mm
- » Mandatory inspections by councils for immersion incidents of children less than five years and requirement for hospitals and the ambulance service to report such incidents to Queensland Health
- » Annual inspections are required for shared pools and inspections each two years for leased properties.

The key feature of the approach in Queensland of relevance to this review is the establishment of a Queensland pool safety standard, which is designated Queensland Development Code Mandatory Practice 3.4 (MP 3.4). In effect this standard is AS 1926-2007 as modified by the Queensland Development Code (QDC) which makes it in effect broadly equivalent to AS 1926-2012. While having a state based standard may appear to be a retrograde step in moving away from national standards, there are some valid reasons for so doing, including:

- » Addresses the lack of clarity with various aspects of the national standard and the reluctance of Standards Australia to provide an interpretations service to clarify aspects of the standard. By having a state standard, closely aligned to the national standard but not identical, the relevant state agency can issue interpretation and clarification statements where required
- » Enables simple to read and understand guides and explanations of the guide to be provided which is difficult if the standard is the national standard. Standards Australia has copyright over the national standards and a commercial fee for access is charged which creates difficulties in communicating the standard to pool owners and pool professionals
- » Provides the state with control of when and how the standard is updated. If the standard is automatically linked to the BCA then there is the possibility that every three years the standard will change, creating a multiplicity of standards.

The current NSW approach appears to have drawn on the Queensland model in key features such as the sale and lease provisions, accredited pool inspectors and a state swimming pool register but not the single state standard. In addition to a single state based standard, there are a number of other features of the Queensland model that are worth considering:

- » There is provision in the case of the vendor of a property with a non-shared pool which is non-compliant, transferring to the purchaser the obligation to obtain a compliance certificate within 90 days of settlement. The vendor is required to provide a Form 36, notice of no pool safety certificate. This is a useful option where a purchaser may want to control the work undertaken and is best suited where a purchaser wants to undertake extensive work on the pool which a vendor is unlikely to want to do. The problem with this approach, as administered in Queensland, is that there is not effective follow up to ensure the purchaser achieves compliance in a timely manner
- » The pool register is a more developed instrument than the NSW register. Firstly, there is greater control on entry of data with authority to enter data limited to local authorities, the Pool Safety Council and pool safety inspectors, not pool owners, though owners can register through QBCC. That allows a higher standard of confidence in the quality of the data entered and there is no provision for the pool owner to certify that the pool meets the barrier standard. Secondly, the register is open to the public and provides information on licensed pool safety inspectors and information on any disciplinary action
- » Greater responsibility assumed by certifiers with respect to handling pools that are assessed as non-compliant. If a pool safety inspector assesses the pool as non-compliant a Form 26, pool safety nonconformity notice, is provided to the owner and the *Building Act* prevents a change of pool inspector for three months. At the end of that period, if the owner has not requested a pool re-inspection, the pool inspector has five days in which to give the council the Form 26 notice. If

the pool owner gets the inspector to reinspect within the three months and it does not comply the three months recommences. The pool owner is not able to appoint a new certifier

- » A suitably qualified and skilled pool inspector can undertake minor works, provided they are appropriately licensed, and with what constitutes minor repairs set out in the regulations. All pool inspectors have an automatic restriction in their accreditation against doing minor works but this can be removed on a case by case basis where the person is assessed to have the necessary skills
- » Defined requirements for temporary fences, which is not the case in NSW
- » Councils are able to charge a cost recovery fee except they cannot charge for responding to immersion notices or complaints notices
- » Removal of all exemptions, however owners can apply to councils for exemptions which are assessed on a case by case basis. This characteristic is in common with NSW
- » Requirement for the ambulance service and private and public hospitals to report any pool immersion accident involving a child less than five years to Queensland Health, who must then issue a notice to the relevant local government authority. The local government authority is then required to inspect the pool. This is seen as a very useful follow up mechanism
- » Where there are disputes or disagreements regarding the council or accredited certifier pool inspection or other matters, the QBCC arbitrates rather than, as is in the case in NSW, it having to go to court. This allows for affordable and timely hearings of disputes.

7.4 Western Australia

Swimming pool regulation in Western Australia is in the *Building Act 2011* and the Building Regulation 2012. Swimming pool regulation is administered by the Building Commission which is a division of the Department of Commerce.

Western Australia applies as its regulatory safety standard AS 1926.1-1993 Part 1: Fencing for swimming pools. The one standard has been continuously in place since 1993. However, from 1 May 2016 Western Australia will be calling up the latest BCA which will automatically reference the latest swimming standard, AS 1926-2012. This new standard will only apply to new pools with existing pools subject to the existing standard.

Post November 2001, approved swimming pools have not been able to include as part of the pool barrier any wall that contains a door unless the door is permanently sealed. Pool barriers constructed prior to this date can contain a door provided the door complies with the safety standard.

The distinctive feature of the Western Australian approach is the requirement for all residential pools to be inspected at least each four years, which has been in place since 1992. The inspection program is the responsibility of local government which tends to use both in house inspectors and contracts to private and not for profit organisations. One of the largest providers of pool inspection services is RLSS (WA). There are no accreditation requirements for pool inspectors established by the state but the state has set out the requirements for pools in Rules for Pools which is directed principally at pool owners but is also a guide for pool inspectors.

The State regulates the annual charge that councils can impose on pool owners which must not exceed the estimated average cost to local government or \$57.45, whichever is the lower. The maximum annual charge was set initially in 1993 at \$52. The evidence indicates that in general the charge to pool owners is less than the maximum, typically in the range of \$15 to \$35 per annum. The low cost reflects a number of factors:

- » The efficiencies of operating on the basis of a set four year inspection program such that areas can be covered in a systematic way, with limited travel and down time

- » Relatively low non-compliance rate at 20 per cent or less after the long experience of regular checks
- » A well-established checking process which allows for up to five pools in a single area to be checked each hour.

In the event that a pool is non-compliant the council typically gives the pool owner a defined period to rectify the non-compliance. Where the pool is still not compliant at the follow up inspection, the council can issue an infringement notice and fine the pool owner

There are no pool inspection accreditation arrangements in place and it is up to individual local authorities to assess the suitability of pool inspectors.

There is not a state swimming pool registry but rather each local government authority keeps its own records. The State, through the Building Commission, does provide guides on swimming pool and spa safety.

The key issue to consider with respect to the Western Australia model is the relative merit of periodic inspection of all pools compared to the approach in NSW and Queensland of mandatory inspections of higher risk pools and of pools subject to sale and lease.

7.5 Conclusion

From the survey of other jurisdictions the following matters are seen to be worth further consideration for application to NSW:

Queensland

- » Adoption of a state swimming pool standard
- » Establishment of a Pool Safety Council
- » Ability for the purchaser of a property with a swimming pool that is non-compliant to take up responsibility for achieving compliance under certain conditions, including timeframes
- » Ability for suitably qualified pool inspectors to undertake minor repair work
- » Greater role for pool certifiers with non-compliant pools
- » Greater flexibility with local council fees
- » Reporting and follow up arrangements for immersion events reported to hospitals
- » Simplified settlement of disputes regarding pool assessments
- » Using the guidance documents for pool owners and for pool professionals as a model for such documents in NSW.

Western Australia

- » Cost and compliance benefits of a periodic inspection program of all pools
- » Pros and cons of a devolved pool registry to local government
- » Using the Rules for Pools as a suitable model for developing a guidance document for pool owners and the community in NSW.

8 Part C: Key issues and reforms

This part of the report undertakes the analysis based on information and research collected and summarised in Part B. Chapter 8 summarises the feedback received from both the questionnaire and submissions. Chapter 9 is a key chapter in this report as it analyses all the issues that have been identified and reaches conclusions on each issue. This chapter approaches the review from what could be termed a micro perspective, assessing individual issues; however the analysis is constrained by an effort to ensure consistency across issues.

In contrast, Chapter 10 adopts a macro perspective, analysing the overall regulatory system against the principles for good regulation set out in Chapter 4.

Finally Chapter 11 presents both the findings of the review and the recommendations for changes, while Chapter 12 provides a suggested but not definitive implementation plan.

8.1 Overview of feedback received from discussion paper

8.1.1 Questionnaire

There were 126 responses to the questionnaire from the following sources:

Source	No. of responses
Pool owner	9
Council employee	55
Water safety advocacy member	2
Industry member	30
Other	30
Total	126

The full details of the results from the questionnaire are provided in Appendix F and are summarised below:

Pool safety standard

Strong support for:

- » State control of when and if the state adopts a national pool standard (21 per cent opposed or unsure)
- » Access for industry and public access to the details of the pool standard
- » Single pool barrier standard for all pools (33 per cent opposed or unsure)
- » Interpretation service to clarify meaning of the standard
- » Temporary pool fencing standard or requirement

- » Testing and identification system for pool barrier material (25 per cent opposed or unsure).

Exemptions

Strong support for:

- » Phased withdrawal of exemptions
- » Additional controls for sale and use of portable pools and spas.

There was a strong view that there was inadequate guidance to councils on how to assess applications for pool barrier exemptions.

Swimming pool register

On a range of 0 (not useful) to 10 (very useful) the average rating for the register was 5.4.

Role, function, training and fees for certifiers

There were divided views on whether certifiers should be able to undertake minor repairs, with just over half of respondents in support (53 per cent).

Strong support for:

- » Full documentation of each pool inspection, including photographs
- » CPD requirements for pool certifiers
- » Requirement for council certifiers and A1 to A3 building certifiers wishing to do pool certification to do the E1 training (35 per cent opposed or unsure)
- » Suitable training for pool barrier installers
- » Additional support and accountability mechanisms for certifiers, including help line, peer review, practice guide and audit program
- » Greater fee flexibility for councils.

Divided views on:

- » Broadening the pre-qualification requirements for entry to E1 course (52 per cent in favour)
- » National recognition of the E1 course by ASQA (59.5 per cent in favour).

Sale/lease provision

Strong support was indicated for commencing sale/lease provision as planned/legislated.

Moderate support was indicated for:

- » Allowing property purchasers to be responsible, under certain conditions, for achieving compliance for non-compliant pools (59 per cent in favour)
- » Expanded pool inspection regime (62 per cent in favour).

Compliance and enforcement

Strong support for:

- » Clear explanation provided by certifier or council where a pool is non-compliant as to why and options to address non-compliance
- » Greater responsibility for pool certifiers to resolve non-compliance matters before the council becomes involved
- » More consistent approach by councils to the design and undertaking of pool compliance programs.

Education

Strong view indicating that not enough is being done to educate pool owners, users and the community on pool safety.

Swimming Pools Act and Regulation

On a scale from 0 (totally unclear) to 10 (totally clear), the Act and Regulation are rated an average of 5.

8.2 Submissions

In general the submissions were supportive of the need for reform and the approach to reform outlined in the Discussion Paper and supported the sale and lease provision not being further deferred. Set out below are highlighted areas of difference with the approach set out in the Discussion Paper as well as additional issues not covered in the Discussion Paper.

Different views

Issue
Transfer of compliance obligation from vendor to purchaser: Concerns raised by Australian Institute of Conveyancing that unless information is provided to purchaser on nature of non-compliance, the provision would distort the market (it should be noted that full disclosure is part of the proposal). The Hannah Foundation opposed the approach in principle. HIA proposed that properties with non-compliant pools be able to be marketed but must be compliant by settlement. Law Society stated that such a transfer is not feasible in the case of an auctioned property as not feasible to negotiate the basis of the transfer (it should be noted that in Queensland all bidders in an auction of a property with a non-compliant pool are given the non-compliance statement).
Single state standard: A substantial number of the submissions (as well as the questionnaires) supported a single state standard on the basis of greater control of what is in the standard, less frequent changes and ability to document the standard without copyright issues.
Some concerns were raised about allowing certifiers to undertake minor repairs on the basis that it creates a conflict of interest or duty or disadvantages certifiers not able to do repairs (CPD Training, HIA, Triton Pools, Law Society).
CPD Training did not support the E1 course being nationally recognised by ASQA due to concerns about how a nationally focused course would address NSW needs while the Samuel Morris Foundation expressed concern about the quality of some registered training organisations.
A number of submissions proposed a staggering of the commencement of the sale and lease provisions, with leases starting on 29 April 2016 and sale commencing either six months (NSW CDRT, CPD Training) or twelve months later (REINSW). However, the Law Society opposed staggering of the sale and lease provisions, noting that both apply to strata title properties.
A number of submissions raised the issue of testing materials used for pool barriers to ensure they are fit for purpose (Hannah's Foundation, some certifiers).

Issue
A number of the submissions (REINSW, Triton Pools) queried the wording in the Discussion Paper regarding pre-qualifications for entry to E1 training that implied requiring experience in building and/or swimming pools and argued that the focus should be on the training undertaken, not the existing skills and experience.
A number of the submissions including SPASA queried the interpretations and suggested actions in the table setting out interpretation issues for the barrier standard.
SPASA raised the issue of whether requiring documentation of the inspection of pools would conflict with privacy requirements.

Additional issues

Issue
Australian Property Institute raised the issue of owner's corporations not complying with an order under Section 23(1) where a swimming pool is part of the common property, leading to sale falling through.
Campbelltown Council and Randwick Council proposed that any pool installed in accordance with the SEPP exempt and complying development provision require a certificate of compliance prior to use and the development standard be added requiring the pool to be registered.
Campbelltown Council proposed that the certificate of compliance be amended to reference the applicable standard for the pool.
NSW CDRT suggested that risk factors be identified and recorded in the register to facilitate council risk based inspections.
NSW CDRT proposed an expanded and more consistent risk based inspection program by councils.
Randwick Council proposed that the focus of any Section 22 exemption should be on developing an alternative solution to maintain pool safety.
SPASA and Triton Pools proposed the establishment of a Pool Safety Council and that the Council, rather than individual councils have responsibility for clarifying any interpretation issues regarding the standard.

9 Assessment of key issues

A number of key issues were identified from the terms of reference, research, discussions with stakeholders and were identified and explained in the Discussion Paper.

The issues have been divided into ten categories which are as follows:

1. Pool safety standards
2. Exemptions from the pool barrier standards
3. Treatment of portable pools and spas
4. Swimming pool register
5. The role function, training, accreditation, accountability and fees for certification
6. Inspection and certification requirements
7. Compliance and enforcement
8. Information, research, education and training
9. Governance arrangements, including the clarity of the legislative framework, ministerial and administrative responsibility for the Act and Regulation and a Pool Safety Council
10. Resourcing and funding the swimming pool safety function.

9.1 Pool safety standards

There are a number of issues relating to pool safety standards and work quality which are assessed in this section, these being:

- » Whether or not there should be a single standard for all pools and the merits of a national versus state standard
- » State based variations from the standard
- » Interpretation of aspects of the standard requiring clarity
- » Documentation of the standard in a form suitable both for the industry and consumers
- » Training and accountability of pool barrier installers
- » Approach to temporary pool fences
- » Issue of fit for purpose barrier materials.

9.1.1 Single versus multiple standards and national versus state standard

There are three different standards that apply in NSW, depending on when the swimming pool was constructed:

- » AS 1926-1986 Fences and gates for private swimming pools: used for pools constructed up to 30 August 2008

- » AS 1926.1-2007 Swimming pool safety, Part 1 Safety barriers for swimming pools: used for pools constructed from 1 September 2008 to 30 April 2013
- » AS 1926.1-2012, Swimming pool safety Part 1 Safety barriers for swimming pools: used for pools constructed from 1 May 2013

There were other Australian standards over this period, namely AS 1926-2003 and AS 1926-2010, but these were not applied in NSW.

In addition the *Swimming Pools Act 1992* has been amended eight times over the period from 1992 to the current period and hence eight different versions of the Act apply for eight different time periods. There were also three versions of the Regulations (1992, 1998 and 2008).

The issue of multiple versus single standard is linked to the issue of national versus state standard.

NSW, under the Swimming Pool Regulation 2008 (section 8) requires that swimming pools must be designed, constructed, installed and maintained in accord with the BCA. The BCA in turn calls up the latest version of the Australian Standard for pool barriers, the latest being AS 1926-2012. This means, going forward, that each variation in the BCA, which could be activated by a revision to the Australian Standard for swimming pool barriers, will result in a new standard that will apply to all pools built after that date. Hence, a significant factor in deciding whether or not to adopt a state standard could be having greater control of when and if a new standard is introduced, particularly if it is intended to maintain a single standard and hence require all pools to upgrade to the new standard.

When Queensland introduced its new standard in 2009 it required all existing pools to be upgraded to that standard by no later than 30 November 2015, giving a five year transition period. At the same time power was given to local government to assess applications for exemptions where application of the standard could prove impractical.

The Queensland approach would make the assessment of conformity of pools with the standard easier to apply after the transition period but it would not necessarily make pools significantly safer or avoid multiple standards in the future. Future possible changes would need to be assessed on a case by case basis to see if they had a material benefit for safety and whether or not they should be applied to all pools or only to new pools. It should be noted that achieving a single standard or controlling the introduction of new standards need not require the adoption of a state standard. Western Australia has had in place the national standard AS 1926-1986 since 1993 and has not chosen to apply the changing national standard. That will change come May 2016 when it adopts AS 1926-2012 for new pools.

There are a number of relevant factors that need to be considered in forming a view of whether it is best to retain a national standard or adopt a state standard. These are summarised below:

1. Whether a state standard provides greater control of when and to what degree the standard varies?

Both a state and a national standard allow a state control of the form of the standard, the timing of any change and whether or not pool owners should be required to upgrade to the new standard. NSW has participated in the committees that are involved in the preparation of the Australian Standard. The evidence would indicate that NSW has not taken an active or coordinated approach to engaging with relevant stakeholders in the past. However, there is no reason not to take a more active and engaged approach in the future.

In addition to providing input at the drafting stage of the standard, NSW can and has decided when or if to adopt the latest standard or if to use regulation or the BCA to vary certain aspects of the new standard.

Finally, it is a state decision whether a new standard applies to new pools or all existing pools are required to upgrade to the new standard. Such a decision will be based on the materiality of the

changes and the assessed impact on pool safety and applies whether the standard is a state or national standard.

2. Would a state standard provide for greater ability to obtain interpretation of aspects of the standard requiring clarification?

To date the answer would be that a state standard would facilitate timely interpretation of matters requiring clarity. The Australian Standard is developed by a committee that has not had an ongoing role and has not felt it was in a position to provide clarification. However, Standards Australia advises that the provision does exist to provide interpretation and this would be facilitated if jurisdictions could both coordinate within and between jurisdictions the identification of issues requiring interpretation. This matter is further addressed in section 9.1.3.

3. Does a national standard restrict the ability to document the standard for both the industry and the community owing to copyright restrictions?

Australian Standards are subject to copyright protection. However, this should not preclude NSW, possibly with other jurisdictions, negotiating for access to the standard for industry and regulatory use on agreed commercial terms. In regard to providing non-technical explanations to the community in general and pool owners, it is noted that both Western Australia and Queensland have produced such documents without apparent copyright protection problems.

This matter is further discussed in Section 9.1.4.

There would thus appear to be no in principle reason not to maintain the use of the national standard.

The second issue is whether to retain the existing multiple standards or apply a single standard to all pools as from a defined date. The latter approach is being followed by Queensland where all pools needed to be compliant with the standard by 30 November 2015.

The advantages and disadvantages of the two options are summarised in Table 9.1.

Table 11 9.1: Advantages versus disadvantages of multiple and single barrier standard

	Single barrier standard	Multiple barrier standards
Advantages	<ul style="list-style-type: none"> » Easier for compliance inspection and less chance of an incorrect assessment » The greater ease of assessment means that a broader range of persons could be considered for accreditation as pool certifiers » In principle, means greater pool safety as the latest standard is applied to all pools. The issue then becomes how significantly different the new standard is from earlier standards in terms of achieving pool safety » The exemption process can apply where there are significant problems in applying the standard in particular cases 	<ul style="list-style-type: none"> » Avoids the costs and inconvenience of moving all pools to a new standard » The differences between the standards 1986, 2007 and 2012 may not be that substantial in terms of safety enhancement to justify the cost and inconvenience involved

	Single barrier standard	Multiple barrier standards
Disadvantages	<ul style="list-style-type: none"> » Imposes a cost of conversion on pool owners, which will need to be compared to the potential greater safety of applying a higher standard to all pools » May lead to a lack of alignment with the national standard over time 	<ul style="list-style-type: none"> » Greater complexity in assessing whether pools are compliant » The greater complexity means that there needs to be higher standards for pool certifiers and hence a more limited number is available » Potentially results in a lower overall level of pool safety

In summary the major benefit of moving to a single standard is to create ease of administration and regulation of the barrier requirements, making the process simpler and more cost effective, and reduces the risk of errors being made in assessing compliance. The cost involved is the cost imposed on pool owners of upgrading to a single standard by a specified date.

The case for adopting a single standard would be strengthened if the latest standard was a substantial qualitative improvement on the earlier standards. However, the three standards that are in place in NSW, while varying in content, are not dissimilar. The core of each standard is the requirement for a 1200mm internal barrier and gate and latch requirement. The major changes between the three standards are summarised in Table 6.2 in Section 6.3.

The main problem with adopting AS 1926-2012 as the single standard is that, while it addresses a number of problems with the previous standard (AS 1926-2007), it still has a significant number of matters that need interpretation. These matters are set out section 9.1.4. A precondition for adopting a single standard would be to clarify in a satisfactory way these interpretation matters.

If this precondition was addressed there would be a case for adopting a single standard and requiring existing pools to transition to that new standard. The lack of major differences between the three standards would mean that there should not be major costs or difficulties in doing so. Conversely, the benefits will be in administrative and regulatory savings of a simpler system and not in terms of improving pool safety to a significant extent.

Assessment and proposed approach

On balance it is considered that the better course of action is to continue with the Australian Standard for swimming pools. This course of action is better provided suitable arrangements can be put in place to obtain timely and satisfactory clarification of issues of interpretation relating to the standard. It is also imperative that access to the standards is provided to the industry and suitable documentation of the pool safety requirements is made available for pool owners and the general community.

Use of the Australian Standard is consistent with NSW's support of the National Construction Code, provides the widest possible forum to draw on to review and refine the standard and maintains a broadly consistent approach across jurisdictions.

9.1.2 Variations from the standard

While NSW does call up the BCA as its basis for setting the standard for swimming pools and hence the Australian Standard, there are explicit areas where NSW has taken a different position from other jurisdictions.

Current variations from the national standard that apply in NSW are as follows:

- » NSW does not allow an out of ground pool wall to form part of a pool barrier which is allowed under the Australian Standard. This reflects in the *Swimming Pools Act 1992* a clear distinction between the pool, the barrier and the external land and requires these to be separate and distinct. This is effected through a variation in the BCA
- » NSW allows a spa pool to have a lockable lid, subject to certain requirements, whereas the national standard requires pool fencing. This is effected through a variation in the BCA
- » NSW also does not allow a lockable door or window to form part of a barrier, whereas the standard does. This is effected through provisions in the Act.

In addition, NSW has recorded in the BCA performance requirements relating to swimming pool standards, various differences from those that apply in other jurisdictions and has a greater focus on protecting young children.

Adopting the national standard does not eliminate the ability to prescribe variations to them that apply in NSW, if that is considered appropriate.

Assessment and proposed approach

NSW should continue to reserve the right to make variations to the standard where it considers it appropriate. It is suggested that the sole criteria for making variations should be to ensure effective and efficient pool safety. Of the current three variations, two have appropriate justification based on this criteria while the lockable lid provision for spas should be reassessed as part of a broader review of what constitutes a spa.

9.1.3 Interpretation of the standard

It is inevitable that when a document as complex as an Australian Standard is produced there will be issues where clarification would be helpful. This is certainly the case with AS 1926-2012. It would be helpful if there was an avenue available for governments and regulators to seek clarification.

Standards Australia appoints technical committees to prepare and review each of the standards. There is a committee that undertakes this role for AS 1926. The committee has an independent chair and is constituted with representatives from the following organisations:

- » Association of Accredited Certifiers
- » Australasian Wire Industry Association
- » Australian Building Codes Board
- » Australian Chamber of Commerce and Industry
- » Australian Competition and Consumer Commission
- » Australian Industry Group
- » Australian Institute of Building Surveyors
- » Australian Local Government Association
- » Building Professionals Board(NSW)
- » Bureau of Steel Manufacturers of Australia
- » Consumers Federation of Australia
- » Department of Health (Australian Government)
- » Kidsafe
- » NSW Fair Trading
- » Royal Life Saving Society Australia

- » Swimming Pool and Spa Alliance
- » Swimming Pool and Spa Association of Australia.

The Committee meets for one to two days to review the standard every two to three years.

There is merit in NSW taking a more active and strategic approach to participating in the Committee. Rather than having BPB and NSW Fair Trading as members it would be more appropriate to have a representative of the swimming pool regulator as the NSW member, thus creating also a direct link with the proposed Pool Safety Council.

Set out below in Table 9.2 are a number of interpretation issues that have been raised concerning AS 1926-2012.

