

INDEPENDENT REVIEW OF SWIMMING POOL BARRIER REQUIREMENTS FOR BACKYARD SWIMMING POOLS IN NSW



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Glossary

Acronym	Full Title
AAC	Association of Accredited Certifiers
AIBS	Australian Institute of Building Surveyors
AS	Australian Standard
ASo	Alternative Solution, being 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
BCA	Building Codes Australia
BPB	Building Professionals Board
CAAG	Cross Agency Advisory Group
CHW	The Children's Hospital Westmead
CPR	Cardiopulmonary resuscitation
CTCPER	The Centre for Trauma Care, Prevention, Education and Research
NCZ	Non climbing zone
NSWCDRT	NSW Child Death Review Team
OLG	Office of Local Government
PSC	Pool Safety Council
QBCC	Queensland Building and Construction Commission
RLSS	Royal Life Saving Society
RTO	Registered Training Authority
SEPP	State Environmental Planning Policies

1. Introduction and purpose of review

The *Swimming Pool 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 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 now being deferred twice, once to 29 April 2015 and then to 29 April 2016.

The NSW Government has commissioned this review for the following purposes:

- To assess whether the regulatory framework for swimming pools can be further simplified and improved to meet its fundamental objectives 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.

The review process involves the following stages:

- **Stage 1** involved meetings with key stakeholders, including pool certifiers, water safety advocates, property industry representatives, owners and tenant representatives and city and regional councils. This was combined with a review of the legislation and regulation, past reviews and an analysis of the pool safety regulatory approaches in other jurisdictions.
- **Stage 2** involves the release of this discussion paper and the linked questionnaire. The discussion paper sets out what are considered to be the relevant issues and identifies possible ways to address the issues. It also seeks the views of the community on these issues both through a questionnaire and, if desired, through submissions containing written comments.
- **Stage 3** will involve a full review of all community and organisational responses provided by questionnaires and submissions with follow up discussions to clarify matters. This will be followed by the production and submission to the Minister for Local Government of a report containing findings and recommendations on the way forward.

There are approximately 340,000 registered swimming pools in NSW¹, though this would appear to be an underestimate given the evidence of unregistered pools. Approximately 5000 new swimming pools are installed each year. The number of swimming pools that are removed each year is unknown.

¹ NSW Swimming Pool Register as at September 2015 had 340,361 pool registrations on 323,069 properties

Each year in NSW there is on average about six children under 5 years of age who drown in private swimming pools and a further 45 who experience non-fatal drownings. Of the non-fatal drownings 7 will experience longer term behavioural and learning difficulties and 4 will have severe long term neurological deficits².

² Based on the analysis from 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

2. Why swimming pool safety regulation?

2.1 Rationale for government regulation

Those of the baby boomer age segment can think back to their younger years and recall that a home swimming pool was a comparative rarity and that there were no requirements for pool fencing imposed by the State Government. This raises the question of why do governments now impose safety regulation on private pools? Is this simply a manifestation of the “nanny state.”