Table 12 9.2 Key interpretation and dispute issues regarding AS 1926.1-2012

Issue	Possible approach
<p>1. Non-climbable zones (NCZ)</p> <p>Clause 2.2.3 states that barriers not less than 1800mm in height shall not require a NCZ and may be climbable on either or both sides. This appears to conflict with the principle of an effective pool barrier as it removes the child resistant feature of a barrier, by allowing it to be climbable. The standard provides no information or commentary that supports the concept of a barrier in clause 2.2.3 being both climbable and achieving the standard objective “to restrict entry to the swimming pool area by young children”. Nor does it necessarily meet the definition of a barrier (clause 1.3.1) being an assembly of components that restrict access to the pool. It is also in conflict with clause 2.2.4 which states that where a boundary fence acts as a pool barrier it shall have a height of not less than 1800mm on the inside and a NCZ formed on the inside. This is presumably to act as a deterrent for a child who has climbed to descend on the pool side. The argument in support of the standard is that an 1800mm fence is an effective barrier because the height will dissuade a child from climbing it. There is apparently no case of a child drowning after climbing a boundary barrier.</p>	<p>Seek to clarify the apparent conflicts between clause 2.2.3 and the other clauses cited.</p>
<p>2. Boundary barriers adjoining public land</p> <p>Boundary fences used as pool barriers are required to be at least 1800mm in height and have a NCZ, both as measured on the pool side. It is expressed in this way on the basis that the pool owner cannot control what neighbours do on their side of the fence. However, where the adjoining land is public land there may be features of the public land that negate the need for fences as high as 1800mm. For example, the land could slope sharply down, the fence may be non-climbable or the land could adjoin a beach where there is open water. In certain circumstances it would seem reasonable to allow the boundary barrier to be not less than 1200mm with non-climbable zone requirements applied to the outside of the barrier.</p>	<p>Provide guidance to council inspectors (and certifiers if outside a section 22 exemption) about appropriate circumstances for allowing greater flexibility with height and NCZ requirements for boundary barriers backing onto public land and the like.</p>
<p>3. The 500mm exclusion zone</p> <p>Clause 2.3.1 requires an exclusion zone of 500mm from a</p>	<p>Clarify to which barriers the 500mm exclusion zone applies</p>

Issue	Possible approach
<p>barrier within a property. It has been argued that the use of the term "within a property" excludes the need for an exclusion zone on the inside for a boundary barrier. However, having objects within the 500mm will reduce the integrity of the barrier for children from the adjoining property. A similar situation arises in relation to window (clause 2.6) and other barriers (clause 2.5) where an 1800mm height deterrent applies with no exclusion zone provision to maintain the integrity of the height requirement.</p> <p>As with issue 1 the argument is that the 1800mm height acts as an effective barrier.</p>	
<p>4. Permitted items within a pool area</p> <p>The standard is silent on what is or is not permissible in a pool area. The <i>Swimming Pools Act 1992</i> does address this with respect to outdoor swimming pools for moveable dwellings and tourist and visitor accommodation where all items not essential to the operation of the pool are excluded. However the Act is silent on what is allowed or excluded from the pool area of normal residential properties. The general principle should be the same for all properties and that is to remove all items that are not solely related to the pool use or operation from the pool area so as to minimise distractions and only utilise the pool for swimming. This is implied by the standards definition of a pool area as the area that contains the pool and is enclosed by a barrier.</p> <p>The argument for restricting the items that can be included within a pool area is to avoid distractions for adults in their role of supervision of children. At the same time there have been two court cases that make clear that seating and shade structures can be included in a pool area. Further, seating and shade structures in the pool area would not appear to compromise pool safety and indeed encouraging supervising adults to sit outside the pool area would appear counterproductive.</p>	<p>Clarify what is permissible within a pool area for residential properties, noting the desirability of having a consistent approach to exclusions from the pool area for all properties and to have a clear statement of principles.</p>
<p>5. Minimum distance between the pool barrier and the pool</p> <p>In NSW there is the exclusion of pool walls for above ground pools and out of ground pool walls as pool barriers. The reason is the principle of distinguishing between the barrier and the pool and seeking to have a zone between the two. Applying that principle consistently would seem to imply that if the barrier is breached by a child, the child should not immediately fall into the water. This means there should be a zone around the pool between the barrier and the water. This would also be available for servicing the pool and in the event that it is necessary to attempt to resuscitate a person. The standard objective is in keeping with this, with the objective being "to restrict entry to the swimming pool area by young children". The term pool area is used as distinct from the pool itself. The provision of an internal setback defining a pool area would clarify setbacks for retaining walls from a pool and allow the use of out-of-ground pool walls</p>	<p>Consider an amendment to the standard to define a minimum area between the pool barrier and the water.</p>

Issue	Possible approach
that meet this requirement via a cantilevered pool coping.	
<p>6. Whether the pool area can be used for general access</p> <p>Both the standard and the Act are silent on whether the pool area can be used for general access to buildings and structures on the property. In principle the pool area should be only for the purpose of swimming and not be an access zone to other areas as the greater the range of other uses the greater the probability that the pool gate will be propped open for ease of access.</p>	<p>Amend the standard or Act to exclude the pool area being an access zone to other areas.</p>
<p>7. Posts, tree trunks and vegetation within the NCZ</p> <p>Under clause 2.2.1 a zone consisting of a space with a radius of 900mm from the top of the barrier must be a NCZ which has been interpreted to exclude all objects within the NCZ. However various objects may not be climbable such as exotic tall grasses, posts and awnings and posts. It is noted however that the clause does refer to "objects or plants that will facilitate climbing".</p>	<p>Confirm that the standard excludes only climbable objects from the NCZ.</p>
<p>8. Height of latch</p> <p>The general requirement under the standard is for the latch to be 1500mm above ground level. Clause 2.4.2.2 provides certain alternatives where the height is less than 1500mm. The previous 2007 standard required, in addition to the 1500mm minimum height, for the latch to be also not less than 1400mm above the highest lower horizontal barrier or gate part. This is not in the 2012 standard which means that the latch could be within 900mm reach of a child. However, clause 2.4.2.2 cannot be read in isolation from clause 2.4.2.3 which states that a latch located at a height less than 1500mm above ground shall have a shielded latch.</p>	<p>Confirm the latch requirements for a pool.</p>
<p>9. Failure of gates and latches</p> <p>The weakest link in a pool barrier is the gate and the latch as these are moveable parts that have a restricted area to align for compliant operation. These are subject to more wear and tear than the other parts of the barrier. This is well demonstrated in data collected by the NSWCDRT where the most frequent non-compliant part of the barrier in the case of child deaths is the gate or the latch.</p> <p>Pool areas can have ongoing change to the level of wetness in the surrounding ground and this can lead to ongoing movement in the gate post resulting in non-alignment of the latch. One way to address this is to require the gate and supporting posts to be a self-contained unit with a more effective footing against movement and for a tolerance to be built in for the alignment of the gate latching operation.</p>	<p>It is suggested that consideration be given to upgrade the requirement for the pool gate, gate posts footings and latch so that the gate footing is effective against soil movement and there is a reasonable tolerance for alignment of the gate latching operation.</p>
<p>10. Wet edge or infinity pools</p> <p>Wet edge or infinity pools can create a safety issue due to the water being both in the waterfall and the collection pond. This would appear to indicate the need for the waterfall and</p>	<p>Require a barrier to restrict access to the water fall and collection pond for wet edge pools where they are greater than</p>

Issue	Possible approach
<p>collection pond to have a barrier to restrict access.</p> <p>Wet edge pools also can be designed such that the wet edge creates a barrier in the form of the pool wall. It is not clear under NSW legislation whether this can be treated as a pool barrier.</p> <p>The standard objective is in keeping with this objective being "to restrict entry to the swimming pool area by young children". The term pool area is used as distinct from the term the pool.</p>	<p>300mm depth.</p> <p>Clarify whether the wet edge of the pool, if creating a barrier of 1.5m or greater can be used as a barrier.</p>
<p>11. 1800mm fall deterrent within standard</p> <p>The 1800mm height deterrent within the standards applies to a number of areas, however only one has a NCZ. Need for standard to be consistent on application of restricting entry to a pool area by a young child.</p> <p><u>Boundary barrier</u></p> <p>Clause 2.2.4</p> <p>1800mm fall deterrent, with NCZ 5 from top of barrier</p> <p><u>Retaining wall above pool</u></p> <p>Clause 2.5</p> <p>1800mm fall deterrent, no NCZ</p> <p><u>Window</u></p> <p>Clause 2.6</p> <p>1800mm fall deterrent, no NCZ</p> <p><u>Balcony over pool area</u></p> <p>Is silent in 2012AS (left out), 2007AS clause 2.9</p> <p>1800mm fall deterrent, no NCZ</p>	<p>Standards to review to have a consistent application of the 1800mm height fall deterrent for all to have a NCZ or all to have no NCZ</p>
<p>12. Restricting entry to a pool area</p> <p>Restricting entry to a pool area by a young child has developed into two main situations:</p> <ul style="list-style-type: none"> » Climbing over a barrier (1200mm barrier) » Climbing down from the top of a barrier (1800mm high barrier) <p>The standards provide no commentary or information to explain the differing principles and requirements for each type of barrier.</p> <p>Climbing dynamics for a young child climbing up differ from climbing down. Need to address how is the climbing dynamic applied to the 1800mm high barrier and is the fear of falling applicable to a young child or is this a concept they are yet to grasp in the same way a young child fails to grasp the danger of pool water.</p>	<p>Standards to provide commentary explaining the different application of a 1200mm climbing up barrier to an 1800mm climbing down barrier.</p>

Beyond addressing specific issues with respect to the current standards, the ongoing issue of how to identify and address matters relating to the standard and its interpretation require clarification. Standards Australia, which oversees the work of establishing and maintaining the Australian Standards, is concerned to not be drawn into a de facto regulatory role, given that it establishes the

standards through technical committees that operate on a voluntary basis and it is governments that have cited these as regulatory standards. Where there is an interpretation issue, its preferred approach is to consider a request for a public ruling. Where there is a disagreement with a standard this can be progressed through a request for a revision or amendment to the standard.

There will always be issues raised by practitioners as they apply the standard to specific cases. Some of these will involve determining how the standard applies in a specific case with unusual features while other issues may require the standard to be reinterpreted. This requires an ongoing process to collect, assess and action these issues.

Standards Australia has advised that it consider requests for public rulings on the interpretation of the standard as well as requests to revise or amend a standard. In order to maintain the consistency and integrity of the standards the best approach where there is an issue of interpretation or disagreement with the standard is to use this avenue. It would be impractical and inefficient to allow any and all parties to raise issues of interpretation directly with Standards Australia. A better approach would be to have a peak council such as a Pool Safety Council which would assess interpretation issues and decide which should be submitted to Standards Australia for clarification. It would also be desirable to have a coordinated inter-jurisdictional approach.

Where there are matters regarding the standards that are not able to be satisfactorily resolved with Standards Australia or matters relating to the regulatory framework generally, this could be handled by the Pool Safety Council and then communicated to the industry. The role and functions of a possible Pool Safety Council is addressed in Section 9.9. However, it is highly desirable to have a consistent approach to pool safety across jurisdictions and hence every effort should be made to obtain interpretation of the standard from Standards Australia.

Assessment and proposed approach

NSW needs to take a more proactive approach (along with other jurisdictions) to the setting and reviewing of the barrier standard and not allow it to be determined as a purely technical exercise by the industry and technical specialists.

It is proposed that a suitable forum be established in NSW to identify and assess matters relating to the standard that require interpretation or clarification or where it is considered that NSW should take a different approach to the standard. In Section 9.10 it is proposed that a Pool Safety Council is established and this is considered to be the appropriate body to advise the Government on pool safety standards.

It will also be necessary to negotiate with Standards Australia, in consultation with other jurisdictions, on establishing a mechanism for submitting and having issues relating to the standard clarified.

Finally, it is proposed that NSW replace the current representatives, BPB and Fair Trading, with a representative of the swimming pool regulator, which will also create a direct link to the proposed Pool Safety Council.

9.1.4 Documentation of the standard

Standards Australia entered into an agreement with SAI Global, whereby SAI Global took on the role of commercialising the Australian Standards and for which it pays an annual royalty to Standards Australia. In 2006 the Productivity Council prepared a Research Report into Standard Setting and Laboratory Accreditation²³. Rather than recommend that Standards Australia make available the standards free, it recommended that government agencies responsible for relevant regulations enter into funding agreements to make relevant standards available.

²³ Productivity Commission, Standard Setting and Laboratory Accreditation, Research Report, November 2006

This has occurred with the Commonwealth Department of Health entering into an arrangement with SAI Global to make e-health related standards available. The State Library of NSW has purchased subscriptions for the full catalogue of Australian Standards which are available online for free view only.

An arrangement could be entered into with SAI Global to make AS 1926.1-2012 and other relevant standards available to the NSW industry in return for a fee. This could be broadened to an across jurisdictions approach. The fee could be funded from a supplement to the relevant accreditation and license fees or by part of a fee for swimming pools registration.

However this does not address the need for a publicly available simple explanation of the standard directed at the general community, including pool owners. This is a significant issue as it is a very difficult position for a Government to be in to prescribe a standard and not be able to communicate that standard to the community in a simple and easy to understand way. Queensland has produced documents explaining the pool barrier standard applying in Queensland, one directed at industry²⁴ and one at pool owners and the general public²⁵. This is despite the barrier standard being based on AS 1926-2007. Similarly, Western Australia has produced a comprehensive guide directed at the industry, pool owners and the general community²⁶, despite the fact that it is based on AS 1926-1993. Moreover, Western Australia is adopting AS 1926-2012 from May 2016 and will have available an updated guide that covers that standard.

Hence, it would appear that it is possible to document the pool barrier safety requirements for the community in a way that is both informative and does not breach the copyright attached to the standards.

The position in NSW is that there is no publication setting out the pool safety requirements. At present the public is directed to their local library to view AS 1926-2007. This is quite unsatisfactory on a number of levels:

- » Inconvenient to have to access the document in hard copy form in a library and not have it available when viewing the pool area
- » The standard is a technical document and is not designed to be read and understood by the general community
- » Accessing the 2007 version of the standard means the changes incorporated into the 2012 version are not taken into account.

Assessment and proposed approach

It is axiomatic that where government imposes regulatory requirements on its citizens it must not only ensure that they are effective, efficient and equitable but also must adequately explain and document these requirements in a way that is accessible to the general community. Asking the community to go to their local library and read a highly technical document that is written for technicians and is out of date is not satisfactory.

It is proposed that using both the Queensland and Western Australian publications as useful models, NSW should develop a publication directed at pool owners and the general public explaining pool safety requirements. This publication should be reviewed and endorsed by the Pool Safety Council

²⁴ Queensland Department of Housing and Public Works, Queensland Development Code Mandatory Part 3.

²⁵ Queensland Government, Guidelines for pool owners and property agents, October 2015

²⁶ Western Australian Government, Department of Commerce, Building Commission, Rules for pools and spas

and will need to be the subject of discussion with SAI Global to ensure that there is no breach of copyright provisions.

9.1.5 Training and accountability of pool barrier installers

Under the current licensing rules of the *Home Building Services Act*, persons installing fences do not need a license if the value of the work is \$5000 or less. Previously this was \$1000. The increase in the value threshold means that a substantial number of persons installing pool barriers are not licensed and there is no regulatory mechanism to ensure that they install pool barriers in line with the standard or have the requisite training and skills.

At the same time, the absence of licensing for pool barrier installers doing work under \$5000 does not mean that they are not regulated. Contractors in NSW who perform residential building work under \$5000 in value and are not regulated under the *Home Building Act* are regulated under the Australian Consumer Law (ACL) and have statutory obligations to consumers. Under the ACL, the trader guarantees that the services will be provided with acceptable care and skill and knowledge. If a consumer hired a contractor to install or repair a pool barrier and it was found that it was not fit for purpose then the consumer can seek assistance from NSW Fair Trading to resolve the dispute with the contractor or enforce their consumer rights through the NSW Civil and Administrative Tribunal.

From discussions with council inspectors it would appear that a significant number of persons installing pool barriers are not aware of the regulatory requirements and standards. This reflects in pool barriers being installed for new pools which are non-compliant and need to be corrected before they can be certified. While the use of ACL will provide a means of redress for consumers who are aware of their rights after the event, it does not necessarily address what appears to be the underlying problem of lack of contractor knowledge or awareness of the barrier standards. The most effective way to achieve that would be to require pool barrier builders/installers to be licensed and impose as a condition of the license having suitable knowledge and training in the pool barrier standards. It is acknowledged that this is a partial reversal of a deregulation that occurred in response to an IPART report²⁷ whereby licensing was removed for all fencing costing less than \$5000. However, it is suggested that regard needs to be had to the safety aspects of pool fencing which is not captured in the metric of the level of expenditure. There may also be suitable mechanisms other than licensing that facilitate achieving training for persons installing pool barriers.

Proposed approach

It is proposed that discussion occurs with Fair Trading and the industry about identifying suitable mechanisms to ensure that pool barrier builders and installers be required to have the necessary training and knowledge to install compliant pool barriers.

9.1.6 Temporary pool fencing

There is no standard for temporary pool fencing in place in NSW though there is a standard for temporary pool fencing in Queensland. Consideration needs to be given to different circumstances where a temporary fence may be required and what the requirements would be in those circumstances.

During the construction stage there is no water in the pool and hence the safety issue is not drowning (though that may be an issue where a pool is partially filled during construction with rain water) but rather falling into an excavated hole. This requires the normal safety barriers that would

²⁷ Independent Pricing and Regulatory Tribunal, 'Reforming Licensing in NSW-Review of Licence Rationale and Design, Final Report, August 2015

apply on a site in such circumstances. Upon completion of the pool, the pool is not able to be filled until the barrier has been installed and determined to be compliant.

For an existing pool there will be occasions where work will be undertaken on the pool and/or the pool area which may require the removal of the existing fence. One approach that could be adopted in such a case is to remove water from the pool and put in place a suitable construction safety barrier. However, where it is decided not to remove the water the requirement must be that a temporary pool fence is put in place that conforms to the barrier standard.

Proposed approach

Clarity should be provided about the need for a suitable protective barrier during construction of a pool and for a temporary pool barrier conforming to the pool barrier standards where a pool area is being renovated with the existing fence removed.

9.1.7 Fit for purpose barrier materials

The barrier standard sets out the requirements which pool fencing needs to meet to be fit for purpose. Glass fencing is required to meet certain standards and the panel is required to be sold with markings indicating conformity with the standard. However, there is no requirement for such certification for other pool fencing materials.

Pool fencing looks very similar to garden fencing but garden fencing does not have the same strength and rigidity as required for pool fencing. It is possible that pool owners are using pool barriers that do not meet the fit for purpose requirements of the standard. Certainly during the public hearings that occurred as part of this process evidence was provided of non-compliant pool barrier materials being used.

This could be addressed at the purchase and installation stage though testing for strength and rigidity does require specialist equipment and hence is not practical. A better and more efficient approach is for the manufacturer or supplier to confirm fit for purpose requirements and have the product stamped accordingly.

Proposed approach

It is proposed that pool barrier material that meets the fit for purpose requirements of the standard be certified and stamped to evidence this. This will require discussion with ABCB and the Building Ministers' Forum.

9.2 Exemptions from the pool barrier standards

There are both legislative exemptions that apply to classes of pools and an exemption process built into the Act that is applied on a case by case basis by local councils. This section will examine the following issues:

- » The appropriateness of the existing legislative exemptions
- » The effectiveness of the current council determined exemption process under Section 22 of the *Swimming Pools Act 1992*.

9.2.1 Legislative exemptions

The legislative exemptions were removed in the 2012 amendments to the Act in respect of any new pools but grandfathered legislative exemptions apply to the following classes of pools:

- » Swimming pools on which construction started before 1 August 1990 or pools on small properties, that is an area of less than 230m², where construction started before 1 July 2010, are required to

have child-resistant barriers around the pool but the barrier does not need to be separate from the house so long as the means of access to the pool from the building is restricted (Section 8 of the Act).

- » Swimming pools on large properties, that is 2ha or more, where construction started before 1 July 2010, are not required to be surrounded by a child-resistant barrier so long as means of access to the pool from the house is restricted (Section 9 of the Act)
- » Swimming pools on waterfront properties, that is properties having a frontage to any large body of water where construction started before 1 July 2010 are not required to be surrounded by a child-resistant barrier, provided means of access to the pool from the house is restricted (Section 10).

With respect to pre 1 August 1990 pools and pools on small properties, the exemption provides that the barrier is not required to separate the swimming pool from the residential building so long as each doorway and each opening portion of a window giving access to the swimming pool is in accordance with the Australian Standards (it should be noted that the regulation references AS 1926.1-2007). For pre 2008 pools under the 1998 regulation child safe doors are not required to be self-closing and self-latching.

The reason for the exemption for pre 1 August 1990 pools was, presumably, that it would be unfair to impose an upgrade responsibility on pool owners retrospectively.

The rationale for the small property exemption was originally that it may be impractical or infeasible to apply a four sided barrier to a swimming pool for small properties and that having provided such an exemption it should not be removed retrospectively.

With large properties the original rationale would appear to have a number of aspects. The first aspect is that a large property creates its own barrier for young children in neighbouring properties in the form of the distance to travel while for children on the property this can be addressed by restricting the access from the home. The difficulty with this rationale is that it is inconsistent with the approach taken on normal size properties whereby it is considered that restricted access from the house is inadequate protection. The second aspect of the exemption may be that properties 2ha or more are typically in rural environments and in such environments there are often dams, ponds and other unfenced water bodies on the property. While this may be true, it is not a convincing reason for an exemption for the swimming pool which typically will be closer to the house and a more attractive target for a young child than a dam or pond. Further, a dam or pond will gradually deepen while a pool has instant depth. In recognition of the weaknesses of these arguments the exemption has been removed for pools post 1 July 2010 but has not been withdrawn retrospectively.

The rationale for the third category, properties on waterways, is difficult to understand. It means that a neighbouring child or a child visiting the location has no protection from the pool and that the children on the property have a standard of protection that is assessed as inadequate on a non-waterfront property. The possible explanation is that as a waterfront pool, the actual waterfront poses a danger to children in that it cannot realistically be fenced and hence the same approach should apply to swimming pools in the same location. If that is the rationale, then it does not seem persuasive. Young children at the waterfront will always be under close parental supervision while children at the house with a waterfront pool and those in neighbouring homes will not necessarily be under close, ongoing parental supervision.

In each case the principle of not acting with retrospective effect is in conflict with ensuring pool safety, especially for young children who are most at risk. As noted earlier, of the 54 young children aged less than 5 years who have drowned in private swimming pools in the period 2006-07 to 2014-15, 15 or 28 per cent of the total drowned in exempt pools, both in respect to pools built before 1 August 1990 and pools on large properties built before 1 July 2010.

Assessment and proposed approach

There is a strong case to remove the existing grandfathered exemptions, allowing a suitable period for owners to move to the new standard.

Such a removal of the exemptions would still allow for pool owners to apply to local councils under section 22 to see if they could establish a case for an exemption on the basis that the application of the current standard would be “impracticable or unreasonable”, subject to ensuring a satisfactory level of pool safety. The removal of the exemptions should be phased and proceed in combination with the changes proposed on the approach to Section 22 exemptions.

9.2.2 Section 22 exemptions

Under Section 22 of the Swimming Pools Act, local government can assess applications for exemption from the application of the barrier standard where the application of the barrier requirement is “impractical or unreasonable in particular cases”. This would provide a means to assess whether there is a case for currently exempt pools to continue to have some form of exemption from the standard and the form such an exemption should take.

However, the situation is that in general councils are reluctant to provide exemptions, possibly for concern that the exemption may lead to a drowning incident for which the council may be considered morally or legally responsible. In order to address this reluctance the OLG has produced a practice note (PN 17) to give guidance to councils in respect to applications for exemption. However the note is mainly a restatement of the legislation with some guidance on process and does not provide more specific guidance.

Beyond the issue of greater guidance being available to councils, there is a structural problem in the actual formulation of Section 22 which sets out two criteria for considering exemptions, these being:

- » That it is impracticable or unreasonable to comply with the requirements, or
- » An alternative solution is no less effective.

The structural problem with the formulation of Section 22 is that in regard to the first criteria for considering exemption, there should be a requirement that an alternative solution is required that addresses the problem of applying the standard and which provides a satisfactory level of pool safety.

The BCA is in fact a performance standard. This means that there are two ways to apply the standards:

- » It can be applied on a “deemed to satisfy” basis which means that provided the technical standard is fully applied it is deemed to meet the performance standard
- » Alternatively, an “alternative solution” can be followed whereby there is a variation from the technical standard but it achieves the performance requirement of the standard.

There are always challenges with the assessment of whether an alternative solution meets the performance standard, particularly as at present the performance standard is expressed in qualitative terms. However, the ABCB is working to incorporate quantitative performance requirements over time.

It would be desirable to rewrite Section 22 to make clearer that while the basis for deciding on an exemption to the technical standard is that the application of the standard in the particular circumstances is “impractical or unreasonable”, there is still a requirement to develop and put in place an alternative solution that achieves the objective of protecting young children.

The other category of exemption that councils can approve is where a person on the property has a disability which makes the exemption impractical. In this case an exemption can be provided but it is

particular to the person not to the property. Once again there should be a requirement to develop an alternative solution to protect young children while addressing the needs of the disabled person.

Assessment and proposed approach

There is a strong case to provide councils with greater guidance and support in their role of assessing applications for exemptions and for the approval of alternative solutions that still achieve a suitable level of pool safety. The focus should not be on the exemption but on ensuring that the modification to the barrier standard is necessary and that it achieves a suitable level of pool safety. This will require a rewrite of Section 22 to require an alternative solution to be put in place.

It is suggested that PN 17 is referred to the Cross Agency Advisory Group for review to achieve this purpose and that a communication network be established between councils that in addition to general communication on relevant developments on pool safety practice, exchanges information on case studies and approaches with respect to exemptions and the assessment of alternative solutions.

9.3 The case of portable pools and spas

Portable pools which are capable of containing water 300mm deep or greater are required to be fenced and as they meet the criteria of a swimming pool in the Act, they are also required to be registered. Hence there is in principle no exemption provided. However, the evidence indicates that there is a high incidence of non-compliance in regard to the fencing and registration requirements.

Spas in NSW do not have to meet fencing requirements, unlike the situation in other jurisdictions, and instead owners can have a lockable cover in place whenever it is not in operation, with the cover capable of being operated by a single person.

The Sydney Children's Hospitals Network has established the Portable Pools Safety Working Group which includes representatives from all relevant stakeholder groups. A report has been prepared which included a campaign to increase awareness about portable pool safety²⁸. More recently an issues paper has been produced with a range of reform options identified²⁹.

The NSWCDRT, in their study of child deaths over the period 2007 to 2015, identified that nearly a fifth (19 per cent) of drowning deaths or ten occurred in above ground portable pools, with all of these pools unfenced. This represents the death on average of 1.2 young children each year in portable pools. In addition there is the incidence of near drownings and the permanent health impact these have in a significant proportion of the cases of near drowning.

Portable pools have features that create a higher risk than other private swimming pools.

First, according to subdivision 30 of the SEPP (Exempt and Complying Development Codes) 2008, portable swimming pools do not require a Development Approval from local councils if the pool does not exceed 2000 litres in capacity and does not require structural work for installation. There is also no requirement for a Principal Certifying Authority (PCA) to inspect the final pool fence to make sure it is compliant with the legislation.

Second, portable pools can be purchased from a wide variety of retail outlets and do not have to be sold with pool fencing when they are capable of being filled to a depth of 300mm or more. Further, they can be bought second hand or online. While there is a requirement for warning signs to be on

²⁸ Kids Health, Children's Hospital Westmead, Kids can drown without a sound, Final Report, June 2013.

²⁹ Children's Hospital Westmead(CHW), Swimming Pool Safety Working Group, Portable Pools Issues Paper

the portable swimming pool these are not necessarily prominent and there is evidence that both purchasers and retail outlets do not understand the legal requirements involved.

Third, the cost of adding a pool fence and the effort involved tends to act as a distinct disincentive to pool fencing. Portable pools are in general purchased because they are cheap and can be easily relocated. It is inconsistent with those factors to spend a multiple of the cost of the portable pool on fencing. Further, to be effective the pool fencing needs to be on a hard surface which adds to the cost and limits its portability. For rental housing it is not likely or practical to add a hard surface.

Fourth, given their portability, they can be easily relocated and hence establishing compliance can be challenging.

Spas are not clearly defined in the legislation and there is evidence of portable pools being sold as spa pools which allows for the use of a lockable lid rather than a pool fence. Furthermore, there have been significant changes in spas over time with the advent of swim spas which are more like a swimming pool than a spa.

The Portable Pools Safety Working Group has made a number of recommendations for portable pools and spas, these being as follows:

1. Ongoing education campaign to promote portable pool safety
2. Mandate the registration of portable swimming pools that have a depth in excess of 300mm at the point of sale
3. Clarify the definition of a spa pool
4. Inclusion of a large warning sign on the bottom of each portable swimming pool that sets out the legal requirements clearly. This warning would draw to the attention of the pool owner and pool users the requirements for pool safety.

In their more recent report the options of banning portable pools or requiring them to be sold with fencing were canvassed. Banning is a relatively blunt policy instrument which will deprive many families of the inexpensive enjoyment of cooling off in summer. Requiring the pools to be sold with fencing is impractical given the range of possible types of fencing that would be suitable for a portable pool and the difficulty of stocking a suitable range of fencing.

The ACCC has mandated that warning signs should be placed on the bottom of portable pools, this commencing on 30 April 2014. However, the definition used in the Australian Consumer Law creates a gap with the labelling requirement. The law defines portable pools as a pool that is proposed for personal use and comprises inflatable pools of any depth, soft-sided pools of any depth and rigid sided structures holding less than 300mm. The exclusion of large rigid sided pools capable of holding more than 300mm creates a gap in the warning labelling area.

Assessment and proposed approach

There is clearly a higher risk with portable pools because of the high incidence of non-compliance in fencing. This would support the need for greater community education about the dangers of portable pools and the obligations to make them safe and compliant. There is also a strong case for placing greater restrictions and requirements on retailers stocking portable pools.

It is proposed that:

- » The SEPP (Exempt and Complying Development Codes) 2008 be amended such that in respect to portable pools handled under the SEPP it be a requirement that portable pool fencing is inspected and certified and the pool is registered before use
- » Retail outlets for portable pools be required to:
 - > have staff available to advise customers wishing to purchase a portable pool on their legal obligations as pool owners where the pool is of a depth of 300mm or more

- > require purchasers of portable pools to sign an acknowledgement of their understanding and commitment to the requirements of pool safety
- > have the pool registered on the swimming pool register at the time of sale, thus facilitating the ability of the relevant council to undertake a compliance check
- » Explore with eBay and other online retailers providing online sales of portable pools the possibility of providing information to purchasers about their obligations and register the pool on the swimming pool register
- » Include in community education programs specific reference to the obligations with respect to portable pools
- » Address the gap in the requirement for a large warning sign on the bottom of each portable swimming pool that sets out the legal requirements clearly, covering rigid sided pools holding more than 300mm
- » Seek to clarify with BCA and Standards Australia the definition of a spa, to ensure there is a clear distinction between a spa and a pool to justify the different barrier requirements.

9.4 Swimming pool register

Under the 2012 amendments to the *Swimming Pools Act 1992* a state register was established for swimming pools which was implemented on 29 April 2013 and required all swimming pools to be registered by 29 October 2013. As at 11 November 2015 there were 325,397 registered pools and spas. Of these 18,352 had been issued with compliance certificates. It is noted that over the last year the average monthly increase in compliance certificates has been 1000.

The prime role of the register is to record the location of all pools and to facilitate the checking of pools for compliance in respect to sale and lease transactions. Owners can insert details direct on the register as can council inspectors and pool certifiers. Pool owners are asked to self-assess whether the pool is compliant and are provided on the web site with guides for the various categories of pool in terms of period of construction.

From discussions with a number of Sydney and regional councils it would appear that there is a significant under-recording of swimming pools in the register. A number of councils that were interviewed had undertaken aerial surveys of their area and in each case where this was done the evidence indicated there was about a 10 to 20 per cent under recording of swimming pools. There is also certainly a major deficiency in recording portable pools. Moreover, it would appear with the delay in the commencement of the sale and lease provision and the decline in the communication program on pool safety and registration requirements, that new pools are not being registered as a matter of course.

The register was established within a very tight deadline and without any additional funding and as a result it has a limited functionality and certain deficiencies.

The main deficiencies with the registry are as follows:

- » Recording of the owner's assessment of whether the pool is compliant is not useful other than as an education device for owners. The assessment of compliance is a challenging requirement in which even experienced pool inspectors can disagree. There is no point in having pool owner's self-assess and record this on the register. There is the very real risk that the assessment is not correct but that it creates a false sense of security and safety
- » The current process allows pool owners to input information onto the register, which can lead to inaccurate information being recorded. In Queensland, where there is a registry, only authorised persons can input such as pool certifiers, council inspectors and the QBCC. This provides good quality control of the information being registered

- » There are significant gaps in the information recorded on the register, including:
 - > no information on the standard that applies to the pool
 - > limited information on any exemptions that apply
 - > where a pool is non-compliant there is no information on the reasons for non-compliance and what rectification work is undertaken and the outcome
 - > no history of pool inspections and outcomes
- » It would also be very useful for certifiers that are undertaking inspections of pools to record this in the register so as to discourage owners shopping around for another certifier if it is assessed as non-compliant
- » Due to the difficulties with using the register councils also maintain their own registers and this results in duplication of effort
- » The register has a very limited reporting function and it is not possible to interrogate the register and extract information from the register such as the number of pools which have had a compliance certificate issued within a defined period or in total
- » There is a problem with addresses of pools in regional areas as the register does not allow the recording of DP or lot number. Hence, for example, there are forty pools with the same address of Princes Highway, Eden
- » Properties with pools that have a current occupation certificate can use the occupation certificate as evidence of pool compliance. However, it is not possible to place the occupation certificate on the register, unlike a compliance certificate. It is suggested that a compliance certificate be issued for all pools that have been inspected and found to be compliant and the provision for an occupation certificate be deleted
- » There is confusion between the certificate of registration and the certificate of compliance which look very similar. It needs to be made explicit on the certificate of registration that it does not indicate compliance and a separate certificate is required for this purpose. In addition the certificate of compliance should clearly state against which standard the pool has been assessed
- » The register should act as the hub of a communication network for pool owners that channels relevant information and reminders and communicates on issues relating to pool safety. Local councils should be able to use the register to do mail outs to their residents. However the register as currently configured cannot for used for any of these functions.

Assessment and proposed approach

The first question to address is whether there is merit in having a state register or instead should it be devolved to each council to maintain its register within a common design and usage protocol, with a state level portal that enables the relevant agencies to access and aggregate the data. This is termed the federated model which is in fact what is being done with ePlanning, capturing information on development applications from councils IT systems with a state level portal.

However, it is considered that given that a state register has been established it should continue but be significantly upgraded to address the deficiencies identified above. A state register will facilitate a more consistent and effective communication program and facilitate effective monitoring of and reporting on the compliance program.

Addressing the deficiencies in the register will require funding being provided for this purpose. It is also important that councils and other key stakeholders, through the proposed Pool Safety Council, are fully involved in the redevelopment of the register. It would also be beneficial to examine the Queensland register as a possible model.

9.5 The role, function, training, accreditation, accountability and fees for pool certification

There are two requirements for certification of swimming pools under the Act:

- » Mandatory inspections of higher risk pools
- » From 29 April 2016 all properties with a swimming pool being sold or leased are to have a certificate of compliance in respect to the pool.

Under section 22B each council must have a program to inspect at least once every three years any swimming pool in its area on which there is tourist and visitor accommodation or on which there are multiple dwellings. Councils are able to expand the program of inspection beyond the mandatory categories of pools. A number of councils are undertaking a full inspection of all identified pools in their area over a four to five year period though most councils are only undertaking mandatory inspections and following up on requests for inspections or complaints.

Under the sale and lease provisions a property with a swimming pool requires a certificate of compliance before either a sale or lease can be transacted from 29 April 2016 onwards. Both council swimming pool inspectors and accredited private certifiers can inspect and provide compliance certificates which state if the pool conforms to the requirements of the legislation and the Australian Standard. The Building Professionals Board, which has a general role of accrediting, supporting and overseeing building certifiers of various categories, has developed a swimming pool certifier category, E1 and a training course structure and criteria have been developed. At present only one training organisation is providing the course.

As at late November 2015 there were 113 accredited certifiers, 85 accredited from the E1 course and 28 from mutual recognition. To date 117 people have successfully completed the E1 course, so there are a further 32 people who can apply for accreditation. Presumably the difference between the two numbers reflects people waiting to see whether the sale/lease provision will be proceeded with before they commit to accreditation and the costs involved.

Accredited certifiers and A1 to A3 building certifiers who are interested in undertaking swimming pool certification work can register their availability on the swimming pool register. As at early November, there were 163 private certifiers listed on the register, 81 being E1 certifiers and 83 being A1 to A3 building certifiers. It should be noted that there is likely to be a difference in availability of E1 versus A1 to A3 building certifiers to certify swimming pools. Building certifiers have a broader role with certifying buildings and are not likely to commit themselves full time to pool certification, unlike E1 certifiers.

In summary, there are 228 people who can undertake the role of private certification, including the 32 who have completed the course but have not yet applied for accreditation.

In addition to private certifiers there are council officers who undertake a pool inspection role and can undertake the role of pool certification. There would be several hundred such council officers operating in this role across the state.

Four topics have been identified and assessed in this area, these being as follows:

1. Role and function of certifiers
2. Accreditation and training
3. Support and accountability of accredited certifiers
4. Determination of fees.

9.5.1 Role and function of certifiers

While the role and function of a swimming pool certifier is reasonably well defined, there are a couple of issues which do require clarity:

- » Whether and on what basis council inspectors and accredited private certifiers can undertake minor repairs
- » Level of documentation that should support an assessment of a swimming pool
- » Relation between the accredited private certifier and the council when a pool is found to be non-compliant.

The first two issues are addressed in this section while the third issue is addressed under the section on compliance and enforcement.

There is a general informal practice followed by council inspectors where they find minor areas of non-compliance (for example, faulty lock or an out of date CPR poster) are repaired or rectified on the spot. This can avoid the need for a second visit and saves the owner the difficulty of locating a suitable person to undertake the repair and then get the council officer back. It also ensures the pool is made compliant with a minimum of delay.

In NSW accredited certifiers are not allowed to undertake repairs on the basis that there should be clear separation between the role of certification and the actual work undertaken to make the pool compliant.

In contrast, in Queensland, there is provision for certifiers with suitable skills and experience to undertake minor repairs up to a certain maximum value. All accredited certifiers are excluded as a matter of course from undertaking minor repairs but there is provision for those that have the skills to apply to have the restriction removed. What constitutes minor repairs is defined in the Building Regulation, under schedules 2B for an accredited certifier and 2C for a pool owner. The itemisation of permitted minor repairs is set out in detail in the regulation.

The issue is whether allowing the accredited certifier to undertake minor repairs compromises the regulatory role. On balance it is not considered that allowing an accredited certifier to undertake minor repairs would compromise the certifier role as the certifier is still responsible and accountable for the assessment of compliance and is equally accountable for the work undertaken. In some ways it is more effective and efficient if the person responsible for the work is required to certify that the work meets a prescribed standard.

It is true that in the *Building Professionals Act* there is a requirement for building certifiers to avoid a conflict of interest and hence not have a design or construction role with respect to a building that they are to certify. This conflict provision applies to Part 4A certificates and complying development certificates issued by certifiers. However, this conflict does not apply in respect to compliance certification and in the Review of the *Building Professionals Act* prepared by the author of this report, it is proposed that there be accreditation of persons to certify critical building elements and that those persons providing the certification can also undertake the design, installation or construction, provided they have the necessary skills.

The second issue is the documentation that a certifier should provide to support a certification. It needs to be noted that certification of a swimming pool is made at a point in time and the position can change quite quickly, not just because of actions such as propping open a gate but also with the wear and tear on the pool barrier. There is a compelling case for requiring both council inspectors and accredited certifiers to document their assessment fully with photographs that are timed and dated, and supplemented with notes setting out their assessment and the supporting reasoning. This documentation should be kept electronically on file. In Queensland it is in fact a relatively common practice to film as a movie the operation of the gate and the latch as part of the pool inspection documentation. This would enable a third party review and assessment to be made of the certification, in line with the proposal with regular audits of pool certification that is addressed under

compliance and enforcement. This approach was recommended by the 2015 Coronial Inquiry into a drowning death³⁰.

Proposed approach

It is proposed to:

- » Allow council and accredited private certifiers with the necessary skills to undertake minor repairs to pools that have elements of non-compliance which are capable of relatively easy rectification. What constitutes minor repairs should be clearly set out in regulation and be subject to the certifier having the prerequisite skills and experience to undertake the work.
- » Require council and accredited private certifiers to document each of their inspections and assessments with timed and dated photographs and supporting notes, which are permanently maintained and are able to be reviewed as part of an audit program.

9.5.2 Accreditation and training

Accreditation is the recognition that a person has suitable qualifications and experience to undertake a particular function, in this case to be a certifier of swimming pools. The accreditation role is undertaken by the Building Professionals Board and involves a number of elements:

- » Setting out the requirements for accreditation which is contained in the Accreditation Scheme
- » Assessing whether a person qualifies for accreditation
- » Providing or facilitating suitable training and support functions to assist accredited certifiers to undertake their task effectively
- » Investigating and, where appropriate, disciplining certifiers who have not conducted themselves in accordance with required standards of conduct and performance
- » Undertaking an audit and investigation program to monitor performance of certifiers, provide feedback and link to the education and training program.

In NSW there are at present three pathways for entry to becoming an E1 pool certifier:

- » Pathway 1: holding suitable qualifications which are A4 building certifier accreditation or contractors endorsed to construct swimming pools or undertake landscaping under the Home Building Act, together with satisfactory completion of the E1 course
- » Pathway 2: having suitable experience, being two years recent experience working for a local council carrying out pool barrier inspections and certification of at least 20 swimming pool barriers for compliance with the *Swimming Pools Act 1992* together with satisfactory completion of the E1 course
- » Pathway 3: accredited as an A1 to A3 building certifier who registers to undertake swimming pool certification, with no requirement to undertake the E1 course.

In addition to the above pathways a pool certifier from another jurisdiction can apply to be recognised as an E1 certifier on the basis of the principle of mutual recognition.

The reason for setting pre-qualification requirements is to ensure familiarity and understanding of the BCA and the Australian Standards which is core to assessing whether swimming pools are compliant.

³⁰ NSW State Coronial Inquest into the death of Sebastien Yeomans, Armidale Local Court, April 2015

In contrast, in Queensland there are not specific pre-qualifications to becoming a pool safety inspector other than successfully undertaking the course, obtaining professional indemnity insurance and being subject to the code of conduct.

Five issues have been considered under accreditation and training, these being:

1. Whether mutual recognition between Australian jurisdictions of the occupation of swimming pool certifier creates problems in terms of capability to assess pools against the NSW standards?
2. Whether there should be continuing professional development requirements for E1 certifiers?
3. Whether council pool inspectors and registered A1 to A3 building certifiers should be required to obtain the E1 qualification?
4. Whether the pre-qualifications for undertaking the E1 certifier course should be broadened to allow people with relevant roles in the building and pool industry greater opportunity to also practice as a certifier?
5. Whether there is merit in having the E1 course accredited by the Australian Skills Quality Authority (ASQA)?

Mutual recognition

Under the *Mutual Recognition Act* pool certifiers from any Australian jurisdiction can apply for accreditation to practice in NSW on the basis of their accreditation for the same role in another jurisdiction.

The issue is that different regulatory requirements and legislation can apply in different jurisdictions. This is the case, for example, with Queensland where certifiers only have to deal with assessing pools against one standard – the Queensland pool barrier standard – and NSW, where there are various standards, all different to the Queensland standard. Further, there is different legislation and regulation in NSW compared to Queensland. However if certifiers are considered equivalent occupations in NSW and Queensland then it would appear that a Queensland accredited pool inspector must be given accreditation in NSW.

The issue is not one of stopping certifiers from other jurisdictions from practicing in NSW but of ensuring that they have the necessary knowledge of the standards and regulatory requirements that apply in NSW. This may simply require imposing a condition on the accreditation that before practicing in NSW the interstate accredited certifier must satisfactorily undertake certain training in the standards and regulatory requirements or demonstrate that they have that knowledge.

It has been argued that the principles of mutual recognition does not allow for imposing requirements on the accreditation of interstate certifiers, that provided the occupation in question is equivalent between jurisdictions mutual recognition requires automatic accreditation. A distinction, however, needs to be made between professions that are automatically equivalent across jurisdictional boundaries such as medical practitioners, engineers and architects, for example, and those regulated professions where the regulations under which the profession operates differ between jurisdictions. Certifiers, both building and pool certifiers, are regulatory agents charged with the responsibility of implementing regulatory requirements in a particular jurisdiction. If every jurisdiction had the same regulatory regime and standards, mutual recognition could be automatically applied. However, that is certainly not the case with swimming pool regulation and certification. Hence in professions where there are different regulatory requirements and frameworks in place between jurisdictions, there is a valid need to ensure that a certifier from another jurisdiction applying to practice under the mutual recognition principles has the necessary knowledge and understanding of the “rules of the game”.

Continuing Professional Development (CPD)

At present there are no CPD requirements attached to being an accredited E1 pool certifier. The normal approach of the BPB is to require CPD for all the categories of certifiers. The BPB is giving consideration to whether this should now be made a requirement for the E1 accreditation.

While the E1 certifier is a quite specialised role and operates in a narrow area, the requirements of the role are quite complex, given the legislative and regulatory requirements and the multiple numbers of pool barrier standards that can apply, depending on when the pool was constructed, its maintenance and the nature of any subsequent work. For these reasons there would appear to be merit in allocating a certain number of hours each year to CPD, provided it is targeted at the specific function and responsibilities of E1 certifiers. This could include useful case studies that illustrate more general issues as well as guidance on assessing alternative solutions.

Requiring E1 qualification for council swimming pool inspectors and A1 to A3 building certifiers

At present there is no requirement for council pool inspectors to have the E1 qualification on the basis that most have substantial experience in inspecting pools. However, councils are able to designate any employees to carry out functions, including pool inspection and it would seem highly desirable that all council pool inspectors have undertaken the E1 course and are accredited.

A1 to A3 certifiers who register with the BPB can undertake pool certification. While building certifiers have extensive experience in assessing building work against the BCA and standards, the assessment of pools is very complicated owing to the multiple standards and the various savings provisions and requires detailed knowledge of both these standards and of the *Swimming Pools Act* and Regulation. Merit is seen in having building certifiers who wish to undertake pool compliance work either demonstrate their understanding of the requirements or, alternatively, undertake the E1 course.

Pre-qualifications for entering the E1 course

In the case of Queensland there are no pre-qualification requirements for those undertaking the training necessary to apply for accreditation as a pool certifier. In NSW, as outlined earlier in this section, there are three pathways for becoming an E1 certifier, each of which requires some level of understanding and familiarity with the BCA and Australian Standards. Given the complexity of the current pool standards in NSW there is merit in ensuring that persons have the appropriate skills and knowledge. However, it does not appear valid to impose relatively restrictive pre-qualifications for persons wishing to undertake training and be assessed for the role. A better approach is to expand the training requirements to cater for a broader range of possible applicants and expand the training requirements for persons without relevant building and swimming pool experience.

The fact that a person may come from another background such as finance, engineering or teaching should not automatically preclude the person undertaking the necessary training and being assessed for suitability for the role.

Accreditation of the E1 training course by ASQA (Australian Skills Quality Authority)

ASQA is the national regulator of Australia's vocational education and training sector. ASQA regulates courses and training providers to ensure nationally approved quality standards are met. ASQA registers training organisations (RTOs) to deliver the nationally recognised qualifications. ASQA is also responsible for accrediting national qualifications under the Australian Qualifications Framework (AQF). The AQF has ten levels of qualification starting with Level 1 – Certificate I and ending with Level 10 – Doctoral Degree. The current E1 Swimming Pool Certification training course (E1 course) is not designed to meet the ASQA requirements for accreditation as a Level 1 – Certificate I qualification under the AQF.

The current Queensland course "Course in Swimming Pool Safety Inspections – 3105QLD" is recognised by ASQA as providing training that leads to a statement of attainment and not a

qualification under the AQF. This national recognition means that any registered training organisation (RTO) that is assessed as having the qualifications and personnel necessary to deliver the training and with the course meeting the course criteria can deliver the course.

There are benefits seen in having the course accredited with ASQA, these being:

- » Frees the BPB from the responsibility of assessing RTOs for suitability for delivering the course which would become the role of ASQA as the national regulator. It is the observation of the reviewer that BPB has struggled in this role which has led to long delays in assessing potential course providers and the withdrawal of possible providers from the process
- » Uses ASQA to undertake the role of investigating any concerns or complaints about an accredited RTO providing the course
- » Provides to those undertaking the course national recognition for the course
- » Protects the State Government from any accusations about the adequacy of training provided
- » Facilitates an expansion in the number of RTOs who would consider providing the course and should create both greater innovation and competition in the provision of training.

It is noted that at this stage there is only one organisation providing E1 training in NSW and two have been approved to deliver the course and hence there is not a competitive market for training in this course. It is important that the number of course providers is increased in a timely and effective manner.

It is recognised that there is significant work required with preparing and taking the course requirements through the ASQA process. However, equally there are likely to be benefits derived from imposing that process on the course and there are substantial demands on the BPB personnel from undertaking its own assessment of RTOs and courses.

In regard to the document prepared by BPB, Course Criteria, Category E1-Accredited Certifier-Swimming Pool Certification Training Course, it is considered that BPB should undertake a review of documentation in the light of its experience over the last year. There are a couple of matters which would be worth reconsidering, including:

- » Whether it is realistic or desirable to have non-face to face course delivery available as an option for all units other than assessment. There is a place for online training but for a number of the units, particularly units 2, 3 and 7 this may require face to face training.
- » Whether the description of desired outcome of "basic understanding" is adequate for most of the units, particularly for units 2, 3, 4, 5, 6 and 7.

Proposed approach

It is proposed that the following changes in respect to accreditation and training are undertaken:

- » Subject to consultation with the Crown Solicitor, develop a process to apply to mutual recognition applicants for E1 accreditation that requires that they demonstrate the necessary knowledge and understanding of the NSW swimming pool standards and regulatory approach or undertake the necessary training
- » Require as a condition of accreditation that E1 pool certifiers undertake a required number of hours each year of relevant CPD
- » Require all council pool inspectors and A1 to A3 certifiers who wish to undertake pool certification work to either demonstrate their knowledge of the role's requirements or undertake the E1 course and in each case be accredited as E1 certifiers
- » Broaden the entry requirements for the E1 course along the lines of the approach undertaken in Queensland, but with the specification of possible pre-requisite training or knowledge to address any additional skills and knowledge that are considered essential

- » Have the E1 course submitted for national recognition and oversight by the ASQA, after a full review of the course criteria.

9.5.3 Support of accredited certifiers

Accredited certifiers undertake a regulatory role even though they are undertaking certification as a commercial business in the case of private certifiers. In undertaking the role they normally operate as sole traders and need support, including obtaining advice and being provided with guidance on issues associated with certification.

Council certifiers also need support as they are often a one person operation within a council and it is highly useful for them to be able to draw upon a broader experience base. It is highly desirable that there is a diffusion of knowledge and experience gained from pool inspection across councils so that there is a high quality and consistent approach across NSW. A particular area where this is highly desirable is in assessing exemptions under Section 22 where there is currently reluctance among most but not all councils to seriously consider and assess exemptions.

Beyond the benefit conferred on the certifier of having access to support and advice, there is a benefit of a greater consistency and quality of certification practice and the diffusion of best practice throughout the system.

As noted above there is at present no CPD requirements for E1 certifiers, in contrast to the other categories of accredited certifiers. In addition there are at present no mechanisms available which a pool certifier can draw on for assistance where there are difficulties in assessing the approach that should be taken. These could relate to interpretation issues about the standard or making a judgment as to whether modifications to a pool area constitutes the pool area being substantially altered or rebuilt and hence losing the savings provision of the Act. The need for advice and assistance is particularly acute in the early period for a new certifier but there are issues where even the most experienced certifier may require a sounding board. Without such support there is a distinct prospect of certifiers undertaking incorrect and inconsistent assessments, compromising the process of pool certification.

Mechanisms that should be considered for implementation include the following:

- » A help line that certifiers can call when they have a query regarding their certification work and particular inspections
- » A practice guide that would provide guidance to certifiers, acting as a form of manual that they can draw upon in the field. The guide would need to be overseen by a committee of suitably qualified people from both government and the industry and the guide would be subject to ongoing review and update. A good model to draw upon is the practice guide that is in place in Queensland for what are termed pool safety inspectors (pool certifiers in the NSW terminology)³¹. Clearly, the standards and regulatory framework differ between NSW and Queensland but it provides a very good structure and many of its features could be readily adapted for use in a NSW guide. What would be particularly helpful for a practice guide or manual would be a clear overview of the requirements that apply to pools built in different periods. The specific technical details need not be covered as they can be referenced in the legislation and standards but identifying all the relevant provisions that apply to particular types of pools would be of great assistance
- » A Review Panel that could have complex matters referred to it which need expert consideration as the matter may create a significant precedent.

³¹ Queensland Department of Housing and Public Works, Pool safety inspector guidelines, October 2015

Proposed approach

It is proposed that a program of support and advice be developed and implemented for E1 certifiers involving the following elements:

- » A hot line to provide over the phone advice
- » Peer review service where complex issues requires expert input can be discussed
- » Practice guide that sets out the approach to be followed by certifiers and is updated in the light of case studies and clarification of standards and which provides a tabulation of the relevant legislation and standards that apply to pools of different vintage
- » Linkage of the CPD and practice guide to the learnings generated from the audit program, the audit program being addressed in the following section.

9.5.4 Accountability of certifiers

It is often forgotten that pool certifiers, like building certifiers, undertake a regulatory function and their obligation is to undertake the regulatory functions as effectively as possible, in the public interest and not necessarily to deliver what the pool owner wants. Clearly there is some tension in this role, particularly for private pool certifiers, given that their client is the pool owner. However, this apparent conflict can be resolved by recognising that the pool owner has a legal obligation to have a compliant pool and to ensure it is operated in a safe manner. Both the pool owner and the certifier are subject to the same regulatory and legal obligations.

Nevertheless, given that certifiers are motivated by commercial considerations there is a need to have appropriate accountability mechanisms in place to ensure that certifiers are acting fully in accordance with their legal and regulatory duties. This same issue was addressed by the reviewer in the review of building regulation and certification in NSW³² and the approach set out in this section is fully consistent with the approach recommended in the other report which has received broad building industry support.

It is suggested that there are key elements in achieving a proper level of accountability:

- » Clearly documenting the required functions and behaviours
- » Communicating the requirements of the role to pool owners and the community in general
- » Monitoring, assessing and if necessary, acting on certifier performance
- » Achieving and maintaining a culture of professionalism.

These key elements are not present in the current system and these gaps need to be addressed as a high priority. The initiatives needed to ensure proper accountability are set out below.

Documenting the role: a practice guide

It is essential that there is clear documentation on the role and responsibilities of a pool certifier. There is no such documentation in place at present and hence there is a lack of full clarity about what is expected of a pool certifier. It is suggested that the following matters should be covered in such a guide:

- » The roles and functions of pool certifiers, the Government as the regulator and local government

³² This is addressed in sections 15.4 Accountability of Certifiers and 15.5 Professionalization of Certifiers, in Michael Lambert, Independent Review of the Building Professionals Act 2005, Final Report, October 2015

- » The role and use of the swimming pools register, including obligations in respect to recording information in the register
- » The barrier standards that apply in NSW, how to assess which pool should adhere to which standard and general pool maintenance requirements
- » Exemptions, variations and alternative solutions and the role of councils with exemptions
- » Pool and pool area compliance requirements
- » How to undertake a pool safety inspection and the requirements for documenting the inspection
- » The appropriate conduct by a certifier
- » The relation between pool certifiers and the local council
- » Administrative and commercial matters, including executing letter of engagement with the pool owner.