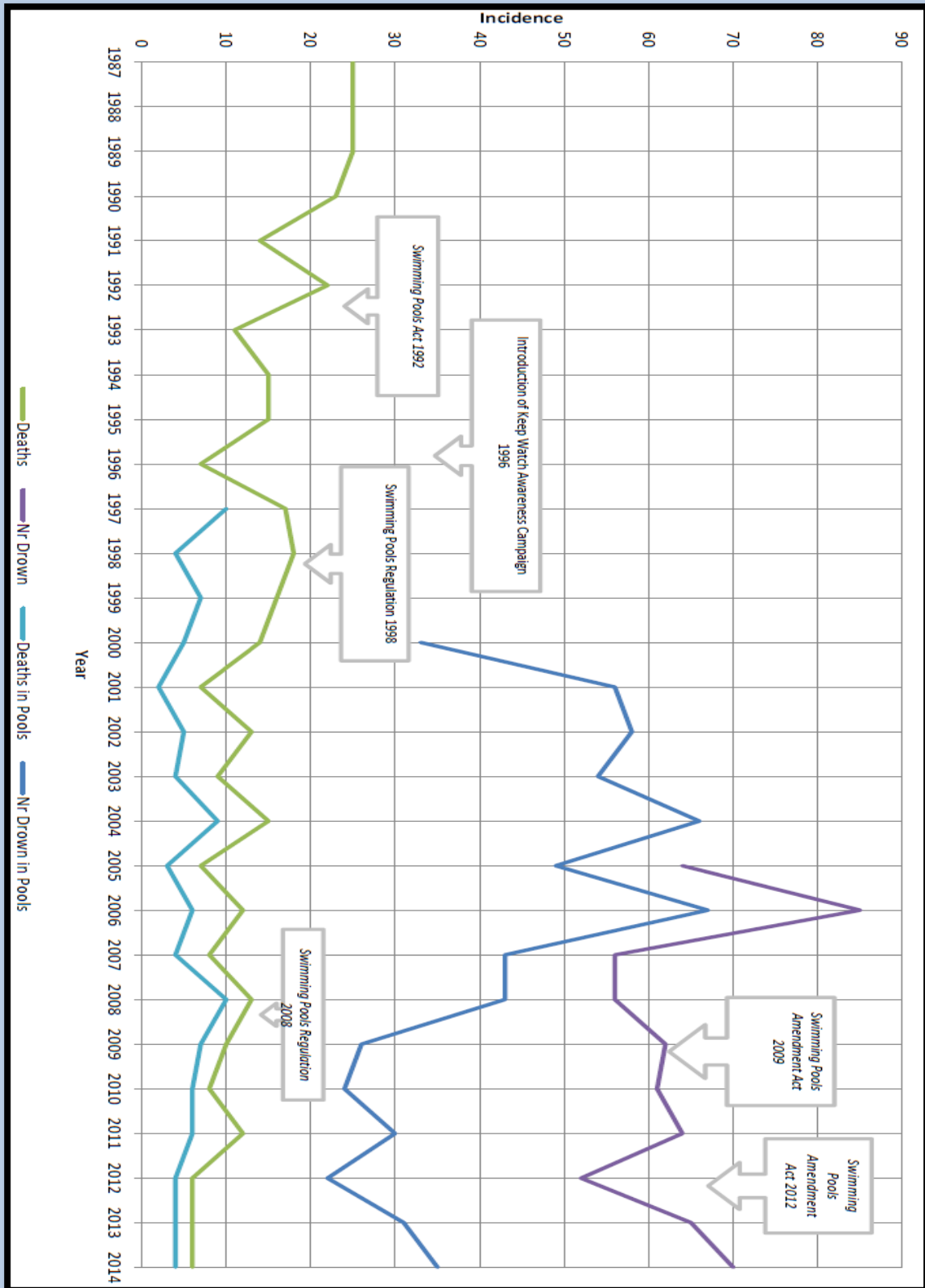
The answer is simple and compelling. Both the number of private swimming pools has increased dramatically over time and, second, there is clear evidence of the dangers posed by swimming pools, particularly to young children. Backyard swimming pools are the most common location for drowning deaths and injury for children less than five years. Approximately 70% of drowning deaths of children under five years of age occur in a backyard swimming pool. While the number of child drownings in NSW in backyard swimming pools has declined with the introduction of legislated pool safety requirements, the toll in terms of death and injury is still substantial and avoidable. Figure 2.1 overleaf provides an historic perspective on drownings and near drownings.

Using the period 1999-2000 to 2008-09 to reflect the period prior to the requirement for compulsory four sided fencing of residential swimming pools and comparing that with the period after for which data is available, we can see that in the earlier period average child drowning deaths in pools and near drownings were 5.5 and 42.8 respectively. In the period from 2009-2010 to 2014-15 the annual drownings and near drownings were 5.2 and 28.4 respectively. There has been only a very slight decline of an average 5.5% in annual drownings but a more significant drop of 33.6% 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 challenge to families and society. It should be noted that child drownings in NSW for the last year 2014-15 were 6, substantially up on the previous year.

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 with drownings (however a more recent study indicates that the ratio could be much higher, of the order of 10 to 1). Many of the near drownings involve severe long term injury which imposes emotional and financial costs on families and society. A study of near drownings across Australia found that 20.3% of near drownings resulted in some form of permanent brain damage³.