The guide not only provides clarity to the pool certifier but also can be used as a point of reference in discussions with the pool owner. Importantly it acts as a benchmark for assessing the performance of a certifier. If certifiers adheres to the guide it should be prima facie evidence that they are acting appropriately and conversely if they are not adhering to the guide it would be prima facie evidence that they are acting inappropriately. The guide would need to be regularly reviewed to ensure it reflects best practice.

Communicating pool requirements and the role of the certifier to pool owners and the community

In addition to the practice guide there is a need for a less technical document directed at pool owners and the general public which explains simply but accurately:

- » The regulatory requirements for private swimming pools
- » The responsibilities of swimming pool owners and users
- » The role of pool certifiers
- » The role of councils.

Both Western Australia³³ and Queensland³⁴ have documents of this nature which could be used as models for developing one applicable to NSW.

Supplementing this there should be community education programs directed at pool owners. This could be very effectively done by the issue of emails providing updates and reminders to pool owners about safety requirements.

Finally, it is proposed that there be a standard letter of engagement established that is executed by a certifier and pool owner whenever a certifier is engaged to inspect and advise on a pool. The letter should be relatively simple and short but should clearly set out the role and obligations of both pool owners and pool certifiers. It should be a requirement that all engagements of pool certifiers by pool owners are evidenced by the execution of the letter of engagement.

³³ Western Australian Government, Department of Commerce, Building Commission, Rules for pools and spas

³⁴ Queensland Government, Guidelines for pool owners and property agents, October 2015

Auditing and investigation

An important element of any accountability approach is for regular performance reviews and feedback to both those reviewed and, where appropriate, to certifiers in general.

A distinction needs to be made between investigations and audits. Audits are pro-active exercises that may target particular areas of activity (for example certification of strata development buildings in major metropolitan locations) or may select individuals and categories of certifier randomly. The objective is to assess what is the practice being undertaken both in the field and in the administration of certification and seek to identify and achieve best practice across all certifiers. There are two key objectives of audits:

- » To assess areas where improvement in certification practice can occur or areas where there is best practice which should be communicated generally to certifiers
- » To create a significant risk to certifiers who are not undertaking their role appropriately and hence achieve a positive change in behaviour.

Investigations are reactive in that they are directed at particular certifiers or groups of certifiers and particular developments and are usually initiated in response to a complaint or information provided to BPB.

Clearly investigations need to occur as a matter of course but it is important that there is also an active program of audits with linkages to mechanisms such as the practice guide, the types of courses provided under CPD and general communication with certifiers. It was noted in the recent review of the Building Professionals Act³⁵ that the Building Professionals Board does not undertake an audit of the performance of certifiers in general, due to inadequate resources. It was recommended that this deficiency needs to be rectified.

A culture of professionalism

Last but not least is what could be seen as more abstract and that is the creation and maintenance of a culture of professionalism among certifiers, such that it is the ethical and professional standards of the individual members of a profession that drives behaviour, not the threat of exposure or sanctions. Such a culture can be seen in professions such as medicine, architecture and engineering where the individuals and the profession are driven by the desire to do the right thing. Ultimately creating and maintaining such a culture is more effective than any number of external investigation and audit programs. In effect the certifier profession becomes self-regulated.

In the context of preparing the report on the Review of the *Building Professionals Act*, the Professional Standards Authority (PSA) provided a submission and this was followed up with a discussion with the PSA about how it could assist in the process of creating a culture of professionalism for all certifiers, given their important role in building regulation. The PSA is the national regulatory agency for professional standards and in this respect applies the professional standards legislation in each jurisdiction, acts as a regulator of professional associations and promotes research into professional standards. It has developed a model that identifies the forty elements of professionalism and uses this as a benchmark for assessing the professional standard of organisations. The four key elements of this model are as follows:

1. Implementing legislation, advocacy and responsiveness
2. Organisational governance, including business processes and quality improvement approach
3. External governance, public accountability, transparency and collaboration

³⁵ Michael Lambert, Independent Review of the Building Professionals Act 2005, Final Report, October 2015

4. Competencies and conduct, ethics and professional behaviour and standards and education.

The PSA can work in a collaborative manner with professional organisations with a view to improving their professionalism in terms of the model of professionalism and at a suitable point in their development they can seek to adopt a Professionals Standards Scheme and be overseen in that capacity by a Professional Standards Council.

The PSA undertook research into the professional groups in what it terms the built environment sector and has produced a research report on this topic³⁶. A risk assessment was undertaken of each of the major professional groups engaged in service delivery in the sector, including engineers, architects, surveyors, planners, building surveyors/certifiers, draftspersons and building designers and valuers. Interestingly it found that building certifiers (and by inference this would include pool certifiers) were at the high end of the risk spectrum across most areas of risk. Particularly relevant to their high risk position were the following attributes:

- » Complexity of legislation
- » Problems of accountability
- » Lack of emphasis on public interest
- » Lack of clarity about role
- » Lack of professional development schemes
- » Lack of support and sources for advice.

PSA has identified building certifiers as a priority area for both research and regulatory interest due to the identified areas of high risk and the important regulatory role they undertake in the building industry. The report on the review of the *Building Professionals Act* recommends that an alliance be formed between the Building Professionals Board, the building regulator, the PSA and the two certifier associations in order to work through the implementation of a culture of professionalism in the certifier profession.

Proposed approach

It is proposed that a number of initiatives be undertaken to improve the accountability and hence the performance of pool certifiers, these being:

- » The development and active maintenance of a practice guide for certifiers with the guide having the force of law in terms of the approach undertaken by certifiers
- » The development and communication to pool owners and the general public of a guide on pool safety requirements and the obligations of pool owners and users as well as explaining the role and responsibilities of pool owners
- » Regular communication with pool owners through a revamped swimming pool register on their role and responsibilities and reminding on pool safety requirements and the role of pool certifiers
- » The development of a standard letter of engagement to be entered into between pool owners and pool certifiers which is to clearly set out the roles and responsibilities of pool owners and certifiers, with measures taken to ensure that certifiers execute these for every project they work on.
- » The establishment of an active audit program of pool certifiers to monitor and assess certifier performance, with linkage to certifier training, the practice guide and, if necessary certifier disciplining

³⁶ Tanya Jackson, Professional Standards Authority, Risk management in the built environment, 19 August 2015

- » Undertaking a program of developing a culture and approach of professionalism for the certification industry in conjunction with the Professional Standards Authority and the two certifier associations, Association of Accredited Certifiers and the Australian Institute of Building Surveyors.

9.5.5 Fees

Under the current arrangements private certifiers are not regulated with respect to the fees they charge for pool certification but are free to set their own fee structure. This is then determined in the market and will reflect the level of competition amongst certifiers and hence the level of supply and demand for certification works. In contrast, councils are regulated in respect to the fees they can charge for pool inspections which are set at maximum of \$150 for the first inspection, \$100 for the second inspection and no charging for subsequent inspections and a maximum fee of \$70 for section 22 applications. Councils are not able to charge to investigate complaints, which is part of their core compliance and enforcement role.

There are differing views among councils as to whether councils can charge for section 22E inspections. This is an inspection after the certifier has assessed non-compliance and the non-compliance is not addressed within a six week period. Those councils who charge classify this as acting on a notice while those that do not charge classify it as acting on a complaint.

Some councils have adopted the practice of charging \$250 up front for an inspection on the basis that there will be a \$100 refund if the pool is assessed as compliant on the first inspection and no additional charge if a second inspection is required. The purpose of this structure is to create an incentive for pool owners to rectify any non-compliance quickly in order to obtain the \$100 rebate, thus relieving the council of subsequent inspections for which they cannot charge.

The difficulties with the current approach for council charges are as follows:

- » The charges do not recover costs, noting that it typically requires three inspections to get a non-compliant pool complaint, thus creating a disincentive for the council undertaking an active inspection program
- » The structure of the charges does not give any incentive to pool owners with non-compliant pools to seek to address the areas of non-compliance in a timely manner
- » Creates a major departure from the principle of competitive neutrality between council inspectors and accredited certifiers where both are undertaking compliance inspections in competition
- » Inconsistent with the general approach to council charging for certification services where the council is required to charge on a cost recovery basis and set and publish their fees on an annual basis.

In addition, councils are having difficulties recovering pool inspection fees charged from some residents. While the total of unrecovered fees could be quite significant for a council, the amount per customer may not be large and may not economically justify taking recovery action. Various councils have proposed that they be given the ability to recover unpaid fees from the value of the property when sold by making unpaid fees a charge against the property.

There are two options available that would address the problems of the current regulated fees:

1. Allow councils to set their own charges subject to the fees only being cost recovery and subject to normal practice of transparency by being set and published annually and able to be reviewed by the external auditor to check that they are only cost recovery
2. Maintain a regulated charge but allow councils to charge for each inspection and adjust up the current charge to at least reflect inflation and allow for the current practice of charging the fee up front with a rebate if it is compliant on first inspection.

On balance while option 2 would be an improvement on the current approach, the preferred approach is option 1 given that it is consistent with the setting of certification fees in general by

councils, in accord with the principle of competitive neutrality that should operate between private and council certifiers and would provide funding to enable the councils to undertake inspections on a cost recovery basis.

Proposed approach

It is proposed that:

- » Broad conformity with the principle of competitive neutrality be adhered to by councils being allowed to set their own pool inspection and certification charges, subject to the fees only being cost recovery and subject to normal practice of transparency by being set and published annually and able to be reviewed by the external auditor to check that they are only cost recovery
- » The *Local Government Act 1993* be amended to allow for charging of incurred but unpaid fees, such as certification and inspection fees, as debts against the property and thus be able to recover the debt on sale of the property.

9.6 Inspection and certification requirements

This section explores both the required compliance certification process with sale and lease transactions and associated issues as well as looking at the issue of the inspection of swimming pools more generally.

Since 29 October 2013 councils have been required to have in place a pool inspection program for their area. This program requires at a minimum the mandatory program of inspecting swimming pools on property where there is a tourist or visitor accommodation or multiple dwellings as well as investigating complaints every three years. In addition each council can determine what additional inspections are undertaken. Councils are also required to respond to complaints regarding pools and inspect pools at the request of owners. Councils are allowed to charge for inspections under this program.

Under the sale and lease provisions, commencing on 29 April 2016, all sale and lease transactions that include a swimming pool need to be accompanied by a compliance certificate. Where a property that is proposed to be sold or leased has a pool which is non-compliant, the owner will need to engage a suitable tradesperson to address the areas of non-compliance and then re-engage the certifier to make another inspection. There are a number of issues to be considered:

- » Whether there are valid circumstances under which the vendor could transfer to the purchaser the obligation to correct non-compliance of a swimming pool on the property
- » Preparedness of the system to commence the sale and lease provisions on the scheduled date of 29 April 2016 and what preconditions, if any, needs to be in place ahead of that date
- » Whether, in addition to the sale and lease compliance certification provision and mandatory inspections, there should be a broader regime of swimming pool inspections.

9.6.1 Whether the obligation to obtain a compliance certificate should be transferred to the purchaser under certain circumstances

Under the sale and lease provisions that are set out in the *Conveyancing Act 1919* and the *Residential Tenancies Act 2010*, commencing 29 April 2016, residential sale and leases with a swimming pool on the property will require the documentation for the sale and the sale is to include a compliance certificate for the pool. At the same time Section 63 of the *Property Stock and Business Agents Act 2002* requires that a residential sale or lease cannot be marketed until there is a valid contract which includes any documents required under the *Conveyancing Act 1919*. This means that until a valid

compliance certificate is available a sale or lease cannot commence. Where a swimming pool is non-compliant this will require the areas of non-compliance to be rectified and a compliance certificate issued before the property can be marketed.

Queensland has a similar residential sale and lease provision in its regulatory framework for swimming pools. However, in Queensland the obligation to have a compliance certificate for a pool in a sale transaction can, if the pool is non-compliant, be transferred to the purchaser in the case of non-shared pools. The vendor is required to provide to the purchaser a Form 36, Notice of no pool safety certificate, and the purchaser has 90 days from settlement to make the pool compliant. It should be noted that the ability to make this transfer of obligations only relates to residential sales and not to residential leases, where the lease cannot be marketed or transacted until the pool is compliant, the same situation as in NSW. The provision also applies with residential auctions where it is required to provide the Form 36 to all bidders.

There are two benefits with the Queensland Form 36 provision:

- » Avoids a significant delay in the sale until the pool is made compliant, with the sale proceeding and the new owner then taking up the obligation to achieve compliance
- » Allows the purchaser to determine the best way to achieve compliance which may involve more expenditure and changes than a vendor would want to undertake. It is likely that a vendor will want to achieve compliance at the minimum cost while a new owner may wish to consider a broader range of options to achieve compliance.

The drawbacks with this approach as it applies in Queensland are twofold:

- » The purchaser does not necessarily obtain the necessary level of information to identify the scale of the non-compliance and what actions may need to be taken to achieve compliance
- » There is no effective follow up with the purchaser and hence pools can remain non-compliant for extended periods, which creates a risk to pool users and the community.

The general drawback with this approach is that it potentially results in the pool being non-compliant for a longer period than would otherwise be the case on the basis that the vendor has a greater incentive to achieve compliance quickly than is the case with a new owner.

One option is a modified form of the Queensland approach which seeks to address the weaknesses of the Queensland model. An approach that would provide greater certainty about the pool being made compliant in a timely manner would involve the following:

- » Vendor required to obtain either a compliance certificate or a statement detailing the nature of the non-compliance and the options for how it can be made compliant. This provides the purchaser with full information against which to assess the situation, including the likely cost involved in rectification, which can become part of the sale price and terms negotiation
- » Vendor and purchaser must mutually agree on whether the vendor will make the pool compliant or the purchaser will take on the responsibility, though in the case of an auction this would be a condition of the auction
- » If the purchaser takes on the responsibility, a copy of the non-compliance statement is provided to both the purchaser and the local council and the purchaser provides to the council a statement of how long it will take to make the pool compliant and supporting details, with the period not to exceed three months
- » In the event the council considers the time nominated by the purchaser excessive, it can seek to vary the period in negotiation with the purchaser
- » The council takes on a compliance role in ensuring the new owner achieves compliance within the designated time period.

Proposed approach

On balance the modified Queensland Form 36 approach as set out above is considered to have merit:

- » Provides the new owner with the opportunity to consider all options to achieve compliance
- » Requires full disclosure to the purchaser to facilitate an informed decision
- » Involves the council to follow up on compliance and seek to achieve the most timely compliance
- » Potentially avoids long delays in sale transactions while pools are made compliant.

The only possible drawback is the potentially longer period that the pool could remain non-compliant, though the council will be fully informed in respect to the situation and if necessary could issue orders.

9.6.2 Preparedness to commence the sale and lease provisions

In order to assess this issue it is necessary to consider the following:

- » Number of available E1 certifiers relative to the volume of certification work to be undertaken
- » Likely volume of barrier repairs that need to be undertaken and the capacity of the market to service this demand.

Set out below is data on annual residential sales over the last five years.

Table 13 9.3: Residential sales numbers over the last five years

	Houses	Units	Dwellings
Number of sales past five years	490,510	259,242	749,752
Annual average	98,102	51,848	149,950
Monthly average	8,175	4,321	12,496
Annual sales			
Year to Aug 2011	86,499	49,076	135,575
Year to Aug 2012	89,374	50,235	139,609
Year to Aug 2013	96,108	54,840	150,948
Year to Aug 2014	107,502	56,036	163,538
Year to Aug 2015	111,027	49,055	160,082
Average Number of sales by month (last five years)			
Jan	4,744	2,318	7,062
Feb	7,932	4,153	12,085
Mar	9,329	5,002	14,331
Apr	7,573	4,133	11,705
May	9,030	4,714	13,745
Jun	8,096	4,399	12,495
Jul	8,189	4,254	12,443
Aug	8,582	4,489	13,071
Sep	8,432	4,520	12,951
Oct	8,570	4,733	13,304
Nov	9,467	4,958	14,425
Dec	8,159	4,175	12,335

In addition there were about 300,000 bonds lodged in respect to lease transactions in 2014-15. It is assumed that on average 12% of residences whether sold or leased has a swimming pool.

It is estimated that there will be approximately 54,000 properties with swimming pools leased or sold in a typical year, based on 18,000 sales and 36,000 leases (this assumes typical total sales of 150,000 pa and leases of 300,000 pa, with 12% of properties having swimming pools). This would imply that in an average month about 4500 certificates of compliance would need to be issued or be available. Assuming that each property will need to be inspected three times before a certificate can be issued and that each inspector works for 240 days per year, it will require a certifier workforce of about 225 working full time. It should be noted that these numbers do not allow for pools that have already being certified, noting that on the register there are about 18,000 certified pools.

One matter of note from Table 9.3 is that there is no evidence of a strong seasonality in sales numbers other than a drop off in January.

As noted earlier there are 238 people who are accredited or building certifiers who have registered or have successfully completed the A1 course but not yet registered. In addition, there are about 400 council officers who are engaged in pool inspections and could undertake pool certification work.

While the A1 to A3 certifiers who have registered to undertake pool certification are unlikely to want to work full time on pools, the numbers would appear to indicate there are sufficient qualified certifiers and council inspectors to undertake the role in respect to the commencement of the sale and lease provision. However, there will be the issue of the location of certifiers and whether there is an adequate distribution across the state.

In regard to the level of demand for repair work on pool barriers, councils that have been spoken to as part of this review advise that on average 90 per cent of pools that have been inspected fail the compliance assessment on the first visit and that on average it takes three visits to achieve compliance. This would indicate that there will be a significant demand for the services of relevant trades once the sale and lease provisions come into effect. Thus there could be some impact on the timing of conveyancing transactions due to the need for sellers and leasers to have corrective work undertaken on pool barriers.

It is likely that once the Government makes an announcement about its approach with respect to the commencement of the sale and lease provisions and if that announcement confirms the commencement date, there will be a significant pick up in pool inspections and the issue of compliance certificates. On the positive side the period from April to July is said to be relatively quieter in terms of sale and lease transactions compared with the balance of the year (though the data in Table 9.3 did not bear this out) and the evidence is that the level of activity and the seasonal pattern is likely to resume a more normal pattern in 2016 after a few years of heightened activity. On the negative side, in the period from December to January, inclusive, it is difficult to obtain the services of tradespersons as many builders and tradespersons take time off over the Christmas and New Year period.

Reform Options

There are a number of options available to seek to avoid disruption of the conveyancing and lease market with the introduction of the sale and lease provisions.

One option is to defer the commencement of the sale and lease provision. However, this is not really a solution as it creates great uncertainty about when or indeed if the sale/lease provisions will start, will result in a lower level of compliance and hence pool safety and will adversely affect the business model for certifiers who have undertaken the training, obtained accreditation and established their business on the basis of the Government's announced approach.

A second option is to proceed with the lease provisions as planned on 29 April 2016 but defer the sale provision by one year, for example. This will address up front the higher risk area of leasing properties with pools, provide greater community confidence about the government proceeding with the sales provision in the future than option one, hopefully encourage prospective sellers to obtain compliance certificates in advance of sale, and provide the opportunity to test the operation of the provision on leases and identify any areas for improvement of the process.

The third option is to proceed on the 29 April 2016 timetable, which will encourage all prospective sellers and leasers to seek compliance certificates. This would be combined with providing greater timing flexibility for the compliance certification which was addressed in the previous section.

The pros and cons of each of these options are assessed in table 9.4 below.

Table 14 9.4 Pros and cons of options for commencement of sale and lease provisions

	Option 1: defer both sale and lease for a further year	Option 2: commence lease 29/4/16 and sale on 29/4/17	Option 3: commence sale and lease on 29/4/16 combined with flexibility to transfer compliance responsibility to purchaser
Pro			
	<ul style="list-style-type: none"> » Eliminates the risk of delays in sale and lease transactions in 2016 due to pool compliance requirements (but the same risk would arise in 2017) » Provides additional time for pool owners to obtain compliance certificates 	<ul style="list-style-type: none"> » Addresses what is assessed to be the highest risk situation, leases, without further delay » Creates greater expectation than option 1 that the sale provision will come into effect » Eliminates the risk of delays in sale transactions in 2016 but does not eliminate that risk in 2017 (but a lower risk than under option 1) » Provides the opportunity to use the lease provision to trial the arrangement and possibly refine the approach ahead of the sale provision being activated 	<ul style="list-style-type: none"> » Demonstrates government's commitment to the sale and lease provision » Result in a concerted effort by pool owners contemplating sale or lease in obtaining compliance certificate » The provision for possible transfer of compliance requirement to pool purchaser should avoid a disruption of the residential sales market » Avoids a further delay in achieving pool compliance » Facilitate the viability of the pool certification profession and likely to lead to an expansion in the numbers seeking accreditation
Con			
	<ul style="list-style-type: none"> » Reduces further the credibility of the government with respect to the implementation of pool safety reforms » Pool owners could assess that further delays could occur and hence not take advantage of the delay to achieve compliance, creating the same problem in a year's 	<ul style="list-style-type: none"> » Will have an impact on the government's credibility in regard to pool safety » Could simply defer the problem in respect to sale provision to 2017, though this is less likely than for option 1 » Likely to result in a significant number of pools that are sold being non-compliant for a further year 	<ul style="list-style-type: none"> » Potential disruption to the residential sale and lease market though this will be mitigated by the relatively quieter period of the year and the provision for transferring compliance to the purchaser

	Option 1: defer both sale and lease for a further year	Option 2: commence lease 29/4/16 and sale on 29/4/17	Option 3: commence sale and lease on 29/4/16 combined with flexibility to transfer compliance responsibility to purchaser
	<p>time</p> <ul style="list-style-type: none"> » Likely to result in a continuing high level of pools that are sold or leased being non-compliant, creating risks for pool safety » Undermines the viability of the pool certifier profession 	<ul style="list-style-type: none"> » Have an adverse impact on the viability of the pool certifier profession, though not to the same extent as option 1 	

Actions required ahead of 29 April 2016

There are a number of actions that should be put in place in advance of the commencement of the sale and lease provisions to maximise the prospects of a successful start to the sale and lease compliance process, these being set out in the following table:

Table 15 9.5: Proposed actions to occur in advance of commencement of the sale and leave provisions

Action	Explanation and rationale
1. Amend the Swimming Pools Act, the Conveyancing Act and the Property Stocks and Business Agents Acts to allow under defined conditions as set out in section 9.6 for vendors to transfer the obligation to the purchaser for achieving pool compliance within a defined period after sale and involving councils in a compliance function.	This approach will assist in creating a smoother transition to the new system by removing a potential pinch point that could delay and disrupt the residential sales market and potentially will achieve a better pool compliance outcome.
2. Amendment to the Conveyancing (Sale of Land) Regulation 2010 to provide an exemption in the Regulation with respect to providing a certificate of compliance in the case of off the plan marketing of residential developments involving a planned swimming pool and require a certificate of compliance and evidence of registration 14 days prior to the vendor being able to require completion.	The current wording implies that a certificate of compliance is required by a developer of a residential development which will have a swimming pool and that the compliance certificate must be available before "off the plan" marketing can commence. This would have a very disruptive effect on the multi-unit residential market if not addressed. Further details can be obtained from The Law Society Property Law Committee
3. Amendment to the Swimming Pools Regulation to require strata owners' corporations to obtain and have available for owners wishing to sell a pool compliance certificate.	Concerns have been raised that strata owner's corporations have not been proactive or cooperative in obtaining a compliance certificate where the property has a pool and hence potentially could negatively impact on unit owners wishing to sell.
4. Activate a state and local campaign informing the community and the property industry of the	It is important that there is an early announcement of the intention to proceed with the sale and lease

Action	Explanation and rationale
legislative requirements of the sale and lease provisions.	provisions and the requirements for persons with property with a swimming pool planning to sell or lease.

Assessment and proposed approach

A further delay in the sale and lease provisions is not supported as it will undermine a key compliance aspect of swimming pool safety and the viability of pool certification profession.

While option 2 of commencement of the lease provision as planned and a one year delay of the sale provision will reduce the risk of disruption to the residential sales market in 2016, the risk is really deferred to 2017, though the risk will be lower. This option does have the benefit of being able to trial the compliance requirement with lease transactions and possibility achieving positive learning outcomes.

However, on balance it is concluded that the preferred approach is to proceed with the sale and lease provisions, as planned, to commence on 29 April 2016. This should be combined with the proposal for the vendor to be able to transfer the compliance requirement to the purchaser, subject to certain requirements and it should mean that the provisions can be put into effect without significant disruption to the residential sale and lease market. However, it is vital the Government's decision is announced and an effective public awareness program commenced as soon as possible.

9.6.3 Sale and lease model versus a periodic inspection model

The rationale for adopting the sale and lease provision was that a young child is at significantly greater risk of drowning in a home swimming pool in the first six months of getting a new pool or moving to a new residence with a pool. However, it only covers a relatively small proportion of residences of pools in any year.

An alternative model to the sale and lease compliance model is to have a more extensive pool inspection regime in place such as the Western Australian approach of inspecting all residential properties on a periodic basis: every one and two years for higher risk categories of pools and every four years for all other pools or some variant of this timing.

Based on reasonable assumptions it is estimated that there are approximately 3 million residential units in NSW³⁷ and an estimated 390,000 pools, allowing for non-registration of pools³⁸. There are 756,400 bonds held by the Rental Bond Board as at 31 July 2015 and there were 294,000 bonds lodged in the financial year 2014-2015. On the basis of 35,000 sales or leases per year it would take about eleven years for every pool to be compliance checked. It is noted that in Queensland there are about 340,000 registered pools, broadly the same as in NSW, and after five years only 65,000 have been compliance checked or 19 per cent of the total. The case for the periodic inspection and certification of all pools is based on this arithmetic and in particular the following considerations:

- » Relying on sale and lease compliance checking means the bulk of pools are not checked at all or only very infrequently and hence most property owners do not become focussed on pool compliance and safety
- » Creating and maintaining a regular cycle of compliance checking encourages property owners to get their pool compliant and maintain that compliance

³⁷ The average number of persons per household in NSW is 2.5 based on ABS 1338.1 NSW State and Regional Indicators, December 2010 while the population for NSW as at September 2014 was 7.544million.

³⁸ This is in fact in close accord with the 2007 ABS Census data which indicated that 12% of residences have a pool or access to a pool.

- » The rate of drowning deaths in Western Australia is significantly lower than for NSW and that may be linked to the periodic checking of pools
- » At the commencement of the inspection program Western Australia had a relatively high level of non-compliance, of the order of 80 per cent, but it now has a non-compliance rate of under 20 per cent
- » By undertaking the program on a regular basis for all pools, the actual inspection costs can be quite low, far lower than more intermittent inspections. For example in Western Australia councils can only charge the cost of inspection with a cap on the maximum amount that can be charged by councils each year to pool owning rate payers for pool inspections of \$57. Typically the annual charge to pool owning rate payers is between \$15 to \$35.

An assessment needs to be undertaken of the relative cost and benefit of periodic inspections though it is noted that Kids Health did undertake such a cost benefit analysis which supported mandatory inspection of all pools³⁹.

Reform options

There are a couple of options that can be considered as a way of broadening the compliance checking approach:

- » Adopting the Western Australian approach of having all pools checked for compliance over say a four year cycle
- » Work with local government to expand the council swimming pool inspection program, which would still be risk based but would extend beyond only mandatory inspections that most councils are undertaking and involve a more consistent approach across councils than is the current situation.

A pool inspection program of either of the approaches outlined above is not an alternative to the sale and lease provision but an addition to it. There is no point seen in removing the sale and lease provisions that require a compliance certificate to be part of the sale or lease documentation for a residential property with a pool. In the case of Western Australia, there are no sale and lease provisions in place.

In both cases the program could be funded by local councils with a surcharge on the rate for pool owners. The Western Australian approach requires local councils to arrange inspection of all pools not less frequently than once every four years. Councils manage the program by a combination of in house resources and contracting out to suitable persons. It is funded by a levy on each pool owner which is set by regulation the lower of cost and a cap of \$57.45 per pool per year. Each council is responsible for undertaking the inspection program and for maintain a register of pools in its area. There is not a central accreditation process for pool inspectors/certifiers, as is the case in NSW, but each council is required to ensure that the persons undertaking the inspection are suitably qualified and experienced.

There are a range of approaches followed by councils in Western Australia to undertake the inspections, involving council officers undertaking the inspections, contracting out the inspections to third parties or a combination of both approaches. One of the larger providers of pool inspection services in Western Australia is the Royal Life Saving Society. What is remarkable about the pool inspection program is the low cost involved which reflects both the low non-compliance rate that has been achieved by regular inspections and the efficiencies that are generated by inspecting all pools over a four yearly cycle. By inspecting all pools it is possible to inspect all pools in a particular area, so minimising transport time and cost. It is possible for the pool inspector to walk up and down

³⁹ Kids Health, Children's Hospital Westmead, Swimming Pool Safety, March 2011

streets inspecting each house with a pool. From discussions with pool certifiers who work in Perth it is possible to inspect about four pools per hour. Where a pool is non-compliant the normal practice is to serve notice on the owner to rectify and to arrange a subsequent inspection. If the pool is still not compliant at the second inspection a fine or other enforcement action is taken.

NSW is in a good position to undertake a periodic inspection model, in fact it is in a better position than Western Australia for NSW has two attributes in place that are not shared by Western Australia:

- » A central swimming pool registry
- » A pool certifier accreditation scheme.

The alternative approach is to expand the current council inspection program and create a more consistent approach across councils. The program would continue to be risk based and would not need to cover all swimming pools within a defined period, though this could be undertaken by councils if they wished to adopt that approach. At present most councils are simply undertaking the minimum mandatory program due to constrained resources. A better approach would be to establish a consistent risk based approach across all councils with pools with high risk factors, such as young children and portable pools being used to target the program.

Proposed approach

It is possible that a state wide pool inspection program, inspecting all pools in a, say, four yearly cycle will be more cost effective approach than a more limited risk based council program.

It is proposed that subject to a cost benefit assessment that a four yearly inspection program be adopted, managed by councils and funded by a levy on the rate of pool owners or, failing that, a more consistent risk based inspection program be developed that applies across all councils, once again funded by a levy on pool owners.

9.7 Compliance and Enforcement

It is only councils that have a compliance and enforcement role and responsibility though private certifiers do provide an input to this process through undertaking pool assessments. Compliance and enforcement mechanisms include the following:

- » Power and responsibility of councils to inspect pools in the area to ensure compliance
- » Councils following up on complaints lodged
- » Requirement for private certifiers to inform councils of non-compliant pools after a defined period.

There are a number of issues that need to be considered in ensuring that there is an effective compliance and enforcement program, these being:

- » Documenting the reasons for non-compliance and how to address it
- » Improving the Section 22E process whereby certifiers inform councils of non-compliant pools
- » Improving the council compliance program
- » More effective sanctions and penalties
- » A more affordable and timely appeals mechanism.

9.7.1 Documenting non-compliance

While section 22E sets out what an accredited certifier must document in the event of a non-compliant pool there is no such requirement stated for council inspectors. Accredited certifiers are

required to set out the reasons why the pool is non-compliant and what steps need to be taken to achieve compliance.

From discussions with various stakeholders it would appear that a significant number of council inspectors are reluctant to provide specific reasons for non-compliance but rather state that the pool is non-compliant with the Act and do not provide sufficient details about the areas of non-compliance and most are reluctant to provide advice on options to make the pool compliant. The concern would appear to be that providing additional information could expose the council to potential liability.

Some private certifiers are also reluctant to document the details of non-compliance and a larger proportion is reluctant to provide advice on options to address the non-compliance. Like council inspectors there appears to be a concern about exposure to potential liability but another concern relates to providing advice on how to address non-compliance and a possible conflict with Section 66 of the *Building Professionals Act*. Section 66 addresses the issue of possible conflicts of interest in the context of issuing Part 4A certificates or complying development certificates. Certifiers are required to avoid any conflict of interest where they are undertaking certification by not being involved in either design or construction work. The concern of some private certifiers is that providing advice on how to rectify instances of non-compliance with pools will trigger a conflict of interest under Section 66 of the BP Act.

It is considered that while this may be a concern of certifiers that is reasonably and honestly held, it is not a valid concern. First, Section 66 only relates to Part 4A Certificates and CDCs and not to compliance certificates such as the certificates issued after inspecting a pool. Second, even if it explicitly caught up compliance certificates (which it does not do), this would be in conflict with Section 22E of the *Swimming Pools Act 1992* which states in clause 22E (3)(d) that the accredited certifier must amongst other matters provide in a notice to the pool owner:

The reasons why the accredited certifier is not satisfied that the requirements for the issue of a certificate of compliance have been met and the steps that need to be taken in order to meet these requirements.

In the case of any conflict with other legislation in respect to matters relating to swimming pool regulation, the *Swimming Pools Act 1992* takes precedence.

At the same time it needs to be acknowledged that there can be multiple ways to achieve compliance and inspectors and certifiers should communicate this to pool owners and encourage them to also think about ways of addressing the problem. However, inspectors and certifiers, because of their training and experience, are in the best position to identify and explain for pool owners the problem and options for addressing the problem. It is essential that both council inspectors and accredited certifiers provide full details on non-compliant pools.

Proposed approach

It is proposed that private certifiers be reminded of their obligations under section 22E to provide both details of any non-compliance and options for how this can be rectified while council pool inspectors should be directed to provide such information as the part of any pool inspection that identifies non-compliance.

9.7.2 Greater discipline with the section 22E process

Where an accredited certifier undertakes a compliance inspection and the pool is assessed as non-compliant, then under section 22E the certifier has to immediately issue a notice to the council if there is a danger to public safety or, if not, after six weeks. If the pool is still non-compliant after six weeks the certifier must issue the notice to the council within five days of the end of the period.

Some certifiers, once they have assessed non-compliance, take no further action with the pool owner and simply pass the matter over to the council. This places an added burden on council compliance staff.

Alternatively, some pool owners, when given a statement of non-compliance, seek to engage another certifier to order to obtain a compliance certificate.

Both practices need to be addressed.

Proposed approach

It is proposed that the following be put in place:

- » Require that a pool owner cannot remove a certifier during the three month non-compliance rectification period without the approval of the BPB and require all certifiers to document on the pool registry their inspections and if a pool is non-compliant the certifier must clearly indicate why
- » Expand the period within which a private certifier seeks to achieve compliance from six weeks to three months, with the ability to extend further if the certifier attests that substantial progress is being made
- » Require a certifier to follow up with the pool owner after assessing non-compliance to develop an action program to address this
- » Only involve the council once it is determined that the pool owner is not willing to address the non-compliance in a reasonable timeframe.

9.7.3 Council compliance program

All councils are required to develop and put into place compliance programs. There are not specific requirements set for the program and each council is able to proceed in a way that it assesses as appropriate. The result is that most, but not all, councils are simply undertaking the mandatory program plus responding to complaints and pool owner requests. A few councils have developed programs to inspect all or most pools over a defined period.

The approach on a compliance program is linked to any future decision as to whether to introduce a system for all pools to be inspected on a periodic basis. If the current approach of inspection only at the time of sale and lease is continued, then there is a case for achieving a more consistent and broader approach to compliance inspection across councils.

Proposed approach

In the event that it is not decided to have a periodic inspection of all private swimming pools, then a more consistent, risk based inspection program should be developed and undertaken by councils based on guidelines developed by the swimming pools regulator providing greater direction to councils about the approach to a swimming pool compliance in order to have a more consistent approach across councils and to have greater coverage over time of pools.

This would need to be combined with giving councils greater flexibility in setting fees and allowing them the option to fund the program in part or whole by a rate surcharge on pool owners.

9.7.4 Sanctions and penalties

There are various penalties prescribed in the Act which are set as maximum fines that a court can impose or maximum PIN that a council can apply. In general the maximum court imposed fine is \$5500 while the maximum PIN is \$550. The offences and related penalties are summarised in Table 9.6 below.

Table 16 9.6 Offences under the *Swimming Pools Act 1992*

SECTION OF ACT	OFFENCE	PENALTY* Penalty Units Max Court Penalty PIN	OPTION/S
s7 (1) - General requirements for outdoor swimming pools	Failure of owner to ensure outdoor pool is: » surrounded by a child-resistant barrier that separates it from residence and other adjoining places » designed, constructed, installed and maintained as per standards prescribed by the regulations	50 penalty units (PU) \$5500 \$550	
s 12 - General requirements for outdoor swimming pools (hotels, motels, moveable dwellings)	Failure of owner to ensure outdoor pool related to movable dwellings, hotels and motels: » is surrounded by a child-resistant barrier that separates it from residence and other adjoining places » is surrounded by barrier located immediately around pool » contains no structure within bounds other than pool and ancillary structures (e.g. diving board) » is designed, constructed, installed and maintained as per standards prescribed by the regulations	50 pu \$5500 \$550	
s 14 - General requirements for indoor swimming pools	Failure of owner of indoor pool to ensure access is restricted as per standards prescribed by the regulations.	50 pu \$5500 \$550	
s 15(1) - Maintenance of child-resistant barrier in good repair	Failure of occupier of premises to maintain the barrier in existence and in good state of repair as an effective and safe barrier.	50 pu \$5500 \$550	
s 16 - Access to swimming pools must be kept securely closed	Failure of occupier to ensure that all doors and gates providing access to the swimming pool are kept securely closed at all times when not in actual use.	50 pu \$5500 \$550	

SECTION OF ACT	OFFENCE	PENALTY* Penalty Units Max Court Penalty PIN	OPTION/S
s 17 (1) - Warning notices must be erected near swimming pools	Failure of occupier to ensure that a sign erected in accordance with the regulations and bearing the notice required by the regulations is in vicinity of pool.	5 pu \$550 \$55	
s 23 (3) - Local authority may order compliance (with a direction)	Failure of owner to comply with a direction served by the local authority directing the owner to ensure that the pool or premises comply with the requirements of the Act or of a condition of an exemption granted under section 22.	50 pu \$5500 \$550	
S 30B – Owner must register pool	Failure of the owner of the premises on which a swimming pool is situated to ensure that any information prescribed by the regulations in relation to the swimming pool (the registration information) is entered on the Register	20 pu \$2200 \$220	

*Note: All penalties increased 5-fold in the Swimming Pools Amendment Act 2010 (except s30B which was introduced in 2012)

Typically in any year there are 100 penalty notices issued by councils across NSW involving PINs of about \$40,000 to \$50,000. The most common offences recorded are as follows:

- » Residential complying pool does not have a complying barrier
- » Failure to maintain child-resistant barrier effective and safe
- » Failure to ensure registration information entered on register
- » Not comply with a written direction.

Merit is seen in increasing the penalties for the more frequent offences allied with a more active compliance program undertaken by councils, the latter being addressed in a separate recommendation.

There are also two areas which merit changes to the structure of penalties:

- » There is no penalty for a landlord in the event of not having a compliance certificate for a swimming pool on the leased property. The only penalty is the voiding of the lease
- » The penalties are structured as one off fines and do not provide an ongoing penalty for the period that the pool remains non-compliant. It is suggested that there be an investigation of a penalty structure that imposes ongoing penalties and hence creates an effective incentive for the property owner to act in a timely manner.

In the 2010 report by the NSW Deputy State Coroner⁴⁰ it was recommended that:

consideration be given to the enactment of a criminal offence where a person dies as a result of the negligence of a third party with respect to the maintenance or use of a private swimming pool

An analogy was drawn in the report to a criminal charge that can be imposed where a person is injured or dies due to the negligence or dangerous behaviour of a motorist. Clearly, regard would need to be had to the specific circumstances including whether previous notices or penalties had been applied or warnings given but such a penalty would send a clear signal to the community about the responsibilities of pool owners and the potential consequences if those responsibilities are not properly undertaken.

Proposed approach

It is proposed that a review be undertaken of the current financial penalties with a view to increase those penalties to reflect the serious nature of the offence and potential consequences that flow from such offences in terms of drownings and near drownings as well as explore imposing a penalty on non-compliant landlords and having a penalty structure that penalises for as long as the pool remains non-compliant.

It is further proposed that the NSW Government give consideration to the Coroner's report recommendation to institute a criminal offence where a person dies as a result of negligence of a third party with respect to maintenance and safety features of a swimming pool.

9.7.5 Appeals

Under Section 26 of the Swimming Pools Act pool owners can appeal against a decision of a local authority to the Land and Environment Court. Matters that are appealable include decision to refuse

⁴⁰ NSW State Coroners' Court Report into child drownings, April 2010

an exemption or impose conditions under Section 22; refusal to grant a certificate of compliance; or the issue of a compliance order.

The problem with this provision is that an appeal to the court is very expensive and time consuming. In addition, it does not cover appeal rights against private certifiers who are also making decisions in regard to compliance.

Considerable merit is seen in establishing a simpler, lower cost and more timely appeal mechanism for decisions of both councils and private certifiers. This would be of benefit both for pool owners and for councils and private certifiers.

Queensland has a simple, affordable appeal avenue which is an appeal to the Disputes Resolution Committee of the Queensland Building and Construction Committee.

Proposed approach

It is proposed that a simple, affordable and timely appeal mechanism be established for pool owners to appeal against decisions of councils and private certifiers in regard to pool certification, compliance and enforcement.

9.8 Information, research and education

An effective pool safety strategy requires in addition to the regulatory framework that has been the subject of review in the first seven sections of this chapter, to have strategies for:

- » Generating information and research on how effective are the swimming pool safety requirements and the outcomes that are achieved
- » Responding in a timely and effective manner to information that indicates potential compliance problems
- » Educating pool owners, users and the general community in best practice pool safety practices.

9.8.1 Information and research

It is essential that information is captured on all fatal and non-fatal drownings involving swimming pools with a particular focus on those involving young children, who are the particular focus of swimming pools regulation.

At present there are three separate sources of information on fatal and non-fatal drownings:

- » The NSW Child Death Review Team, situated in the NSW Ombudsman's Office, compiles an annual report analysing all child deaths⁴¹. The report covers child deaths from all causes and includes a chapter on drowning deaths, with a specific section on deaths in swimming pools. The data on deaths is sourced from Births, Deaths and Marriages and the National Coronial Information System.
- » The Centre for Trauma Care, Prevention, Education and Research and Kids Health has since 2013 produced an annual report on drowning and near drowning in children 0 to 16, covering non-fatal

⁴¹ The latest report is for 2014, NSW Child Death Review Team, Annual Report 2014, October 2015

drownings⁴². The data is obtained from the three paediatric hospitals in NSW, Sydney Children's Hospital, The Children's Hospital at Westmead and John Hunter Children's Hospital.

- » The Royal Life Savings Society produces an annual report on national drownings which provides a useful comparison between jurisdictions⁴³. The report segments the information by age groups, including children 0 to 4 and by location of the drowning (rivers, oceans, swimming pools etc.).

It is considered that the area where greater attention needs to apply is in respect to collecting information and follow up on non-fatal drownings. Excellent work has been initiated by CTCPER and Kids Health and it is important to build on that work. The incidence of non-fatal drownings is significantly higher than for drowning deaths, exhibits an increasing, not declining trend and potentially provides an indicator of where there is the risk of drowning deaths.

Pool safety measures need to be evidence based and hence there needs to be a feedback loop from non-fatal drownings, to inform policy and practice. A program along the lines of that applying in Queensland should be considered for application in NSW whereby all non-fatal swimming pool drownings are reported by private and public hospitals and the ambulance service and there is an automatic requirement for the relevant council to follow up with a pool inspection and report. This happens in NSW as a matter of course with fatal drownings but it needs to happen also with non-fatal drownings as these are clear indications of problems that can easily lead to fatalities.

The second area where it is highly desirable to improve information is in expanding the information captured on the swimming pool register and generating reports on the level of swimming pool compliance. The NSWCDRT 2014 annual report proposed that the OLG should generate reports analysing data on compliance with the Swimming Pools Act. At present not all the information is available but under the proposals set out in section 9.3 a comprehensive annual report on the *Swimming Pools Act 1992* compliance would be possible. This report could also be undertaken by individual councils.

A third area for developing additional information would be to seek to identify and capture on the swimming pool register relevant risk factors such as young children in residence at a home with a pool and for this to feed into the design of the council inspection program.

Proposed approach

It is proposed that:

- » it be a requirement that all public and private hospitals and the ambulance service be required to report all non-fatal child drownings in private swimming pools to a central unit in the NSW Health Ministry and that this information be provided to the relevant local council as soon as it is received for the council to follow up and check for pool compliance and safety.
- » The CTCPER/Kids Health annual review of non-fatal drownings of children be extended to include information drawn from all public and private hospitals and the ambulance service on non-fatal drownings
- » The swimming pool regulator be required to produce an annual report on swimming pool compliance detailing amongst other things the number of pools registered, the number of pools that have been inspected within a defined period, the results in terms of compliance and the main defects identified, the number of pools with compliance certificates and assess the effectiveness of the compliance program and in what ways it could be made more effective.

⁴² The Centre for Trauma Care, Prevention, Education and Research and Kids Health, The NSW study of drowning and near drowning (0-16), The Children's Hospital at Westmead, 2015

⁴³ Royal Life Saving Society Australia, National Drowning Report, 2015

9.9 Education and awareness

No level of regulation can completely avoid child drownings. What is a core requirement to reduce child drownings, both fatal and non-fatal, is a full awareness of the need for and commitment to the active supervision of young children, in addition to making pools child safe.

There is a need for an active program of communication and education, using multiple channels that explain the what, how and why of child and pool safety, specifically:

- » Explain the need for active supervision of young children where there is a swimming pool or water in reasonable proximity and what constitutes active supervision
- » Explain what constitutes a child safe pool and why these measures are necessary
- » Explain what is meant by active supervision of young children around water and encourage that behaviour
- » Train persons in CPR.

It is noted that at the time of the last changes in the *Swimming Pools Act 1992* and associated other legislative changes, including the introduction of the pool register and the sale and lease pool compliance provisions, the State Government engaged RLSS to develop and implement a program of education and training on pool safety, delivered through councils as well as directed at the community in general.

The program is coordinated by the RLSS and involves the following elements and stages:

- » Planning programs and activities for the summer season.

Prior to the commencement of the summer season, which has the largest exposure for fatal and non-fatal drownings, the RLSS prepares a program of activities and strategies. The key program is "Be Pool Safe" which seeks to establish and maintain an understanding by pool owners, parents and the general community of the swimming pool regulatory requirements and what they mean for members of the community as well as deliver key water safety messages.

There is also a range of community resources that have been developed and are distributed which include fact sheets in various languages, mini information cards, an information manual for each NSW council, an outline of the forthcoming media campaign and information resource for new pool owners.

The media campaign involves community service advertisements for radio and TV, paid newspaper ads, advertising in the property industry publications and media releases.

This is supplemented by local media strategy and the MP Ambassador program, the latter involving all MPs leveraging their community contacts and networks.

There is also active liaison with the property and real estate industry and placement of messages and advertisements in their publications.

In 2015, in anticipation of the commencement of the sale and lease provisions, there was a program to alert the community and particularly prospective vendors and landlords to their legal requirements.

- » Monitoring and evaluating program.

There are regular reports to Government on activities undertaken. In addition an independent media expert is commissioned to assess the program in terms of measuring exposure in total and by target age and population groups. Last year's program generated 2345 Australian media reports, with a potential audience of 52million and an advertising buying rate equivalent of \$2million.

- » Best practice model for local engagement.

RLSS is working with Sutherland Shire Council, Penrith City Council and the Hills Shire Council to develop a best practice local engagement model, which once developed will be rolled out to all councils.

The program of communication and education needs to be extended to include pool builders, suppliers, retailers and service providers. Where a pool is installed, built or purchased, information needs to be provided to the pool owner about the risks involved, their responsibilities and what action they need to take to keep the pool safe. As identified in Section 9.3 particular attention needs to be paid to portable pools given their significant contribution to child drownings and the high incidence of non-fencing for portable pools with a capacity for depth greater than 300mm.

In the following Section 9.9 it is proposed that a Pool Safety Council is established. An important function of such a council would be to advise the Government on pool safety and to oversight measures to inform the community on pool safety.

Proposed approach

It is proposed that:

- » RLSS be engaged as early as possible to develop in conjunction with councils, health and safety organisations and the property industry a program targeted to both alert the public to the forthcoming commencement of the sale and lease provisions and what they mean for property owners with swimming pools as well as reinforce the key pool safety messages in the period leading into summer
- » A program be developed to engage with the pool industry, including pool builders, suppliers, retailers and service providers and with a particular focus on engaging with retailers of portable pools.

9.10 Governance arrangements

There are three governance issues which have been considered:

- » The clarity of both the Swimming Pools Act and Regulation
- » Ministerial and administrative responsibility for the function of swimming pool regulation
- » Establishing a mechanism for ongoing involvement of key stakeholders in review and oversight of swimming pool regulation.

9.10.1 Clarity of the Swimming Pools Act and Regulation

Reflecting in part the number of amendments that have been made to the legislation, the Act has become somewhat unwieldy and unclear in various areas. Given the scale of these problems there is merit in considering a full rewrite of the Act, setting out in the Act the clear principles and broad approach to be followed and having more of the detail included in the Regulation. Set out in Table 9.7 are suggested changes and improvements to the Act and Regulation. In addition the structural changes identified in other parts of this chapter will also require legislative change.

Table 17 9.7: Possible changes to the Swimming Pools Act and Regulation

Relevant section	Possible change and rationale
Swimming Pools Act	
Objective	The Act should have a clear statement of the legislative objectives in order to facilitate ongoing assessment of performance against the objectives.
Clarification of residential building definition and inclusion of a pool area definition	<p>It is not clear what can be included in a pool area and what should be excluded. It is notable that in respect to visitor and tourist accommodation there is a clear statement that only matters directly relevant to swimming can be in the swimming pool area and there is a list of excluded items. However, there is no such statement for pools in general. The principle should be to ensure the focus in the pool area is on swimming and supervision of children and to exclude any items that could distract attention.</p> <p>Clearly items directly relevant to the pool can be included such as filtration unit, diving board, outdoor shower and pool slide. In regard to other items such as shade structure and seating there are varying practices across councils with some allowing such structures within the pool area and others not allowing them.</p> <p>The two court cases of <i>Medway v Pittwater Council</i> and <i>Pearson v Thuringawa City Council</i> concluded that shade structures were permitted. However, that is not necessarily the conclusive position: the fundamental consideration is what is the safety impact of such structures being allowed or not allowed within the pool area.</p> <p>This issue requires further consideration but there is an in principle argument that excluding them from the pool area could be counterproductive as it may encourage supervising adults to locate outside the pool area under the shade structures.</p> <p>Other structures such as bars and barbecues are more clear cut as their presence in the pool area would constitute a distraction for adults.</p>
Definitions not provided of "situated", "installed" and "constructed"	These terms are used in the Act but are not defined. A pool can be constructed or installed but not completed.
Section 4 Swimming pools to which this Act applies	What is not addressed is whether the Act includes partially constructed pools or properties where the residential building has been demolished but a pool remains. In principle it should.
Part 1, Division 1, 2 and 3	It would be helpful to combine the three divisions into one and group all common features and then show the differences of approach.

Relevant section	Possible change and rationale
Section 17 Warning notices must be erected near swimming pools	It needs to be explicit that the sign needs to be within clear view of the pool.
Section 18 Owner may decide location of the barrier	There needs to be some constraints set on the ability of the owner to decide location of the pool. Relevant considerations include that the pool area should not be an access zone to another part of the property; it should only include the pool and appropriate items for the pool etc.
Section 20 exemption for spa pools	There needs to be greater clarity about what are spa pools, noting in particular the introduction of swim spas. It would appear reasonable that once a spa takes on the attributes of a swimming pool that the spa exemption should cease to apply
Section 21 Multiple swimming pools in close proximity	The approach here is in conflict with the state register where separate registrations are for each pool
Section 22 Local authority may grant exemptions from barrier requirements that are impractical or unreasonable in particular ways	<p>Section 22 at present presents two situations that can be considered by councils:</p> <p>» That application of the standard is impractical or unreasonable</p> <p>or</p> <p>» That an alternative solution exists</p> <p>This mischaracterises the approach that should be followed by creating a dichotomy between the situation where applying the standard is impractical or unreasonable on the one hand and on the other that it is desired to pursue an alternative solution. While the two circumstances should be retained, it should be a requirement with the first case of “impractical or unreasonable” that an alternative solution is required to be developed that provides a suitable level of pool safety.</p> <p>It should be a requirement that the register records section 22 exemptions and indeed all exemptions. There should also be a requirement to reassess section 22 exemptions from time to time.</p> <p>In addition, councils have taken the view that an application for an exemption can only apply to a proposed or existing pool and not one under construction. However, a pool may be under construction when certain problems are identified with adhering to the standard. However, under the existing interpretation the pool has to be completed before an application can be made for an exemption.</p>
Section 22A definition	Include E1

Relevant section	Possible change and rationale
Section 22B(2)	Under this section a property with more than two dwellings with a pool requires certification every three years on the basis that there is a higher level of risk associated with shared pools. However, there are many residential developments where a number of apartments but not all will have a private non-shared pool. These need to be excluded as they are not shared pools.
Section 22E Notices by accredited certifier if pool does not comply	This section needs to include both accredited certifiers and council inspectors. There also needs to be an obligation for certifiers to follow up in the event the pool is assessed as non-compliant
Section 23 Local authority may order compliance with the Act	A notice of intention to issue an order is not required where a notice under section 22E has been already issued
Section 23A Council to carry out works	The notice to carry out works needs to be served on the owner with a copy to the occupier where the owner is different to the occupier.
Section 26 Appeals against decisions of local authority and Section 30 Land and Environment Court	A simpler, more timely and less costly process for resolving disputes needs to be incorporated. In Queensland the QBCC has a Disputes Committee that handles such matters. In addition, as private certifiers are making regulatory decisions, there should also be a simple appeal mechanism available for pool owners to utilise.
Section 27B Powers of entry and search warrants-local council	Needs to be expanded to include relevant sections of the Local Government Act.
Regulation	
Clause 3 definitions	The reference to AS 1926.1-2007 should be replaced with AS 1926.1-2012
Off the plan sale	When the regulation is read in conjunction with section 3(1A) and 4 it would appear that a compliance certificate may be required to be attached to an off the plan contract when a swimming pool is to be on the property. Propose that there is an exemption in the regulation for the requirement for a compliance certificate for a proposed pool at the time of the exchange and require a compliance certificate and registration once the vendor completes the pool and prior to occupation.