³ R Kreisfield and G Henley, Deaths and hospitalisations due to drownings, Australia 1999/2000 to 2003/2004, Australian Institute of Health and Welfare, 2008

Figure 2.14: Drowning and near drowning among children under 5 years in swimming pools in NSW.



⁴ Data from Kids Health, Children’s Hospital Westmead.

The first and best protection against drowning and near drowning of young children is responsible 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 for when a child's 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 1.2metres high or the latch being less than 1.5 metres 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 Pool Act 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, that is 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 considered the effectiveness of four sided relative to 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. Of course this need not reflect the relative merits of the barriers but could 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 report undertook cost benefit analysis 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 and the ratio of near drownings to fatal drownings was very much less than what is indicated by the

latest data. A more recent study undertaken by Kids Health ⁵ on a similar but different cost benefit analysis, involving assessing the cost benefit of regular inspection of swimming pools, found that there were substantial net benefits generated.

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 State's taxpayers.

2.2 Australian Water Safety Strategy 2016-2020⁶

The Australian Water Safety strategy covers 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. Its strategies to reduce drownings and near drownings for children under five years involve:

- Strengthening child drowning prevention programs that increase awareness of the critical role of adult supervision; importance of pool fencing; and 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 no fatal drowning.

The Royal Life Saving Society produces an annual report on drownings for Australia⁷. In total across all age groups for Australia there were 271 fatal drownings in 2014-2015, of which 100 or 37% occurred in NSW. There were 26 drowning deaths nationally of children aged under five years of which 14 were in swimming pools and NSW accounted for 6 of these deaths or 50%.

2.3 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.

The NSW Child Death Review Team (NSWCDRT), part of the NSW Ombudsman, undertakes an annual review of all children's deaths by cause, with one part covering drowning deaths⁸.

Predominantly it is young children, aged under five years, who drown in private swimming pools,

⁵ Kids Health, Children's Hospital Westmead, Swimming Pool Safety, March 2011

⁶ Australian Water Safety Council, Australian Water Safety Strategy 2016-2020

⁷ Royal Life Saving Society Australia, National Drowning Report, 2015

⁸ At the time of writing this paper the latest report was for 2013, NSW Child Death Review Team, Annual Report 2013

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 NSWCDRT has undertaken an analysis of child drowning deaths over the period 2007 to 2014,⁹ as a report for this review, updating the analysis that they did for the period 2007-2011 for the 2012 Swimming Pool Act review. Over the period 54 children drowned in 53 private swimming pools, with 46 or 87% being children under the age of five. The distribution by type of pool associated with child death is as set out in Table 2.1.

Table 2.1: Type of private pool associated with NSW child death drownings, 2007-2014

Type of pool	Number of pools Number and %
In ground	35(67%)
Above ground	
➤ Portable	7(13%)
➤ Inflatable/wading	4(8%)
➤ Permanent installation	2(4%)
Partially in ground	2(4%)
Unknown	1
Total	53(100%)

Source NSWCDRT September 2015

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

Interestingly, 15 or 28% of the pools were exempt from the general standards (which will be discussed in greater detail in chapter 4), 10 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%) of the pools there was either no barrier or the existing barrier was defective. Thirteen (25%) of the 52 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 2.2. Of the 32 fenced pools summarised in the table below, a gate/faulty gate lock was the most likely point of access to the pool by the child in 21 cases or 66% of the deaths.

Table 2.2: Identified swimming pool barrier faults for fenced pools

⁹NSW Child Death Review Team, NSW Ombudsman, Drowning deaths of children (private swimming pools), 2007-2014, September 2015

Fault	Number of pools with fault
Gate propped open	4
Gate not self- latching /latch broken	30
Fence in poor state of repair	13
Climbable objects within NCZ	13
Gaps in gate or fence too great	10
Handholds or footholds present	5
Where house forms a barrier, window or door not secure	4
Fence too low	4

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.

2.4 Study of non - fatal child drownings

The Centre for Trauma Care, Prevention, Education and Research (CTCPER) and Kids Health have undertaken a study of non- fatal drownings of children¹⁰. 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 for 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.

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

2.5 Cost Benefit assessment of child drownings

The Department of Local Government in its 2008 review of the Swimming Pool Act 1992¹¹ reported on a cost benefit study that had been undertaken as part of the review. This quantified the annual cost of death and disability for young children as being in excess of \$23million per annum. It is likely that this is a significant underestimate as it used a conservative value for life and impairment and what would appear to be a conservative estimate of non-fatal drownings given the recent study cited above.

¹⁰ 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

¹¹ Department of Local Government, Review of the Swimming Pools Act 1992, August 2008

2.6 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 drowning¹². The report set out a series of recommendations which this review will be examining, these recommendations being as follows:

Minister responsible for the Swimming Pool Act

1. Continuing media campaign highlighting need for active supervision of young children around water.
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.
3. Consideration be given to developing a central register of private swimming pools and developing a plan for regular review of all private swimming pools.
4. Consideration be given to removal of all exemptions with respect to pool barriers.

Minister responsible for Residential Tenancies Act

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.

Fair Trading Minister

6. Purchasers of above ground swimming pools be advised at point of sale of their obligations under the Swimming Pools Act.
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.

Attorney General

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.

¹² NSW State Coroners' Court Report into child drownings, April 2010

3. Brief history of swimming pool regulation in NSW

Introduction

Up until 1990 each local government council set its own pool requirements. This changed in 1990 with the introduction of the *Swimming Pools Act 1990* which set state wide requirements for swimming pools. 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.

The subsequent history of the Act, regulation and the related Australian swimming pool barrier standard is summarised in Table 3.1 below.

Table 3.1: History of NSW Swimming Pool legislation, regulation and pool barrier standards

Pool Build Date	Act	Regulation	Australian Standard
Pre 1 August 1990	Comply with Swimming Pools Act 1992	Comply with Swimming Pools Regulation 1992	Pre 1 August 1990 pools exempted from the standard under section 8 and small, large and waterfront pools also given exemption.
1 August 1990 to before 1 September 2008	Swimming Pools Act 1992	Swimming Pools Regulation 1992	AS 1926-1986 Exemptions to the standards under sections 8, 9 and 1 for small, large and waterfront properties. Doors and window requirements in the regulation.
1 September 2008 to 1 July 2010	Swimming Pools Act 1992	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.
1 July 2010 to end April 2013	Swimming Pools Act 1992 and Amendment Act 2010 & 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.
1 May 2013 onward	Swimming Pool Act 1992	Swimming Pools Regulation 2008	AS 1926.1-2012

3.1 Swimming Pools Act 1992

The *Swimming Pools Act 1992* and the associated *Swimming Pools Regulation 1998* 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. A wall of a residential building can 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.

3.2 Swimming Pools Amendment Act 2009

A review of the *Swimming Pools Act* 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 barriers having a much lower probability of a drowning or near drowning than a three sided barrier. A discussion paper was released in August 2006¹³ followed by a final report in August 2008¹⁴. 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 time frame. 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 has to be completed as soon as practical after a permanent barrier had been erected.

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

3.3 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*. This led to the release of a Discussion Paper¹⁵ in November 2011, followed by a final report¹⁶ in May 2012. This was followed by the enactment of the

¹³ Department of Local Government, Review of the *Swimming Pools Act 1992*: Discussion Paper, August 2006

¹⁴ Department of Local Government, Review of the *Swimming Pools Act 1992*, August 2008

¹⁵ Division of Local Government, Department of Premier and Cabinet, *Swimming Pools Act 1992 Review*, Discussion Paper, November 2011

¹⁶ Division of Local Government, Department of Premier and Cabinet, *Swimming Pools Act Review* Discussion Paper Report, May 2012

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
- 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 oversight 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
- 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 and was 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.

4. Approach to swimming pool regulation in NSW

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 is 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 Finance, Services and Property portfolio.

The regulatory structure is set out in the *Swimming Pools Act 1992* and the Swimming Pools Regulation 2008 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.

4.1 Swimming Pools Act and Regulation

The key provisions in the legislation can be summarised as follows:

Scope

The legislation covers all indoor and outdoor pools on residential properties, including moveable dwellings, tourist and visitor accommodation. A swimming pool is any structure that is capable of being filled to a depth greater than 300mm and is principally for aquatic activity.