Relevant section	Possible change and rationale
Clauses 5(general requirements for outdoor swimming pools),6(Standards required for certain swimming pools to be exempt from requirement to separate swimming pool from residential building),7(Standards required for swimming pools on large or waterfront properties to be exempt from requirement to surround swimming pool) and 8 (general requirements for indoor swimming pools),	These should be combined into one clause with common features combined and with clearer identification of the differences
Clause 9, standards required to be exempt from requirement to surround spa pool	Need to make clear what is meant by "child-safe" and "lockable"
Clause 10(2) contents of warning notices	The ability to use the pre August 2008 warning sign needs to be removed as the latest sign is substantially different.
Clause 11 Legibility of warning notices	It needs to be stated that the sign needs to be in clear sight of the pool and preferably at the shallow end where it is likely any resuscitation would take place.
Clause 13 exemption application form	The fee needs to be increased or preferably be set by the council on a cost recovery principle basis.
Clause 18A Fee for inspection	Fees should be payable for inspections beyond the second inspection and ideally the council should set the fee on a cost recovery basis.
Clause 21 Public access to As 1926.1-2007,BCA and CPR	The AS should be the latest 2012 and access should be available on the website.

Relevant section	Possible change and rationale
<p>Clause 23 Existing complying swimming pools may continue to comply with earlier standards</p>	<p>The clause states that the savings provision does not apply if the barrier or premises “are substantially altered or rebuilt” but there is no guidance provided on what these terms mean. There are varying practices taken between councils with a number of councils taking the position that any significant maintenance work removes the grandfathering protection of the clause and requires the pool barriers to be upgraded to the latest standard. However, it is quite reasonable and indeed appropriate for significant maintenance to be undertaken over time including the replacement of sections of the barrier with like material. Maintaining the functionality and performance of the barrier should not negate the savings provision.</p>

Proposed approach

It is proposed that the *Swimming Pools Act 1992* and Regulation be re-written, taking into account the matters identified in Table 9.7. This should be undertaken as a second stage after any amendments associated with implementing the sale and lease provisions have been undertaken.

9.10.2 Ministerial and administrative responsibility for the Swimming Pools Act and Regulation

In NSW the Minister for Local Government is the minister responsible for the *Swimming Pools Act 1992* and the agency that administers the Act is the Office of Local Government. In contrast, in all other Australian jurisdictions the ministerial responsibility rests with the minister with responsibility for building regulation and the agency responsible for its administration and advice to the Minister is the agency with responsibility for building regulation. In addition it is only in NSW, South Australia and the Northern Territory that there is separate legislation for swimming pools. In all other jurisdictions swimming pools are administered in a Building Act.

Merit is seen in transferring the Act to the minister responsible for building regulation and the administrative responsibility to the agency responsible for building regulation. At present the minister responsible for building regulation is the Minister for Planning, with the agency being the Department of Planning and the Environment. However, the Minister responsible for the Building Professionals Board and for building certification is the Minister for Better Regulation. The report, Review of the Building Professionals Act, which has a broad terms of reference to advise on building regulation in general, proposes the establishment of an Office of Building Regulation and the designation of a minister with responsibility for building regulation.

There are benefits in transferring responsibility for the *Swimming Pools Act 1992* to the Minister responsible for building regulation given that swimming pool regulation is a subset of the broader responsibility of building regulation. Further, it would be in accord with the practice that applies with all other Australian jurisdictions.

While it is also possible to incorporate the *Swimming Pools Act 1992* within a Building Act, there are not compelling reasons to do so.

Proposed approach

It is proposed that responsibility for the *Swimming Pools Act 1992* transfer to the Minister with responsibility for building regulation, in accord with the practice that applies in all other Australian jurisdictions.

9.10.3 Pool Safety Council

It is vital that the Government has access on an ongoing basis to key external stakeholders with a particular interest in the issue of swimming pool regulation and safety.

In NSW there was a Pool Fencing Advisory Committee but that was abolished with the assent of the Swimming Pools Amendment Bill 2009. The intention was that its function would be carried out by the Water Safety Advisory Council (WSAC). The Council is composed of people with suitable expertise, covering government and non-government members, and covering such areas as water safety, boating, fishing, swimming, surfing, in land waterways, training and education. It advises the Minister for Emergency Services. The membership of the Council comprises representatives of the following organisations:

» Ministry for Police and Emergency Services

- » Recreational Fisheries Programs, Primary Industries
- » Maritime Management Centre, Roads and Maritime
- » NSW Police Force
- » NSW Department of Education and Communities
- » NSW Office of Communities-Sport and Recreation
- » Office of Local Government
- » Royal Life Saving Society Australia (NSW)
- » Surf Educators International
- » Surf Life Saving NSW
- » AUSTSWIM NSW
- » Australian Professional Ocean Lifeguard Association
- » Marine Research NSW
- » Local Government NSW.

The difficulties with the WSAC having a role to advise on swimming pool regulation is that it has a very broad remit, advises the Minister for Emergency Service and does not include representation that is in general relevant to a Pool Safety Council. It is understood that it has not in fact taken on the role of advising on swimming pool regulation and safety.

Queensland until recently had a Pool Safety Committee. Acting on the recommendation by the review of the then Queensland Building Services Authority undertaken in 2012, the Queensland Government decided in 2014 to transfer the function to the QBCC where it has now being absorbed within the organisation. The previous Pool Safety Council (PSC) had membership drawn from the state government, local government, the pool industry, regulators and health and safety advocates. It had both an advisory and executive function.

There is considerable merit seen in establishing a Pool Safety Council. It could have purely an advisory role, advising the Minister responsible for the *Swimming Pools Act 1992* on a range of matters or else this could be combined with certain executive functions. Set out below are a range of functions, divided between advisory and executive that could be considered for assigning to a Council:

1. Advisory functions

- > Advise on swimming pool barrier standards: this would involve advising on possible changes to the standards which would be input to a NSW position when AS 1926 is subject to review.
- > Advise on other aspects of swimming pool regulation including CPR notices etc.
- > Advise on publications seeking to explain pool safety requirements to pool owners and the general public
- > Advise on swimming pool barrier interpretations: where there are aspects of the current standard that lack full clarity, the Council could provide advice on an appropriate interpretation and assist with interaction with the AS 1926 standards committee. At present individual councils form their own views on how to interpret aspects of the standard and this can result in different practices across council areas which is not desirable.
- > Advise on changes to the Swimming Pools Act and Regulation
- > Advise on communication programs aimed at increasing awareness in the community about pool safety
- > Investigate and provide advice on areas of concern

- > Assess performance of the swimming pool safety function against agreed outcome measures.
- 2. Possible executive functions
 - > Prepare and maintain a practice guide for pool certifiers and council inspectors
 - > Operate a hotline advisory service for pool certifiers and pool owners
 - > Maintain the Swimming Pool Register
 - > Assist Training Providers seeking clarification on interpretations of the standards and regulatory requirements
 - > Manage the communications program on pool safety
 - > Develop and maintain a CPD model for pool certifiers
 - > Publish on line newsletters for pool certifiers and provide communication to pool owners through the swimming pool register
 - > Act as a dispute resolution service for pool owners regarding assessments made by pool certifiers and councils pool inspectors.

Further consideration will need to be given to the range of functions that the Council would undertake and the method of funding if it had executive functions.

Membership of the Council

Membership of the council would be drawn from representatives of organisations involved in relevant health and safety issues, swimming pool industry, local government, pool certification and property owners, with an independent chair.

Consideration will also need to be given to whether there is a continuing role for the Cross Agency Advisory Group (CAAG) which is chaired by the BPB and has representation from the Office of Local Government, three Sydney councils, the AIBS, the Building Policy Unit of the Department of the Environment and Planning, Home Industry Australia (HIA), University of Technology Sydney: Centre for Local Government and a certifier training organisation. Amongst other roles, the CAAG has the responsibility to advise on matters relating to the barrier standard and regulatory framework that require clarification. The problem is that there has not been a process defined for how the CAAG assessment and advice flows through to councils and accredited certifiers and relevant industry participants.

Proposed approach

It is proposed that a Pool Safety Council is established to advise the relevant Minister on pool safety matters and, possibly, to undertake certain executive functions relating to pool safety, with membership drawn from organisations involved in relevant health and safety issues, swimming pool industry, local government, pool certification and property owners, with an independent chair. It is suggested that the Council is established and operate as an advisory body, with any extension of its functions to an executive level considered at a later stage.

The Council should seek to operate on the basis of achieving consensus across all stakeholders rather than on a simple majority view.

In the light of a decision on the establishment and role of the Pool Safety Council, consideration should be given as to whether there continues to be a need for the Cross Agency Advisory Group.

9.11 Resourcing the swimming pool safety function

The issue of resourcing the regulatory function has been touched on in a number of areas in this chapter. This section seeks to consolidate consideration of the resourcing issue.

The functions of the State in this area can be categorised as follows:

- » Review and change as appropriate the legislation and regulations
- » Assess the performance of the regulatory system relative its objectives and targets
- » Maintain ongoing contact with both local government authorities, the BPB and other relevant agencies
- » Provide secretariat and research support for the Cross Agency Advisory Group and the Pool Safety Council, if the latter were established
- » Prepare, maintain and update from time to time the Swimming Pool Certifier Practice Guide
- » Regular liaison with external stakeholders
- » Oversight the development and implementation of the education program on pool safety
- » Manage the swimming pool register.

Local government councils have the following functions:

- » Develop and implement a pool inspection program
- » Develop and implement a community pool safety education and communication program
- » Undertake the compliance and enforcement responsibility in response to following up community complaints, pool investigations and non-compliance notices received from accredited certifiers.

A distinction needs to be made between resourcing and funding. Resourcing refers to the level of staff and other resources necessary to undertake the assigned function. Funding refers to how the resourcing is financed. The funding can be from the budget, sourced from taxes and other revenue, from rate payer revenue, from fees for services and from fines.

In the event that the State's role in swimming pool safety regulation is transferred to the proposed Office of Building Regulation⁴⁴, then the resourcing for this function would be one aspect of the overall assessment of the level of resourcing required for the Office. There would be significant economies of scale involved in including this function in the Office of Building Regulation which means the incremental level of resourcing would be less than it being administered on a standalone basis in the Office of Local Government.

In the case of local government, the core compliance and enforcement functions need to be undertaken by suitably qualified and experienced council staff. However, undertaking pool inspections in general need not be undertaken by council staff but could be contracted out to accredited pool certifiers or be undertaken by a combination of internal and external resources.

The draft report on the Building Professionals Act identifies two major sources of funding the State's responsibilities in the area of building regulation: consolidated revenue and a levy on Development Approvals and Complying Development Certificates. The swimming pool safety program differs from

⁴⁴ This is one of the recommendations in the Draft Report of the Independent Review of the Building Professionals Act 2005, August 2015

the building regulation function in a number of ways that have implications for the source of funding used:

- » The program is ongoing rather than related to individual building developments
- » The beneficiaries of the program are pool users and in particular young children rather than the general community.

It is suggested that any incremental funding of the State's functions could be sourced from a combination of the following sources:

- » Consolidated revenue
- » An annual levy on registered pools
- » Appropriately targeted user charges. One area where a user charge would be appropriate would be in handling disputes.

Consolidated revenue could be used to fund community education and awareness programs and part of costs of administering State regulation of swimming pools, including the redevelopment of the swimming pool register.

A levy on registered pools could be used to fund all or part of the costs of administering State regulation of swimming pools but not, it is suggested that the capital costs associated with redevelopment of the swimming pool register.

The local government function with respect to pool safety was not subject to additional resourcing at the time that the regulatory arrangements were put in place or when the latest amendments to the Swimming Pools Act were legislated, which imposed additional requirements on councils. As a consequence councils have generally limited the scale of the compliance and education program. Furthermore, as noted earlier, the fee for undertaking pool inspections was capped at \$150 for first inspection, \$100 for second inspection and zero for any subsequent visits. This is contrary to the normal practice of allowing councils to impose cost recovery charges. It is proposed that councils be provided with the necessary resourcing to undertake their function through a combination of the following:

- » Fees for service in respect to undertaking inspections, with the fee to be set by councils on the basis of reasonable cost recovery
- » Fines for non-compliant pools
- » The ability to impose a surcharge on rates for rate payers who own pools to fund the inspection and education programs.

As noted earlier councils need not employ their own staff to undertake all the functions. Pool inspections could be contracted out to accredited private certifiers.

Proposed approach

The resourcing of the State's role in swimming pool regulation should be considered as part of the resourcing of the Office of Building Regulation and the BPB, if the function is transferred to these bodies. Consideration should be given to establishing an annual charge for pools on the pool register as a way to fund the State's cost of administering swimming pool regulation.

Councils should be given the funding flexibility to be able to self-fund their functions in respect to swimming pool safety regulation and education by a combination of cost recovery inspection fees, fines and a levy on the rates of ratepayers with swimming pools.

Councils should be encouraged to contract out the pool inspection function to accredited certifiers.

10 Evaluation of the swimming pools regulatory approach

10.1 Introduction

The best practice regulatory principles presented in Chapter 4 are applied in this chapter to assess at a macro level, as distinct from the detailed level of the previous chapter, the effectiveness of the swimming pools regulatory approach. The objective is to assess whether there is any major departure from regulatory best practice in the design of the regulatory approach and to recommend how to address these.

10.2 Evaluation

Table 10.1 is a summary of the evaluation of the swimming pool regulatory framework against the best practice regulatory principles.

Table 18 Best Practice Regulatory Principles

Attribute	Principle and desired characteristics	Summary assessment
Part 1: Prior Principles		
Scoping	<p>Principle</p> <ul style="list-style-type: none"> » A case for action should be established and all feasible options assessed, including all non-regulatory options <p>Desired characteristics</p> <ul style="list-style-type: none"> » Define and assess the problem » Identify and assess all feasible options to address the problem 	<p>The case for regulatory intervention was based on evidence of persistent drowning deaths and non-fatal drownings for young children, noting that a significant proportion of non-fatal drownings resulted in long term disabilities. This occurred across different council areas and despite community education programs conducted by councils warning of the need for close supervision of young children where swimming pools were present.</p> <p>There was also an increasing incidence of such drownings. This also reflected substantial growth in the number of private swimming pools.</p> <p>The evidence was that while close and active supervision was a necessary condition for achieving pool safety, it was not a sufficient condition. In particular there were circumstances where parents/supervisors were momentarily distracted or where there was not awareness that the children had gained access to the pool area despite lockable doors and/or windows.</p>

Attribute	Principle and desired characteristics	Summary assessment
		<p>It was concluded that in addition to active parental supervision there needed to be a child resistant pool barrier around the pool. The alternatives were to accept the fatal and non-fatal child drownings that would occur even with active education and pool safety programs, or ban private swimming pools which would be a severe restriction on personal freedom</p>
Net benefit maximisation	<p>Principle</p> <ul style="list-style-type: none"> » The approach that generates greatest net benefit for the community should be selected <p>Desired characteristics</p> <ul style="list-style-type: none"> » The assessment of net benefits is fully transparent and accountable 	<p>A cost benefit analysis of the proposal to require pool barriers around private swimming pools was undertaken at the time of the 2010 amendments. It demonstrated that there were significant net community benefits in demanding pool barriers for all pools. There was not a similar cost benefit analysis undertaken at the time of the 2012 amendments</p>
Consultation	<p>Principle</p> <ul style="list-style-type: none"> » Full and effective consultation with all affected stakeholders during the regulatory design stage and thereafter throughout the regulatory cycle <p>Desired characteristics</p> <ul style="list-style-type: none"> » All relevant stakeholders are identified and the input obtained and assessed » Feedback is provided to stakeholders and the opportunity provided to comment on the draft approach 	<p>There was a consultation process that preceded the introduction of the <i>Swimming Pools Act 1992</i> and since that time there have been consultation processes in respect to the amendments to the Act, namely the 2009 and 2012 Amendments.</p> <p>However, a more systematic and ongoing process of engagement with key external stakeholders would be very desirable, which could be facilitated through the establishment of a Pool Safety Council</p>
Part 2: Design Principles		
Market compatible	<p>Principle</p> <ul style="list-style-type: none"> » Every effort should be made to utilise market mechanisms and incentives and to avoid distorting the economy and markets <p>Desired characteristics</p> <ul style="list-style-type: none"> » The impact of the regulatory regime on the economy and markets is assessed and every effort taken to minimise adverse economic impacts 	<p>The right of persons to have swimming pools and the market for the delivery of swimming pools has not been altered. Rather it has been decided that swimming pools create an externality that can impact negatively not only on the pool owner and family but on visitors to the property, neighbours and the surrounding community and hence the purchase of the swimming pool product comes with conditions concerning registration, erecting and maintaining barriers that meet a certain standards etc.</p> <p>This has been supplemented with regulatory measures directed at achieving compliance and effective enforcement</p>

Attribute	Principle and desired characteristics	Summary assessment
Proportional	<p>Principle</p> <ul style="list-style-type: none"> » The scope and burden of regulatory rules and their enforcement should be proportional to the benefits that are expected to be generated <p>Desired characteristics</p> <ul style="list-style-type: none"> » A risk based cost benefit framework is utilised for rule making and enforcement 	<p>A cost benefit study undertaken by OLG concluded that while there was a net economic benefit in establishing the barrier requirements, there was unlikely to be significant additional net benefit from additional investment in pool safety. However, this study was based on a low assessed value of life and did not have regard to the later studies that indicated both a higher ratio of non-fatal to fatal drownings and significant long term impacts for a portion of non-fatal drownings.</p> <p>A more recent cost benefit study undertaken by the Samuel Morrison Foundation and Kids Health⁴⁵ found that when regard is had to the impact of fatal and non- fatal drownings associated with lack of effective barrier protection there is a significant net economic benefit from the regulatory requirements, such as inspections of all pools on a periodic basis</p>
Flexible and adaptable	<p>Principle</p> <ul style="list-style-type: none"> » The regulated entities have the scope to adopt least cost and innovative approaches to meeting their regulatory obligations » The regulatory system has the capacity to evolve and refine its approach over time <p>Desired characteristics</p> <ul style="list-style-type: none"> » Regulatory approach is performance based and is administered in a responsive and flexible manner » Non-regulatory approaches such as self-regulation are used wherever possible » Feedback systems are in place to assess how the system is operating and the approach is adjusted in light of available evidence of what approaches are effective » The system is fully up to date 	<p>The regulatory framework has been subject to regular review, including this one.</p> <p>The barrier standard is regularly re-examined to determine how effective it is and whether it can be made simpler without compromising effectiveness.</p> <p>In addition, there is a general provision in the Act, section 22, which allows pool owners to seek to have exemption from the barrier requirements where it is impractical or unreasonable to adhere to the standard or an alternative solution that is no less effective can be used.</p> <p>While in principle this provision allows for the application of alternative, performance based approaches, which is in accord with the performance approach of the overall National Construction Code, there are certain deficiencies in both the design and execution of this provision which need to be addressed. These were addressed in Section 9.2 and the recommendations</p>

⁴⁵ Samuel Morris Foundation, in consultation with Kids Health, Cost benefit analysis of a pool inspection program for NSW.

Attribute	Principle and desired characteristics	Summary assessment
	with technological and market change and societal expectations	
Certain and predictable	<p>Principle</p> <ul style="list-style-type: none"> » Regulatory entities have certainty and clarity about their obligations » There is predictability and consistency in the action of the regulator <p>Desired characteristics</p> <ul style="list-style-type: none"> » Clear and available information and advice for regulated parties » Clear and transparent decision making criteria with certainty and consistency of process and outcomes 	<p>This is a second area where the regulatory framework, as implemented, is deficient.</p> <p>There is no clear, simple documentation available in a convenient form for pool owners and the general community that sets out the pool safety requirements, particularly relating to the pool barrier. Furthermore there is not an advisory hotline available to which individuals can make inquiries and problems.</p> <p>There is no documentation for pool inspectors and certifiers about their role, responsibilities and obligations, which should also be available for reference by the general community.</p> <p>Finally, where a pool owner disagrees with the assessment of a council pool inspector or a private pool certifier, there is no convenient, affordable and timely appeal mechanism where the decision can be objectively assessed</p>
Transparent, accountable and evidence based	<p>Principle</p> <ul style="list-style-type: none"> » The development and implementation of regulatory rules and enforcement should be evidence based and fully transparent <p>Desired characteristics</p> <ul style="list-style-type: none"> » All regulated entities and stakeholders have full information on the regulatory system » Regulators justify decisions and are subject to public scrutiny 	<p>Changes to the regulatory framework are subject to consultation and are required to be evidence based.</p> <p>However, there is not a reporting mechanism whereby the regulator reports to the Government and the community on the performance of the regulatory approach</p>
Capable regulators	<p>Principle</p> <ul style="list-style-type: none"> » The regulator must have the right resources, skills and systems to operate an efficient and effective regulatory approach <p>Desired characteristics</p> <ul style="list-style-type: none"> » The capacity of the system against its demands is regularly assessed and resources are adjusted accordingly » Skills and knowledge of the regulator and its agents is 	<p>The resourcing of the function at the state level, as well as at the local council level appears inadequate and hence could be compromising the effectiveness of the education, compliance and enforcement functions.</p>

Attribute	Principle and desired characteristics	Summary assessment
	upgraded on an ongoing basis	
Outcomes focused	<p>Principle</p> <p>The performance of the regulatory system should be assessed against the objectives set for the system and based on measurable outcomes</p> <p>Desired characteristics</p> <p>Regular reporting of outcomes and against objectives</p>	<p>Information is generated each year on fatal and non-fatal drownings of young children. This is presumed to reflect the objective of the regulatory approach. However, the Act does not have an explicit statement of its objective. This should be rectified so that there is both clarity in this area and clear outcome measures. These outcome measures must be reported on, reflecting the agreed and defined objective.</p>

10.3 Conclusions

While the swimming pool regulatory approach generally conforms to the best practice principles, there are five areas where further improvements need to be made:

- » Revised, performance based approach to the assessment of Section 22 exemptions
- » Clear documentation on the regulatory requirements be made available to pool owners and the general public, supplemented by an advisory service and a simple, timely appeals mechanism
- » The establishment of a Pool Safety Council who can act in an advisory function
- » Clarity about the objective of the regulatory framework and desired outcomes, with annual reporting on the performance of the scheme
- » An appropriate level of resourcing of the regulatory function at both the NSW Government and Local Government levels.

11 Findings and recommendations

11.1 Findings

1. There is a strong justification for swimming pool regulation that centres on seeking to reduce the incidence of fatal and non-fatal child drownings. This should be made an explicit object of the legislation and for reporting purposes
2. Both active adult supervision and effective pool barriers are necessary for pool safety involving young children
3. The drowning rate for young children in NSW (i.e. the number of deaths of young children expressed as a proportion per 100,000 of young children) is higher than either Western Australia or Queensland, the two most comparable states, when account is taken of the level of private swimming pool ownership. This would indicate that there is room to improve the child safety outcomes in NSW
4. There is in principle merit in having a single pool barrier standard, as well as legislative and regulatory requirements. This should be based on the national standard, the current standard, AS 1926-2012. However, before this can occur there is a need for clarification of a number of the provisions on the standard
5. NSW (and other jurisdictions) should take a more proactive role in the setting, reviewing and interpretation of the standard
6. A priority should be to eliminate current legislative exemptions to the standard which have contributed to avoidable fatal and non-fatal child drownings
7. It should also be a priority to tighten up the regulation of portable pools and spa pools, which continue to contribute to avoidable fatal and non-fatal child drownings
8. There is a range of deficiencies that need to be addressed with respect to the regulation of private swimming pools, including the following:
 - > Complexity of the pool barrier standards and regulatory requirements which create difficulties in assessing compliance
 - > Lack of documentation available to pool owners, and the community in general, regarding swimming pool regulatory requirements
 - > Absence of an advisory service
 - > Lack of documentation available to swimming pool certifiers and council swimming pool inspectors providing guidance for the undertaking of their functions
 - > Lack of training requirements in pool barrier standards for persons installing pool safety barriers
 - > Lack of support and advice facilities for pool certifiers as well as an absence of suitable accountability mechanisms
 - > Absence of a process for obtaining clarity on interpretation issues relating to pool barrier standards, including the absence of a coordinated and considered approach across relevant agencies in regard to review and changes to the pool barrier standard

- > Lack of clarity or guidance about how councils should approach the role of assessing applications for exemptions from pool barrier requirements and an absence of the concept of finding alternative, effective safety solutions in such circumstances
- 9. There is considerable merit in adopting an inspection approach whereby all private swimming pools are inspected at least every four years, subject to undertaking a cost benefit assessment of the proposal. If this approach is not favoured then the current council inspection program needs to have a more consistent and resourced approach across councils
- 10. There are areas for further improvement in information collection on pool safety performance and linked follow up action, including more comprehensive collection of information on non-fatal drownings and the council process to follow up on these
- 11. It is desirable to reform the governance arrangements for swimming pool regulation through transferring ministerial and administrative responsibility to align with that for building regulation. This could also be achieved through a re-write of the Act and Regulation and the establishment of a Pool Safety Council that includes all key stakeholders
- 12. The current resourcing of the swimming pool regulation function is inadequate and needs to be addressed at NSW Government level through an annual charge on the registry and budget funding for a revamp of the registry. Local Government can address this through flexibility in charging for pool inspections and a levy on council rates for pool owners.