Duties and responsibilities of local government authorities

Local government councils are to:

1. take steps to ensure that they are notified or aware of all swimming pools in the area (S5a)¹⁷
2. promote awareness of the regulatory requirements and pool safety in its area (S5b)
3. investigate complaints concerning pool safety and breaches of the Act (S5c)
4. 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)
5. inspect pools at the owner's request (S22C)
6. report on pool inspections in the annual report (S22F (2))
7. 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)
8. provide exemptions from barrier requirements where application of the standard is impracticable or unreasonable (S22)

¹⁷ Reference is the relevant section of the Act, with S5a being section 5a

9. 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

1. Maintain accreditation
2. 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)
3. 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:

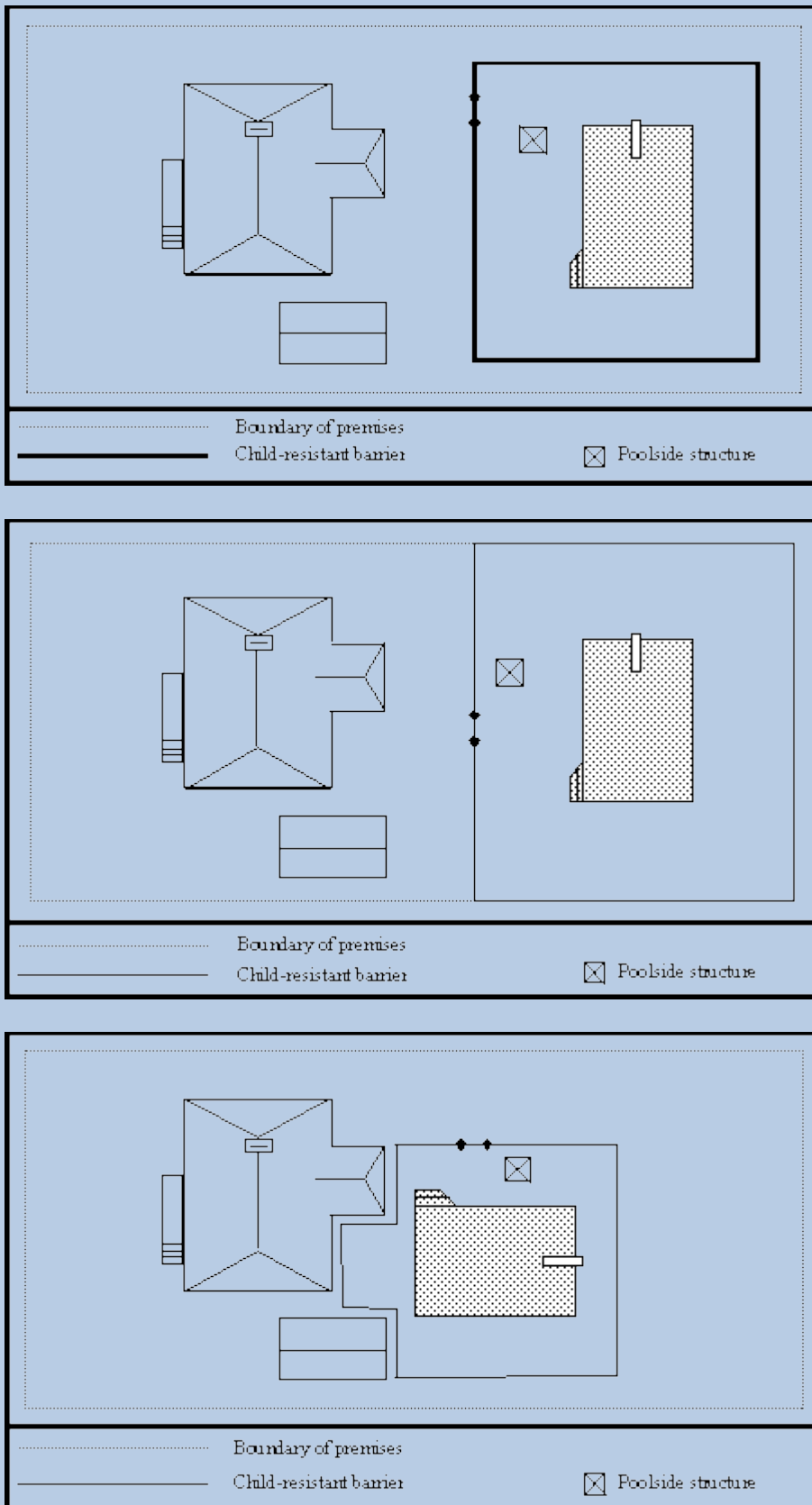
1. register their pool on the state pool register (30B)
2. provide a valid compliance certificate for the pool before being able to sell or lease a property with a pool
3. determine the location of the pool barrier, consistent with the barrier standards
4. ensure that the pool barrier requirements are met (S7 (1))