11.2 Recommendations

It is recommended that the following actions and reforms be put in place:

1. Pool safety standard

- a. Maintain use of the national swimming pool barrier standard, though reserving the right to make variations to it (where it is considered that these variations will enhance effective and efficient pool safety) and determine when to update to the latest version of the standard
- b. NSW to take an active ongoing role in the setting and review of pool barrier standards and to actively engage in seeking to clarify the identified interpretation issues with the current barrier standard in NSW. Once clarified, phase the standard in over a suitable transition period as the single barrier standard, with common legislative and regulatory provisions to apply to all pools
- c. Engage with other jurisdictions and Standards Australia to establish an interpretation service for matters in the standard judged to require clarification
- d. Establish a suitable forum in NSW, drawing upon the input of relevant stakeholders, to identify and assess matters in the standard requiring interpretation and create a coordinated NSW approach to the reviews of the standard
- e. Replace the current NSW representatives (BPB and Fair Trading) with a representative of the swimming pool regulator, which will also create a direct link to the proposed Pool Safety Council
- f. Note that as a general principle, Australian Standards, which are a regulatory requirement, should be fully accessible at no cost. Noting the current copyright arrangements, negotiate with SAI Global and Standards Australia, involving other jurisdictions, on an industry access arrangement for reasonable terms to the swimming pool standard

- g. As a priority, develop an explanation of the pool safety requirements directed at pool owners and the general public
 - h. In consultation with Fair Trading and the industry, seek to establish a requirement for pool barrier builders and installers to have the necessary training and knowledge to install pool barriers in conformity with the standard.
 - i. Clarity should be provided about the need for a suitable protective barrier during construction of a pool. Clarity should also be provided for a temporary pool barrier conforming to the pool barrier standards where a pool area is being renovated with the existing fence removed
 - j. Progress with the ABCB and the Building Ministers' Forum establishing a process whereby pool barrier material that meets the fit for purpose requirements of the standard is certified and stamped to evidence this
2. **Exemptions from pool barrier standards**
- a. All legislative exemptions should be removed and owners required to adopt the current standard within a suitable transition period of three to five years, or at the time of sale or lease, whichever occurs first; owners should otherwise obtain an exemption under section 22 of the *Swimming Pools Act 1992*
 - b. Greater guidance should be given to councils in the application of the Section 22 exemption provision under the Swimming Pools Act, based on the principle that where an exemption is assessed to apply, an alternative solution should be developed that provides an appropriate level of pool safety
3. **Treatment of portable pools and spas**
- a. The SEPP (Exempt and Complying Development Codes) 2008 should be amended such that portable pools handled under the SEPP should be a requirement that portable pool fencing is inspected and certified and the pool is registered before use
 - b. Require retail outlets for portable pools to have staff available to advise customers wishing to purchase a portable pool to sign an acknowledgement of their understanding and commitment to the requirements of pool safety and have the pool registered on the swimming pool register at the time of sale, so facilitating inspection by the relevant council
 - c. Explore with eBay and other on line retailers requiring online sales of portable pools to provide information to purchasers on their obligations and register the pool on the swimming pool register
 - d. Include programs specific reference to the obligations associated with portable pools in community education
 - e. Address the gap in the requirement in the Australian Consumer Law for a large warning sign on the bottom of each portable swimming pool that sets out the legal requirements clearly, covering rigid sided pools holding more than 300mm
 - f. Seek to clarify with BCA and Standards Australia the definition of a spa, to ensure there is a clear distinction between a spa and a pool to justify the different barrier requirements
4. **Swimming pool register**
- a. The NSW Government should commit resources to substantially upgrade the swimming pool register, working closely with councils and the Pool Safety Council (see recommendation 9.c) on its design and development, ensuring that all relevant information is recorded on the register; removal of self-assessment provision; limiting the

- parties that can input to the register to maintain its integrity; substantially expanding its reporting capability; and making it a mechanism for communicating with pool owners
- b. Require that all new pools must be issued with a compliance certificate rather than occupation certificate to facilitate recording of compliance information on the register
 - c. Change the compliance certificate to clearly distinguish it from the registration certificate and record on it the standard against which the pool was assessed
5. **The role, functions, training, accreditation, accountability and fees for pool certification**
- a. Allow council and accredited private certifiers with the necessary skills to undertake minor repairs to pools that have elements of non-compliance and are capable of relatively easy rectification. What constitutes minor repairs should be clearly set out in regulation and be subject to the certifier having the prerequisite skills and experience to undertake the work
 - b. Require council and accredited private certifiers to document each of their inspections and assessments with timed and dated photographs and supporting notes. These must be permanently maintained and fit for review as part of an audit program
 - c. Subject to consultation with the Crown Solicitor, develop a process that requires that those applying for E1 accreditation demonstrate the necessary knowledge and understanding of the NSW swimming pool standards and regulatory approach or undertake the necessary training
 - d. Require as a condition of accreditation that E1 pool certifiers undertake a required number of hours each year of relevant Continuing Professional Development
 - e. Require all council pool inspectors and A1 to A3 certifiers who wish to undertake pool certification work to demonstrate the required knowledge or undertake the E1 course and be accredited as E1 certifiers
 - f. Broaden the entry requirements for the E1 course along the lines of the approach undertaken in Queensland, but with the specification of possible pre-requisite training or knowledge to address any additional skills and knowledge that are considered essential
 - g. Have the E1 course submitted for national recognition and oversight by the ASQA, after a full review of the course criteria in light of the experience of the course over the last year
 - h. A program of support and advice should be developed and implemented for E1 certifiers involving the following elements:
 - i. A hot line to provide over the phone advice
 - ii. Peer review service where a complex issue requires expert input
 - iii. Practice guide (see 5.i below)
 - iv. Linkage of the Continuing Professional Development and practice guide to the learnings generated from the audit program (the audit program is addressed in the following section)
 - i. The development and active maintenance of a practice guide for certifiers. The guide will have the force of law in terms of the approach undertaken by certifiers, setting out the approach to be followed and clearly identifying the requirements with respect to standards, legislation and regulation that applies to each pool vintage category.
 - j. The development of a guide on pool safety requirements and the obligations (including role and responsibilities) of pool owners and users

- k. Regular communication with pool owners (through a revamped swimming pool register) regarding their role and responsibilities, pool safety requirements and the role of pool certifiers
- l. The development of a standard letter of engagement to be entered into between pool owners and pool certifiers which clearly sets out the roles and responsibilities of pool owners and certifiers. It should also include the measures to ensure that certifiers execute their responsibilities for every project they work on
- m. The establishment of an active audit program of pool certifiers to monitor and assess certifier performance. This will have linkage to certifier training, the practice guide and, if necessary, certifier disciplining
- n. Noting that a program of developing a culture and approach of professionalism for the certification industry in conjunction with the Professional Standards Authority and the two certifier associations, Association of Accredited Certifiers and the Australian Institute of Building Surveyors, is proposed in the review of *Building Professionals Act 2005*, to apply across all certifier categories
- o. Establish reasonable competitive neutrality between private certifiers and council pool inspectors by allowing councils to set their own pool inspection and certification charges, subject to the fees only being cost recovery and subject to normal practice of transparency by being set and published annually; they should be able to be reviewed by an external auditor to check that they are only cost recovery
- p. The *Local Government Act 1993* should be amended to allow for charging of incurred unpaid fees, such as certification and inspection fees, as debts against the property and thus be able to recover the debt on sale of the property

6. **Inspection and certification requirements**

- a. Arrangements should be put in place in respect to residential sale transactions to enable, under certain conditions, the obligation to obtain a pool compliance certificate to transfer from the vendor to the purchaser, involving the following:
 - i. Vendor is required to obtain either a compliance certificate or a statement detailing the nature of the non-compliance and the options for how it can be made compliant, providing the purchaser with full information against which to assess the situation, including the likely cost involved in rectification, which can become part of the sale price and terms negotiation
 - ii. Vendor and purchaser to mutually agree on whether the vendor will make the pool compliant or the purchaser will take on the responsibility (in the case of an auction, all bidders would be provided with the non-compliance statement)
 - iii. If the purchaser takes on the responsibility, a copy of the non-compliance statement is provided to both the purchaser and the local council; the purchaser will provide to the council a statement of how long it will take to make the pool complaint and supporting details, with the period not to exceed three months
 - iv. In the event council considers the time nominated by the purchaser excessive, it can seek to vary the period in discussion with the purchaser
 - v. The council takes on a compliance role in ensuring the new owner achieves compliance within the designated time period
- b. The sale and lease provisions commence, as planned on 29 April 2016, ideally with the arrangement set out in recommendation 6.a in place for sale transactions, with the

decision to be announced as early as possible, ideally before Christmas 2015, and to be accompanied by a public awareness program

- c. The following actions should be taken in advance of the commencement of the sale and lease provisions:

Action	Explanation and rationale
1. Amend the <i>Swimming Pools Act 1992</i> , the <i>Conveyancing Act 1919</i> and the <i>Property Stocks and Business Agents Act 2002</i> to allow, under defined conditions for vendors to transfer the obligation to the purchaser for achieving pool compliance within a defined period after sale and involving councils in a compliance function	This approach will assist in creating a smoother transition to the new system by removing a potential pinch point that could delay and disrupt the residential sales market and potentially will achieve a better pool compliance outcome
2. Amendment to the Conveyancing (Sale of Land) Regulation 2010 to provide an exemption in the Regulation with respect to providing a certificate of compliance in the case of off the plan marketing of residential developments involving a planned swimming pool and require a certificate of compliance and evidence of registration 14 days prior to the vendor being able to require completion.	The current wording implies that a certificate of compliance is required by a developer of a residential development which will have a swimming pool and that the compliance certificate must be available before 'off the plan' marketing can commence. This would have a very disruptive effect on the multi-unit residential market if not addressed. Further details can be obtained from The Law Society Property Law Committee
3. Amendment to the <i>Swimming Pools Act 1992</i> to require owners' corporations to obtain and have available for owners wishing to sell a pool compliance certificate	Concerns have been raised that owner's corporations have not been proactive or cooperative in obtaining a compliance certificate where the property has a pool and hence potentially could negatively impact on unit owners wishing to sell
4. Activate a NSW Government and Local Government campaign informing the community and the property industry of the legislative requirements of the sale and lease provisions	It is important that there is an early announcement of the intention to proceed with the sale and lease provisions and the requirements for persons with property with a swimming pool planning to sell or lease

- d. Subject to a cost benefit assessment, a four yearly inspection program should be adopted, managed by councils and funded by a levy on the council rate of pool owners. Failing that, a more consistent, risk-based inspection program should be developed that applies across all councils and funded by a levy on pool owners (see recommendation 7.f)

7. Compliance and enforcement

- a. Private certifiers should be reminded of their obligations under Section 22E to provide both details of any non-compliance and options for how this can be rectified. Council pool inspectors should be directed to provide such information as part of any pool inspection that identifies non-compliance
- b. Require that a pool owner cannot remove a certifier where a pool has been found to be non-compliant for the three months non-compliance rectification period (see recommendation 7.3) without the approval of the BPB and require all certifiers to document on the pool registry their inspections, and if a pool is non-compliant and why
- c. Expand the period within which a private certifier seeks to achieve compliance from a maximum of six weeks to a maximum of three months, with the ability to extend further if the certifier attests that substantial progress is being made
- d. Require a certifier to follow up with the pool owner after assessing non-compliance to develop an action program to address this
- e. Only involve the council once it is reasonably determined that the pool owner is not willing to address the non-compliance in a reasonable time frame
- f. In the event that it is not decided to have a periodic inspection of all private swimming pools, then a more consistent, risk based inspection program be developed and undertaken by councils based on guidelines developed by the regulator in order to achieve a more consistent approach across all councils and provide greater coverage overtime of pools, noting that councils have the flexibility to have greater coverage of pools then set out in the base program
- g. A review should be undertaken of the current financial penalties, with a view to increase those penalties to reflect the serious nature of the offence and potential consequences that flow from such offences in terms of drownings and near drownings. Furthermore, it should explore imposing a penalty on non-compliant landlords and having a penalty structure that penalises for as long as the pool remains non-compliant
- h. The NSW Government should give consideration to the Coroner's report recommendation to institute a criminal offence where a person dies as a result of negligence of a third party with respect to maintenance and safety features of a swimming pool
- i. A simple, affordable and timely appeal mechanism should be established for pool owners to appeal against decisions of councils and private certifiers in regard to pool certification, compliance and enforcement

8. Information, research and education

- a. It should be a requirement that all public and private hospitals and the ambulance service are required to report to a central unit in the NSW Health Ministry; this information should be provided to the relevant local council as soon as it is received for the council to follow up and check for pool compliance and safety
- b. The CTCPER/Kids Health annual review of non-fatal drownings of children should be extended to include information drawn from all public and private hospitals and the ambulance service
- c. The swimming pool regulator should be required to produce an annual report on swimming pool compliance. It should detail, amongst other things, the number of pools registered; the number of pools that have been inspected within a defined period; the results in terms of compliance and the main defects identified; the number of pools with

compliance certificates. IT should also assess the effectiveness of the compliance program and in what ways it could be improved

- d. RLSS should be engaged as early as possible to develop (in conjunction with councils, health and safety organisations and the property industry) a program targeted to alert the public of the forthcoming commencement of the sale and lease provisions and what they mean for property owners with swimming pools. It should also serve to reinforce the key pool safety messages in the period leading into summer
- e. A program should be developed to engage with the pool industry, including pool builders, suppliers, retailers and service providers, with a particular focus on engaging with retailers of portable pools

9. **Governance arrangements**

- a. The *Swimming Pools Act 1996* should be re-written, taking into account the matters identified in Table 9.4.
- b. Responsibility for the *Swimming Pools Act 1996* should transfer to the Minister with responsibility for building regulation, in accordance with the practice that applies in all other Australian jurisdictions
- c. A Pool Safety Council is established to advise the relevant Minister on pool safety matters. Its membership should be drawn from government and non-government organisations involved in relevant health and safety issues, the swimming pool industry, pool certification and property owners, with an independent chair. Any decision on expanding the role of the council to include executive functions should be considered at a later stage
- d. In light of a decision on the establishment and role of the Pool Safety Council, consideration should be given as to whether there continues to be a need for the Cross Agency Advisory Group

10. **Resourcing and funding**

- a. Resourcing of the NSW Government's role in swimming pool regulation should be considered as part of the resourcing of the Office of Building Regulation and the BPB, if the function is transferred to these bodies. Consideration should be given to an annual charge on pools on the swimming pool register as a means to partly fund the swimming pool regulatory function of the NSW Government
- b. Councils be given the funding flexibility to be able to self-fund their functions in respect to swimming pool safety regulation and education through a combination of cost recovery pool inspection fees, fines and a levy on council rates for pool owners
- c. Councils should be encouraged to contract out the pool inspection function to accredited certifiers.

12 Implementation

This final chapter provides an outline of an implementation plan for progressing the recommendations set out in this report. The word 'outline' is stressed as more detailed planning and consultation will be necessary, if some or all of the recommendations are endorsed.

Identifying which Minister and agency will have responsibility is an important aspect of the reform. Until that is decided it will be difficult to progress matters.

The implementation plan sets out:

- » Actions required to progress the recommendations
- » Assessed timing
- » Parties likely to be responsible for undertaking the action and any linkage between the action and other actions.

The key principles which have been used in drawing up the plan are:

- » Prioritise actions that will deliver the highest net benefit
- » Ensure those pre-conditions that need to be met before an action is successfully put into place are been identified and acted on
- » Identify all relevant stakeholders that need to be consulted on for each initiative
- » Group together related actions and seek to progress as a linked package.

Set out below are what are assessed as the highest priority actions to be progressed in part or whole over the next twelve months. Please note that they are not listed in priority order.

Priority action	Rationale for priority
1. Clarify the interpretation issues with current pool barrier standard and establish an ongoing mechanism for clarifying future interpretation issues	It is important that there is a common understanding and agreement on the requirements of the standard. In addition resolving the current interpretation issues lays the ground work for potentially moving into the future of a single standard and common legislative/regulatory requirements for all pools
2. Remove current legislative exemptions from the pool barrier standard and establish clear guidance for councils in assessing applications for exemptions	The exemptions are contributing significantly to child fatal and non-fatal drownings and should be removed. However, there is a need to make a case by case exemption process far more effective than it is at present. The core principle for approving an exemption under Section 22 must be that an alternative solution has been put in place, which delivers satisfactory safety outcomes.

Priority action	Rationale for priority
3. Put in place suitable regulatory measures to ensure that portable swimming pools are registered and conform to safety requirements	As with statutory exempt pools, portable pools contribute significantly to fatal and non-fatal child drownings
4. Revamp the swimming pool register	The register needs to be the centre point of swimming pool regulation and education. It must be the centre point for the collection of all relevant information on swimming pools, including all inspections and their outcome. It must also become an important mechanism for communication to pool owners regularly on pool safety and compliance requirements
5. Produce a practice guide for E1 certifiers and council pool inspectors, as well as a clearly documented explanation of swimming pool safety and regulatory requirements for swimming pool owners and the general community	It is fundamental that regulatory agents, certifiers and pool inspectors, require clear guidelines for how to undertake their functions. It is equally important that there is a well-documented explanation of the swimming pool safety requirements that is easily accessible and explicable to the community
6. Establish an active audit program and support program for pool certifiers	The audit program will facilitate, together with the practice guide, proper accountability of pool certifiers; the support program will assist certifiers in undertaking their role to a high standard
7. Provide financial flexibility to councils to undertake the swimming pool regulatory function	Councils are the key compliance, enforcement and education mechanism for swimming pool safety. As such there needs to be greater flexibility for councils to fund these activities, including both cost recovery pool inspection fees and the ability to impose a levy on the rates of pool owners
8. Commence the sale and lease provisions from the planned date of 29 April 2016, combined with providing flexibility for vendors to transfer the requirement for obtaining pool compliance to the purchaser under certain conditions and other actions summarised at Table 9.5	The sale and lease provisions were one of the main compliance mechanisms in the 2012 legislative amendments. These have, in effect, been deferred for two years, therefore undermining the credibility of the provisions. The deferrals have also had a negative impact on attracting persons to the role of pool certifier.

Priority action	Rationale for priority
9. Undertake a cost benefit analysis of adopting a four yearly inspection of all pools	The sale and lease provisions are sensible checking requirements at the time of a lease or sale transaction but they do not constitute an effective compliance mechanism. The evidence indicates that Western Australia has achieved a high level of compliance and a lower rate of child drowning than other jurisdictions by employing four yearly inspections and has done this in a very cost effective way.
10. Establish reporting and follow up requirements in the event of non-fatal child drownings	Near drownings are a clear warning signal that something is wrong and needs investigation. This system has been in operation in Queensland for some time and appears to work effectively.

The main priorities in the first six months will include undertaking the necessary policy work to progress the reforms and putting in place the sale and lease provisions.

The implementation plan is set out in Table 12.1.

Action	Relevant recommendation	Start	Finish	Any prior action required	Responsibility		2016												2017												2018												If after Jan 2018	
						Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec			
1. Pool safety standard and work quality																																												
1. Clarify AS 1926-2012 and determine whether to move to one standard: resolve interpretation issues with respect to AS 1926-2012 and to simplify the number of applicable standards, legislative and regulatory provisions in a cost efficient manner	1.2	Jul-16	Dec-16	Complete action 2	Regulator , Pool Safety Council																																							
2. Seek to establish an interpretation service for AS 1926-2012 and negotiate on an industry access arrangement for AS 1926	1.3, 1.5	Jan-16	Jun-16		Regulator, other jurisdictions and Standards Australia																																							
3. Utilise Pool Safety Forum to coordinate a NSW approach on matters with respect to the standard to be clarified	1.4	Feb-16	ongoing	Establish Pool Safety Council , action	Regulator																																							
5. Develop a document setting out pool safety requirements for consumers	1.6	Dec-16	Apr-17	Establish Pool Safety Council and clarify the standard	Regulator, Pool Safety Council us																																							
6. Establish training requirements for pool barriers installers	1.7	Jul-16	Oct-16		Regulator, Fair Trading																																							
7. Establish requirements for temporary pool fences	1.8	Aug-16	Dec-16		Regulator, Pool Safety Council																																							
8. Pursue requirement for certification and stamping of fit for purpose pool barriers	1.9	Oct-16	Jun-17		Regulator, ABCB																																							
2. Exemptions from pool barrier standards																																												
9. Removal of all legislative exemptions	2.1	Feb-17	Feb-20	Actions 1 and 10	Regulator																																							
10. Develop guidance for councils regarding Section 22	2.2	Jun-16	Dec-16	Formulate the legislative amendments for Section 22 { part of action 42)	Regulator, Pool Safety Council																																							
3. Treatment of portable pools and spas																																												
11. Amend SEPP (Exempt and Complying Development Code) to require portable swimming pools to be inspected, certified and registered before use	3.1	Feb-16	Jun-16		Regulator, DPE																																							
12. Require retail outlets (including on line) for portable pools, to have staff to advise customers; require signing of acknowledgment of requirements and registration of pool upon purchase.	3.2, 3.3, 3.4	Jun-16	Feb-17	Explore legislative/regulatory requirements	Regulator and Fair Trading																																							
13. Seek to address the gap in Australian Consumer Law regarding definition of portable pool and warning signs	3.5	Jun-16	Feb-17		Regulator, ACCC and Fair Trading																																							
14. Clarify the definition of spa/spa pool	3.6	Jun-16	Dec-16		Regulator, BCA and Standards Australia																																							
4. Swimming pool register																																												
15. Upgrade the swimming pool register and change process	4.1	May-16	Feb-17		Regulator, Pool Safety Council																																							
16. Require all new pools be issued with a compliance certificate which is recorded in the register	4.2	Jun-16	Aug-16		Regulator																																							
17. Redesign compliance certificate	4.3	Jun-16	Aug-16		Regulator																																							
5. The role ,functions, training accreditation, accountability and council fees for pool certifiers																																												
18. Allow certifiers with required skills to undertake minor works subject to a definition of minor works and a monetary limit	5.1	Jun-16	Oct-16		Regulator, BPB																																							
19. Establish requirements for documentation for inspections of pools applying to private certifiers and council inspectors	5.2	Jan-16	Jun-16	Links into the practice guide but should be communicated in advance of completion of practice guide	Regulator.																																							
20. Develop requirements for mutual recognition pool certifiers	5.3	Jan-16	Aug-16	Consultation with Crown Solicitor	BPB																																							
21. Establish CPD requirements for E1 certifiers	5.4	Jan-16	Sep-16		BPB																																							
22. Require council pool inspectors and A1 to A3 certifiers wishing to undertake E1 certification to do E1 course, subject to any credits	5.5	Jan-16	Mar-16		BPB																																							
23. Broaden entry requirements for E1 course	5.6	Jan-16	Jun-16		BPB																																							
24. Have E1 course submitted for national recognition and oversight by ASQA	5.7	Jan-16	Feb-17		BPB																																							

Appendices

A	Terms of reference
B	References
C	Comparison of private swimming pool regulation in Australian states and territories
D	Initial Stakeholder Meetings
E	Tabulations for the discussion paper questionnaire
F	Submissions received (additional to returned questionnaires)

A Terms of reference

General

The Review is to make recommendations on reforms to the *Swimming Pools Act 1992* and regulations to create an effective swimming pool barrier regulatory framework that protects the safety of children under the age of five around backyard swimming pools in NSW.

The Reviewer is to examine the:

11. Inspection and certification framework, in particular the requirement for compliance certificates for properties sold and leased;
12. Enforcement framework, including consideration of the relevant recommendations of the NSW Coroner and Child Death Safety Review Team;
13. Barrier standards and exemptions framework, including the adoption or otherwise of the relevant Australian Standards and potential improvements based on the experience and frameworks in other jurisdictions; and
14. Appropriate machinery of government arrangement to administer the *Swimming Pools Act 1992* and 2008 Regulation and to support the recommendations of this review.

The Review is to ensure that the regulatory and enforcement framework for swimming pool barriers in NSW:

15. Is underpinned by swimming pool barrier standards that are simple and effective
16. Facilitates the application of a uniform standard wherever possible, including to existing swimming pools
17. Is proportionate to the risk being managed, including consideration of the *Guide to Better Regulation* principles;
18. Ensures responsibility for maintaining and installing a compliant swimming pool barrier remains with the swimming pool owner; and
19. Provides an effective enforcement and compliance framework that maximises the likelihood of responsible owner behaviour.

Consultation

Consultation should occur as necessary with all relevant stakeholders and NSW Government bodies. This should include the public release of a discussion paper to inform the final report.

Timing

The Reviewer should provide a final report to the Minister for Local Government by December 2015.

Evidence

The Reviewer will collect evidence to establish the impacts on pool owners and councils in order to substantiate any recommendations for reform.

Secretariat

Secretariat will be provided by Office of Local Government.

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C Comparison of private swimming pool regulation in Australian states and territories

	NSW	Victoria	Queensland	Western Australia
Legislation	Swimming Pools Act 1992 Swimming Pools Regulation 2008 Act reviews in 2010 and 2012	Building Act 1993 PART 2—Building Standards 15A Building Regs with respect to swimming pools and spas Building Regulations 2006 PART 7—Building Work—Safety Requirements Division 1—Existing swimming pools and spas Building Code of Australia	Building Act 1975 Building Regulation 2006	Building Act 2011 Building Regulations 2012
Responsible Minister	Minister for Local Government	Minister for Planning	Minister for Public Works and Housing	Minister for Commerce
Responsible agency	Office of Local Government	VBA for operations and the Department of Environment, Land, Water and Planning for policy	QBCC for operations and Department of Housing and Public Works for policy	Building Commission, a division within the Department of Commerce
BCA coverage	Class 1 (single dwelling eg.house) Class 2 (building with 2 or more dwellings e.g. units) Class 3 (residential building for long term or transient living e.g. boarding-house) Hotels, motels and movable dwellings	Class 1, 2, 3,4 (single flat in building of other use) & 10 (garage)	From 1 December 2010, pools associated with class 1, 2, 3 and 4 buildings (including indoor pools, hotel/motel pools and caravan parks) must comply with the pool safety laws.	Legislation refers to Private Swimming Pools. It does not refer to Class of buildings. Public Swimming Pools are covered by Aquatic Facility Regulations.
New pool approval and				

	NSW	Victoria	Queensland	Western Australia
new fence certification -new pool	Pool inspected at construction by council/certifier. Council grants certificate of compliance which are issued on application from property owner.	Council/certifier approves the pool and a certificate of final inspection provided which is not evidence that construction complies with standard	Final inspection undertaken by council/certifier and mandatory for new pools to have a compliance certificate	Required to be registered but no provision for certification at that time. However it will be inspected during the periodic inspection program and will require a certificate of compliance at that point in time.
-new pool fence	Council/accredited certifier certifies a new fence	Council or private certifier certifies a new fence	Building certifier certifies a new fence	Discretionary for councils to certify a new fence
Certification required at point of sale or lease	Pending - introduction from 29 April 2015.	No	Yes	No
Barrier standards Current	AS1926.1-2012 via BCA with variations: - Exclude out of ground and aboveground pool walls as barriers - Excludes house walls with usable doors directly to pool area as barriers Allow pool spas to have lockable lids	AS1926.1 - 2012 called up through the BCA with only variation being to disallow child-resistant door sets to form part of barrier.	QDC MP 3.4 and modified AS1926.1-2007 from 1 Dec 09 30 modifications in the Queensland Development Code to swimming pool barriers. One of the modifications requires an aboveground pool to have a designated access point which is enclosed by a barrier, including a gate complying with the pool safety standard.	S1926.1-1993 In the process of adopting the 2012 version by May 2016.