Pool barrier requirements

1. Outdoor pools must be surrounded by a child resistant barrier separating the pool from any residential building and be in accord with the standards set out in the regulation (S6,7,11,12) but house walls can be used as a barrier if it contains no opening(S19)

Set out in Figure 4.1 below are examples of compliant pool fencing layout.

Figure 4.1: Examples of compliant pool barriers



2. Indoor pools must conform to the standards set out in the regulation (S14)
3. Barriers must be maintained in good repair (S15) and access kept securely closed (S17)
4. Warning signs with required information must be prominently displayed (S17)

Pool barrier exemptions

The following exemptions are provided for:

1. 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 the means of access to the pool from the building are in accord with the relevant standard (S8)
2. Large properties (two hectares or more) and waterfront properties with pools installed before 1 August 1990 do not require barriers
3. 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)
4. Spa pools are subject to their own regulations (S20) which requires a lockable cover
5. 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 not later than 29 October 2013. Registered pools are issued with a certificate of registration (S30C) and access is provided to the register to authorised persons (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 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 two other States that have notable features that differ from the approach in NSW.

5. Overview of approach in select other Australian States

All Australian States and Territories have in place some form of swimming pool safety regulation. This review is compiling a survey of the practice in each Australian State as a resource for this review. In this chapter, two alternative models to the NSW approach are explained and assessed in order to identify whether there are tried and tested alternative approaches which should be considered for application in NSW.

The two alternative models considered in this chapter are those that apply in Queensland and Western Australia. These two models have been selected as they have features distinct from the approach applied in NSW: Queensland has a single state based barrier standard while Western Australia has both a single barrier standard and a periodic inspection of all residential swimming pools.

5.1 Queensland

The legislation for swimming pool regulation is in the *Building Act 1975*, with operational responsibility with the 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 Part 1 as modified by the 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 not possible 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 significant barriers to 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 not providing a valid pool safety certificate because the pool is non-compliant and the purchaser having the obligation to obtain one 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.

- The pool register is a more developed instrument than the NSW register. First 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. Second 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 pool inspector can undertake minor works, provided they are appropriately licensed, with what constitutes minor repairs set out in the regulations.
- 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, though in common with NSW, owners can apply to councils for exemptions which are assessed on a case by case basis.
- Requirement for the ambulance service and private and public hospitals to report any pool immersion accident involving a child under five years to Queensland Health who must issue a notice to the relevant local government authority which is required to inspect the pool.
- 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.

5.2 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.

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 in the main the responsibility of local government who tends to use both in house inspectors and tender out contracts to private pool inspectors. There are no accreditation requirements for pool inspectors established by the state 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.

The various features identified in this chapter, including a state standard and periodic inspections of all swimming pools will be considered further in the next chapter.

6. Identified key issues

Based on consideration of the terms of reference, discussions with stakeholders and research, a number of key issues have been identified and are grouped in this chapter under a number of broader categories. It is not represented that these are the only issues or the only issues that will be considered by the review. If it is considered that there are additional significant issues or the issues set out in this paper have been misstated please let us know (see chapter 7, How to let your views be known).

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

1. Pool safety standards
2. Exemptions from the pool barrier standards
3. Swimming pool register
4. The role function, training and fees for certification
5. Certification requirements
6. Compliance and enforcement
7. Supervision, education and training of pool owners and users
8. Responsibility for and clarity of the Swimming Pool Act
9. Resourcing the swimming pool safety function

6.1 Pool Safety Standards

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 standards, 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).

There are a number of issues relating to pool safety barrier standards:

6.1.1 Pool barrier standard setting and documentation

Explanation

Under the Swimming Pool Regulation 2008 (section 8) it is required that swimming pools must be designed, constructed, installed and maintained in accord with the BCA. 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. The BCA is revised on a three yearly cycle so that it is possible to have many more standards in place in NSW in the future.