	NSW	Victoria	Queensland	Western Australia
Number of standards that apply	<p>Four standards apply</p> <p>AS1926.1 - 2012 - For pools built after 1 May 2013</p> <p>AS1926.1 - 2007 - For pools built between 1 Sep 2008 and 30 April 2013</p> <p>AS1926-1986 - For pools built between 1 Aug 1990 and 31 Aug 2008</p> <p>Swimming Pools Regulation 1998 - For pools built prior to Aug 1990</p> <p>Requirement for pool barriers to come up to the current standard if they are substantially altered or rebuilt.</p>	<p>Existing Pools prior to 8 April 1991 – comply with Building Regulations 2006</p> <p>PART 7—BUILDING WORK—SAFETY REQUIREMENTS</p> <p>702 Application of this Division</p> <p>On an allotment containing a Class 1, 2, 3 or 10 building or a Class 4 part of a building where the swimming pool or spa is appurtenant to that building; and</p> <p>Capable of containing a depth of water exceeding 300mm; and</p> <p>Pools built before 8 April 1991</p> <p>All are required to comply with the Building Regulations 2006</p>	<p>One Standard applies to regulated swimming pools (Queensland Development Code mandatory part 3.4 which varies the Australian Standard 1926.1-2007).</p> <p>Pool owners have until 30 November 2015 to comply with latest standard, or earlier if the property is sold or leased.</p>	<p>2 (Previously 3) - Pre-November 2001 and post-November 2001 standards. The introduction of AS 1926-2012 will create a third standard as from 1 May 2016.</p>
Signage requirements	<p>Sign must state that young children should be supervised; pool gates must be kept closed; objects must be kept at least 900mm clear of the pool fence at all times (s17(1) of Act and cl10 of Reg).</p>	No	<p>Before a swimming pool is constructed a warning sign complying with the requirements of the regulation, must be displayed and remain in place until a building certifier issues a certificate.</p> <p>All regulated pools must display a resuscitation sign complying with 'Guideline 7- cardiopulmonary resuscitation' published by the Australian Resuscitation Council in February 2006.</p>	No
Requirement for spas	<p>Exemption allowing lockable lid.</p> <p>Spa pool must be covered and</p>	<p>No exemption allowing lockable lid.</p> <p>Requires barriers in accordance with AS1926.</p>	<p>Lockable lids are not permitted as a compliance barrier.</p>	<p>No exemption allowing lockable lid.</p>

	NSW	Victoria	Queensland	Western Australia
	secured by a lockable child-safe structure (such as a door, lid, grille or mesh) that is: (a) of substantial construction and having no opening through which it is possible to pass a testing apparatus, and (b) fastened to the spa pool by a device that is itself of substantial construction and having no opening through which it is possible to pass a testing apparatus."	AS1926 allows that the walls of the spa may provide a barrier if they are at least 1.2m in height and climbable objects (ladder etc.) are fenced.	Spas are required to be fenced in accordance with the Queensland Development Code mandatory part 3.4, as for pools.	Spas are required to be fenced in accordance with AS1926.1 - 1993 as for pools
Requirement for above ground pools, including inflatable pools	all above ground, out of ground and inflatable pools with a depth of 300mm or greater required to be fenced in accordance with applicable Australian Standard and maintained to that standard by the owner.	The walls of an above ground and Out of Ground pool walls may provide a barrier if they are at least 1.2m in height and climbable objects (ladder, filter and pump) are fenced and/or away from the pool wall. Inflatable pools are required to be fenced if they can be filled to 300mm.	All pools capable of being filled with water to a depth of 300mm or more including above ground pools must have a pool safety barrier. (removed previous exemption for portable pools)	No exemptions. If filled to more than 300mm depth of water, it is captured and needs suitable safety barrier.
Exemptions	The Act provides exemptions for existing pools that are built prior to 1 October 2010 and are : -built prior to 1 October 2010 -on small properties (less than 230m ²) -on large properties (2 Ha or more) -on waterfront properties	No. Requires 4-sided barrier, with walls of buildings being acceptable. However, Vic does not allow doors from the dwelling into the pool surround (as per the standard.) No other exemptions apply	No automatic exemptions. A pool owner is able to apply to the Local Government for an exemption from part of the pool safety standard for reasons of disability or because it is not practicable to comply. Requires 4-sided barrier	No automatic exemptions. Requires 4-sided barrier. Local government can approve child resistant doorsets but only if certain conditions are met.

	NSW	Victoria	Queensland	Western Australia
	<p>The exemptions are conditional on the pools being compliant to the relevant standard and major upgrades have not occurred</p> <p>Section 22 of the Act allows councils to grant additional exemptions in certain circumstances.</p>		Previously local governments could grant exemptions for rural properties, waterfront properties, double gates etc. and State Government had exempted 19 tourist resorts.	
Pool register	Yes - State wide register Currently just over 325,000 pools on register.	No	yes - electronic swimming pool safety register developed and implemented (State-wide Got administered register).	Yes - implicit Register required by virtue of the need to conduct 4 yearly inspections.
Inspections	Mandatory risk-based inspection programs. Must include 3 yearly inspections of visitor and tourist accommodation as well as multi-occupancy (e.g. strata) properties.	<p>No. Some local governments have their own program.</p> <p>Under the Building Act - councils to administer building provisions in its municipal district</p>	<p>Yes. New swimming pools require a building development approval and a building certifier to perform the final inspection.</p> <p>All other regulated swimming pools must have a pool safety inspection at point of sale and lease.</p> <p>An accredited pool safety inspector training course has been developed. This course must be completed by all applicants with the exception of building certifiers prior to applying for a pool safety inspector licence.</p> <p>The inspection fees are set by</p>	<p>Yes once every four years or less.</p> <p>Councils are responsible. May charge up to \$56 in any one year. Persons authorised by Councils as having appropriate experience. Councils may involve others with expertise such as RLSS.</p>

	NSW	Victoria	Queensland	Western Australia
			market. Pool safety certificates must be lodged with the Queensland Building and Construction Commission to ensure the pool safety register is accurate.	
Compliance and enforcement -mandatory inspections following complaints	Councils required to commence investigation of complaints of non-compliance with the Act within an appropriate timeframe (72 hours where practicable)	No. Complaints may be investigated but this is not prescribed.	All complaints made to the Local Government about pool safety compliance must be investigated unless the Local Government reasonably believes that the complaint is frivolous or vexatious.	Local governments deal with enforcement and complaints regarding compliance with standards under the Building Act 2011. Building Commission provides dispute resolution process for contractual and/or workmanship issues under Building Services (Complaint Resolution and Administration) Act 2011.
-power to undertake remedial work	Councils enabled to enter properties to undertake remedial work where non-action poses a significant risk to public safety	No	All complaints made to the Queensland Building and Construction Commission about a pool safety inspector must be investigated. Yes. Councils already enabled under Local Government Act 2009 to enter properties to undertake urgent remedial work. This includes provision of temporary pool fencing (by contractors) if the pool owner will not comply.	Yes. Local government can issue a building order and seek compliance. The local government can give effect to the building order if necessary. Cost recovery through rates.

	NSW	Victoria	Queensland	Western Australia
-penalties	<p>Most significant offences (e.g. failure to ensure pool surrounded by barrier) Max penalty - \$5,500 Penalty Notice Amount - \$550</p> <p>Less significant offences (failure to ensure sign erected) Max penalty - \$550 Penalty notice amount - \$220</p>	<p>1 pu = \$147.61 til 30 jun 15</p> <p>Failure to maintain barrier etc Maximum penalty - 50 penalty units or \$7380.50</p> <p>On-the-spot fines</p>	<p>Maximum court imposed penalty for pool safety offences is \$18,785 for individuals and \$90,750 for corporations.</p> <p>On-the-spot fines of up to \$1822 for individuals or \$5465 for corporations can be issued.</p> <p>Most significant offences - failure to comply with pool safety standard (s232 - for an existing (regulated) pool and s234 for a newly constructed pool) have maximum penalty of 165 penalty units or \$18,785</p> <p>On-the-spot fines of up to \$1822 for individuals or \$5465 for corporations</p> <p>Failing to register your pool carries an on the spot fine of \$228 or a maximum penalty of up to 20 penalty units (\$2277). Failure to have warning sign (s233) carries a maximum penalty of up to 20 penalty units (\$2277)</p> <p>Tiered penalty system does NOT apply</p>	<p>Prescribed modified penalty for non-compliance of \$750 can be issued as an infringement notice by local governments. Penalty of up to \$5000 for prosecution purposes also applies. Failure to comply with a building order can attract a penalty of up to \$50,000 for the first offence.</p> <p>Tiered penalty system does not apply</p>
Community education	There are both State and local government based community	Government has sponsored a community education program on pool safety	The <i>Building Act 1975</i> provides that a Regulation may	The State Government has undertaken from time

	NSW	Victoria	Queensland	Western Australia
	education and awareness programs which are typically undertaken over the summer period. The RLSS (NSW) has a coordinating role with these programs and is developing in cooperation with three local councils a best practice swimming pool education and awareness program.		<p>prescribe information that the local government must give to pool owners in their respective area every 4 years. Currently nothing is prescribed in Regulation. However, this provision was included to support educating pool owners about their obligations and responsibilities.</p> <p>In the past 5 years Queensland has launched a summer pool safety campaign raising awareness of the need for compliant barriers, supervising young children around water, teaching young children to swim and learning CPR.</p> <p>The Department of Housing and Public Works and the Queensland Building and Construction Commission also develop web pages, factsheets and provide advice to the general public.</p>	to time public safety programs and councils undertake programs at the local level
Incident report and data collection	Data collected annually for child deaths, including drowning in swimming pools by NSW CDRT and CTCPER collects information from the three children's hospitals on no fatal drownings.	Public and private hospital admissions are recorded by type of admission with a category for submersions or drownings but this is not a trigger for notification or inspection.	In Queensland the <i>building Act 1975</i> (BA) requires a person in charge of a hospital to notify the chief executive (health) if the examination of a child by a doctor indicates that the child has been involved in	None

	NSW	Victoria	Queensland	Western Australia
			<p>an immersion incident. The chief executive (health) must within 5 business days of receiving the notice provide a copy to</p> <ul style="list-style-type: none"> • Queensland Building and Construction Commissioner; • The local government for the area in which the incident happened; and • The family and child commissioner <p>Once the local government receives the report they must as soon as possible inspect the pool for compliance with the pool safety standard. If the pool doesn't comply with the pool safety standard then they are able to take enforcement action including issuing an infringement notice.</p> <p>An ambulance officer or health professional under the <i>Hospital and Health Boards Act 2011</i> may choose to give the chief executive (health) information about an immersion incident, however, they are not required to. If the chief executive</p>	

	NSW	Victoria	Queensland	Western Australia
			<p>(health) receives this notice then the same process will be followed as above.</p> <p>Queensland is reviewing the immersion incident reporting process with the view to implementing improvements.</p>	

	SA	Tasmania	ACT	NT
Legislation	<p>Development Act 1993</p> <p>Swimming Pools (Safety) Act 1972</p> <p>Building Code of Australia</p>	<p>Building Act 2000</p> <p>Building Regulations 2014</p> <p>Building Code of Australia</p>	<p>Building Act 2004 (or its predecessors as the case requires)</p> <p>Building Code of Australia</p> <p>Approx 6700 regulated pools.</p>	<p>Swimming Pool Safety Act 2004</p> <p>Swimming Pool Safety Regulations (2004)</p>
Responsible Minister	Minister for Planning	Minister for Justice	Minister for Planning	Minister for Land, Planning and the Environment
Responsible agency	Building Policy unit within the Department of Planning, Transport and Infrastructure	Building Standard and Occupational Licensing, within the Department of Justice	Environment and Planning Directorate	Swimming Pool Unit within the Department of Land, Planning and the Environment
BCA coverage	1, 2, 3, 4	1, 2, 3, 4	1, 2, 3, 4	<p>1 (single dwelling)</p> <p>Barriers do not apply to commercial buildings - hotels, motels, caravan parks</p>
New pool approval and new fence certification -new pools	Council/certifier inspects pool and statement of compliance issued once completed	Final inspection by building certifier and council notified with certificate of final inspection issued and certificate of completion issued by council	Certifier issues certificate of completion once constructed.	Mandatory inspection for new pools and compliance certificate provided

	SA	Tasmania	ACT	NT
-new pool fences	Building certifier certifies new fence	Building certifier certifies new fence	Building certifier certifies new fence	Swimming pool safety advisor or self assessment. No qualification provisions.
Certification required prior to sale or lease	<p>No inspection or compliance certificate required to date.</p> <p>Current owner of pre-1 July 1993 pools required to bring barriers up to current standard prior to the property being sold. No requirement on lease. (Response to 2003 review. Commenced 1 Oct 2008)</p> <p>(s71AA Dev Act and reg76D Dev Reg).</p>	No	No	<p>Owners of pools/spas constructed before 1 Jan 2003 need to meet new minimum standard at property sale or change of lease. At point of sale for all properties, need either:</p> <ol style="list-style-type: none"> 1. self-declaration by vendor and purchaser that property does not have pool 2. inspection and compliance certificate by NT Government at no cost or self-declaration for certain pools. Info is entered on Territory pool register which links to titles database to allow cross-checking. <p>Option for 'provisional certificate' at point of sale which means responsibility to bring pool fence up to standard is transferred to buyer to do within 3 months. Option also exists for 'temporary acknowledgement notice' in certain circumstances such as deceased</p>

	SA	Tasmania	ACT	NT
				estate so as not to delay sale. False self-declarations re Community Safety Standards can result in prosecution and loss of licence.
Barrier standards				
-Current	AS1926.1 - 2012 - called up through the BCA, Part 2 incl amendments 1&2	AS1926.2012 called up through the BCA with no variations	926.1-2012 via BCA with a minor variation .	AS1926.1-1993 Also applies a Community Safety Standard (self-declaration by existing pool owners) Considering calling up a later standard.
-Number of standards that apply	9 sets of rules, depending on when the pool was new, and whether the property has been sold Currently reviewing need to consolidate (via RIS and cost- benefit analysis).	Only 1 Pools built before 2 November 1994 do not have to be fenced if they have never been upgraded or replaced.	8 Depending on when pool was constructed. AS1926 - 1976, AS1926 - 1979, AS1926 - 1986, AS 2818 - 1986, AS2820 - 1985, AS2820 - 1993, AS1926.1 - 1993, AS1926.2 – 1995 Pools built before about 1970 are not required to be fenced, generally, but can be ordered to be fenced if unsafe. Pools built after 1970 are required to comply with the standards at the time the pool	2 Modified AS1926.1-1993 applies to pools built after 1 January 2003. Modification means neighbour's property does not affect pool's compliance. Pools built before 1 January 2003 are to comply with the Community Safety Standard - less stringent - requires pool owner to self declare that their pool or spa is enclosed by a barrier that will effectively prevent a child under 5 from obtaining unsupervised access to pool.

	SA	Tasmania	ACT	NT
			was constructed, but can be ordered to be fenced to current standards if unsafe.	
Signage requirements	No	Not for CPR. Mandatory signs and markings for the pool depth in a pool in a Class 3.	No	No
Requirement for spas	No exemption allowing lockable lid. Spas are required to be fenced in accordance with AS1926.1 - 2012 and AS1926.2-2007 as for pools	A lockable lid to a spa does not constitute a compliant safety barrier as it would not meet BCA Performance Requirements as a lid does not restrict access to the pool in the same way as a barrier, and a lid may not be of the strength and rigidity to prevent its dislodgement.	No exemption allowing lockable lid. Spas are required to be fenced in accordance with the BCA as for pools	No exemption allowing lockable lid. Spas are required to be fenced in accordance with AS1926.1 - 1993 as for pools
Requirement for above ground pools, including inflatable pools	Sides of above-ground pool can be part of barrier provided they comply with AS 1926.1. However, a barrier must be provided around the ladder. Inflatable pools are required to be fenced, if incorporating a filtration system	same requirements for fencing for aboveground/out of ground and inflatable swimming pools - all required to be fenced if can hold 300mm of water or more.	BCA dictates which pools require fencing, without regard to whether the pool is in or out of the ground or inflatable or not. No approval required to demount and erect 'demountable' pool annually once approved, if compliant with original approval.	Aboveground pools must have a barrier around access point. Inflatable pools required to be fenced.
Exemptions, including approach to spas and out of ground pools	Existing pool, built before 1 July 1993, if the nearest part of the pool is closer than 1.8m from an existing door, that door can be used as part of the barrier, as long as it is child-resistant. Barrier must be provided between other doors and the pool.	Yes. Pools built prior to 2 Nov 1994 do not require a barrier. 3-sided barrier applies - walls of buildings can be acceptable subject to child-resistant doorsets and windows in accordance with AS 1926.1 (ie.	Yes. Pools built prior to about 1970 do not require a barrier, generally, but can be ordered to comply with current standards if unsafe. Pools built between about 1970 and about 2010 can	Yes. All pools built prior to 1 January 2003 only need to comply with Community Safety Standard All pools built after 1 Jan 2003 must have four-sided fence unless:

	SA	Tasmania	ACT	NT
	No other exemptions apply	self-closing and latching doors). May change to requirement for 4-sided barrier if BCA changes.	comply with the standards they were built under, which permit less than 4-sided barriers, unless specifically ordered to comply with current BCA due to being unsafe. Pools built to BCA 2010 onwards must comply with the BCA's requirements (generally 4-sided).	- on a small property (less than 300 sq m). - on a large properties (1.8 ha or over)
Pool register	No	No	No	Yes. But not kept by councils. Dept Local Govt and Housing has database of compliant pools which is linked to the lands title database.
Inspections	No. Councils respond to complaints and may take action.	No. New pools only. At time of construction by the relevant building surveyor. Failure to maintain BCA safety requirements may generate a building order from a council and this does occur.	No. New pools only. All required pool barriers must be inspected at completion of construction by a building certifier and certified as BCA compliant, before the pool can be certified for use.	No. DLPE Department of Lands Planning and Environment (Swimming Pool Fencing Unit) will do inspections on community safety standard properties if requested. Councils in NT do not deal with pools.
Compliance and enforcement -mandatory inspections following complaints	No. Complaints may be investigated but this is not prescribed.	No. Complaints of unsafe or non-compliant pools and barriers may be investigated at the	Yes, authority must investigate complaints, unless vexatious etc	Department investigates complaints.

	SA	Tasmania	ACT	NT
-power to undertake remedial work	No	discretion of the general manager of a council, but these compliance actions are their decision according to staffing, funding constraints etc. Yes. Under Building Act councils may do remedial work in emergency situations following set processes.	Yes. Authority may order or do remedial work - Construction Occupations (Licensing) Act 2004 - rectification order power including emergency rectification order.	No. Department cannot do remedial work. (Pre-2003 councils used to be able to do remedial work)
-penalties	Penalty for non-complying barrier (Development Act 1993 - s71AA, Division 4 fines) Maximum penalties - \$15,000 OR up to 4 years imprisonment (came in on 1 Oct 2008). To date a person was prosecuted Spring 2013 and fined \$8,000. No jail sentences imposed yet.	For non-compliance actions can include; Emergency Order, Building Order, court actions for offences, infringement notice (monetary penalty fines), or seeking additional orders from a Magistrate. Council can also enter land, carry out work, demolish work, charge the owner, take away materials and sell them to recoup those costs. While councils can investigate complaints, we can't force them, so it not "mandatory investigations" in that sense. We do however provide for a wide range of sanctions if the matter proceeded to taking compliance actions with fines of up to \$13,000 for individuals and \$60,000 for	Failure to comply with notice to provide or fix pool barrier: Maximum penalty: 50 penalty units Failure to comply with Building Code: Maximum penalty: 500 penalty units, imprisonment for 5 years or both. The value of a penalty unit is— (a) if the person charged is an individual—\$100; or (b) if the person charged is a corporation—\$500. No requirement to keep gate shut, ensure barrier complies etc	Making a false declaration of compliance Maximum penalty - 20 penalty units (\$2,200) or 12 months imprisonment Obstruction of power of entry/refusal to provide assistance to local authority carrying out an investigation Penalty - 5 penalty units - \$550

	SA	Tasmania	ACT	NT
		corporations performing illegal works. Tiered penalty system? - tbc		

D Stakeholder Meetings

<i>CONSULT DATE</i>	<i>ORGANISATION</i>
17 August 2015	SPASA
17 August 2015	LGNSW
17 August 2015	AIBS
	AAC
17 August 2015	OMBO
18 August 2015	HIA
	REINSW
	AICNSW
18 August 2015	LG Professionals
	Australian Institute of LG Rangers
18 August 2015	Law Society of NSW
19 August 2015	Hannah's Foundation
	Samuel Morris Foundation
	Royal Life Saving NSW
	Kids Health - The Children's Hospital Westmead
	RACGP
	Australian Water Safety Council
19 August 2015	Mosman Council
	Sutherland Council
	Penrith City Council
	Camden Council
	Randwick City Council
	Campbelltown City Council
	The Hills Shire Council
19 August 2015	Strata Communities Aust (NSW)
	OCN
	POA - Certifier
20 August 2015	Lismore City Council
	Byron Shire Council
	Ballina Shire Council
	Tweed Shire Council
	Richmond Valley Council
	Kyogle Council
20 August 2015	Assenttects

24 August 2015	Shoalhaven Council
	Eurobodalla Council
	Wingecarribee Council
	Goulburn Council
	Bega Valley Council
26 August 2015	Lithgow City Council
	Bathurst Regional Council
	Orange City Council
	Blue Mountains Council
	Dubbo City Council
	Bathurst Regional Council
	Parkes Shire Council
27 August 2015	CPD Training
27 August 2015	Sutherland Council
31 August 2015	Campbelltown Council
September 2015	BPB
	Standards Australia
	APSIC
	Triton Pools

E Tabulations for the discussion paper questionnaire

ROLES

Pool owner	9
Council employee	55
Water safety advocacy member	2
Industry member	30
Other	30

QUESTIONS ON POOL SAFETY STANDARDS (1-6)

- 1. Do you support the following possible approaches to a pool barrier standard?**

	Yes	No	Unsure
Control of when and if the State adopts a revised national standard	99	5	22
Provide ready access to pool professionals to the standard	123	0	3
Provide an easy to understand explanation for the general public	124	1	1

- 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?**

Yes	85
No	32
Unsure	9

- 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?**

Yes	100
No	15
Unsure	11

- 4. Do you have any additional matters that you feel need clarification with AS1926.1-2012 beyond those matters set out in Table 6.2 of this paper?**

Yes	38
No	88

- 5. Do you believe it is necessary to establish an explicit standard or requirement for temporary pool fencing?**

Yes	102
No	16
Unsure	8

- 6. Do you support requiring pool barrier material to be tested and subject to an identification system as a product meeting the required standard?**

Yes	94
No	17
Unsure	15

QUESTIONS ON EXEMPTIONS FROM THE POOL BARRIER STANDARDS (7-9)

- 7. Do you support the withdrawal of current exemptions from the pool barrier safety standards, with a phase in period for pool owners to comply and allow councils to assess exemptions and alternative suitable arrangements on a case by case basis subject to guidelines?**

Yes	100
No	23
Unsure	3

- 8. Do you believe there is sufficient guidance available at present to enable councils to assess applications for exemptions from the pool barrier standards?**

Yes	22
No	87
Unsure	17

- 9. Do you support requiring additional controls on the sale and use of portable pools and spas such as provision of information on safety requirements and registration at point of sale, inspection of the pool once installed as well as greater consumer education?**

Yes	108
No	8
Unsure	10

QUESTION ON SWIMMING POOL REGISTER

- 10. As a user of the register how would you rate it on a scale of 0 to 10 for ease of use and usefulness (0 being not useful and extremely hard to use while 10 is very useful and very easy to use)?**

	0	1	2	3	4	5	6	7	8	9	10
Ease of use and usefulness	2	4	9	8	12	12	14	8	14	7	3

QUESTIONS ON THE ROLE, FUNCTION, TRAINING AND FEES FOR CERTIFICATION (11-19)

- 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?**

Yes	67
No	53
Unsure	6

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

Yes	104
No	11
Unsure	11

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

Yes	102
No	12

Unsure	12
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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?

Yes	82
No	31
Unsure	13

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 prerequisite?

Yes	66
No	35
Unsure	25

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

Yes	75
No	20
Unsure	31

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?

Yes	109
No	13
Unsure	4

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

	Yes	No	Unsure
Help line	95	14	17
Peer Review Panel	79	23	24

Practice Guide	98	12	16
Audit program	77	21	28

19. Do you support giving councils greater flexibility in setting fees for pool certification and assessing applications for exemptions, subject to the fee being a cost recovery charge and being publicly displayed and subject to periodic independent review?

Yes	93
No	25
Unsure	8

QUESTIONS ON SALE AND LEASE CERTIFICATION REQUIREMENTS (20-23)

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

Defer commencement six months to a quieter period of the property year	9
Commence the lease provision as planned and the sale provision six months later	15
Commence sale and lease provision as planned, with or without flexibility in timing of the compliance certificate	93
Other	9

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

Yes	74
No	45
Unsure	7

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?

Yes	78
No	27

Unsure	21
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23. Which approach would you believe is the most appropriate way to inspect pools?

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)	69
An expanded and more consistent risk based inspection program undertaken by councils	27
Other (please specify in comment)	30

QUESTIONS ON COMPLIANCE AND ENFORCEMENT (24-26)

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?

Yes	100
No	19
Unsure	7

25. Do you believe there needs to be greater responsibility taken by an accredited pool certifier to seek to resolve matters of pool non-compliance before the matter is transferred to the relevant council?

Yes	96
No	21
Unsure	9

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?

Yes	106
No	12
Unsure	8

QUESTIONS ON SUPERVISION AND EDUCATION OF POOL OWNERS AND USERS (27-29)

27. Do you believe enough is being done to educate pool owners and users in pool safety and the importance of active supervision where children are pool users?

Yes	26
No	89
Unsure	11

28. Is enough being done in the area of educating the community in both the importance and the approach to pool safety?

Yes	23
No	91
Unsure	12

QUESTION ON SWIMMING POOLS ACT AND REGULATION

30. On a scale of 0 to 10 (0 being totally unclear and 10 being totally clear) how would you rate the Swimming Pools Act 1992 and the Swimming Pool Regulation 2008 in regard to ease of understanding and use?

	0	1	2	3	4	5	6	7	8	9	10
Ease of understanding and use	1	7	12	14	17	22	17	16	16	4	0

F Submissions received (additional to returned questionnaires)

Sub No	OLG Ref	Name	Submission Type	Organisation
1	A444542	Borg, Shane	Local council	Blacktown City Council
2	A444763	Curley, Paul	Local council	Campbelltown City Council
3	A443516	Dassakis, Spiros	Industry representative body	Swimming Pool & Spa Association, NSW & ACT
4	A444543	Dicello, Jeremy	Private company	CPD Training Pty Ltd
5	A444030	Donalson, Scott	Private company	Splash.com
6	A444487	Higgins, Bob	Local council	Byron Shire Council
7	A444494	Jackson, Garth	Private company	Triton Pool & Spa Inspections
8	A443509	Jahn, Graham	Private individual/s	Not applicable
9	A444220	Lawrence, David	Industry representative body	Housing Industry Association
10	A446510	Lea, Gabrielle	Industry representative body	The Law Society of New South Wales
11	A445741	Loveridge, Frank	Local government representative body	Local Government NSW
12	A445744	Morris, Michael	Swimming Pool Safety Advocate	Samuel Morris Foundation
13	A444221	Patten, Greg	Private individual/s	Not applicable
14	A444540	Plint, Katherine	Swimming Pool Safety Advocate	Hannah's Foundation
15	A447838	Powell, Stacie	Swimming Pool Safety Advocate	Swimming Pool Safety Working Group, The Children's Hospital at Westmead
16	A444213	Roitman, Alexis	Industry representative body	Australian Institute of Conveyancers, NSW Division
17	A444029	Sheehan, John	Industry representative body	Australian Property Institute
18	A444225	Stanley, Cal	Private company	Neptune Pools
19	A444366	Tuxford, Tim	Local council	Woollahra Municipal Council
20	A443508	Unger, Nicole	Industry representative body	Real Estate Institute of NSW
21	A444492	Vella, Laura	Local council	Randwick City Council
22	A444364	Wheeler, Tim	Private company	Standards Australia
23	A444372	Withers, Julie	NSW government agency	NSW Child Death Review Team, NSW Ombudsman
24	A447842	Woods, Craig et al	Private individual/s	Regulatory Services Team, The Hills Shire Council
25	A444496	Woods, Danielle	Local council	Mosman Municipal Council