However, there is a broader issue than single versus multiple standards and that is the issue of how the standard should be set. NSW has been a strong supporter of the BCA and the principle of having national building standards. As noted above this is the approach at present applied in NSW for swimming pool barrier standards which are referenced by BCA which triggers the latest relevant Australian Standard.

While there is considerable merit in following national standards, there are a number of significant drawbacks in the case of swimming pool barrier standards, these being as follows:

- Produces multiple standards that apply to pools of varying construction periods.

Applying multiple standards has three significant drawbacks:

- Increases the complexity of inspecting and certifying pools and hence increases the risk of mistakes in assessment
 - Means that different pools have different standards of barriers and this could mean significant variations in safety performance
 - Creates confusion amongst owners and other stakeholders over which standard applies to a pool
- Potential difficulties in addressing interpretation issues relating to the Australian Standard.

Standards Australia, which oversees the work of establishing and maintaining the Australian Standards, is concerned to not being drawn into a de facto regulatory role, given that it establishes the standards 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.

- Concerns about certain aspects of the Australian Standard 1926.1-2012.

Beyond issues of interpretation there are certain aspects of the standard which are open to valid alternative views and approach and it may be advisable to reserve the right to take a different position to Australian Standards on these matters. This can initially be handled by a request for a revision or amendment but may ultimately require a different approach being taken in NSW.

- Inability to disseminate documentation on 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 Accreditation¹⁸. 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.

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 available to the NSW industry in return for a fee. The fee could be funded from the budget and could be covered in part by a supplement to the relevant accreditation and license fees.

However this does not address the need for a publically 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. It is suggested that this matter be raised with Standards Australia.

Queensland has addressed the issues identified above by establishing a State standard which, while based on the Australian Standard, is not identical. This means that there is no automatic flow through of variations in the Australian standard to the State standard; it is possible to provide interpretations and advice on the standard; and documentation can be provided which clearly explains the standard to both the industry and the general public.

At the same time Queensland reserves the right to update the standard in the future if there is a substantial change in the Australian Standard which significantly enhances pool safety or if it feels there is a reason to improve the standard based on its own work and research. It should be noted that Western Australia has had the one standard in place since 1993 and is only changing it next year.

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 AS 1926.1-2012. NSW does not allow an out of ground pool wall to form part of a pool barrier while this was allowed under the Australian standard though the standard has been changed to recognize the different position in NSW. NSW also makes a clear distinction between the pool and the barrier and requires these to be separate and distinct. NSW also does not allow a lockable door or window to form part of a barrier, whereas the standard does.

¹⁸ Productivity Commission, Standard Setting and Laboratory Accreditation, Research Report, November 2006

Reform options

One option is a State based standard modelled on AS 1926.1 2012 but addressing the various interpretation and dispute issues, backed by an advisory service and readily available documentation. Under such an approach the State would actively monitor the BCA and Australian Standards process and would decide when and how to update the State standard to reflect changes in the national standard.

This standard would apply to all new pools and it would be an option for the government to decide whether all pools over time should conform to that standard. This issue is addressed next.

The benefits of such an approach are as follows:

- Enables timely determination and communication of pool barrier matters requiring clarification or change.
- Enables the documentation and communication in easy to read explanations of the pool barrier standard.
- Draws on and seeks to achieve consistency with the Australian Standard but has the flexibility to deviate where it is considered, based on expert advice, that an alternative approach has merit.

The alternative approach is reference directly the Australian Standard, rather than through the BCA, and thus control the timing of any changes in the take up in NSW in the swimming barrier standard. This would need to combine with measures to provide access to the standard for relevant professionals and to generate a simple to understand explanation for the general public.

Question

Do you support the following possible approaches to a pool barrier standard?

- Control of when and if the State adopts a revised national standard
- Provide ready access to pool professionals to the standard
- Provide an easy to understand explanation for the general public

6.1.2 Multiple versus one standard

Explanation

When Queensland introduced its new standard in 2009 it required all existing pools to be upgraded to that standard by not 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.

This 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. In regard to safety, once the standard addressed the need for four

sided isolation fencing, the subsequent changes have not had significant implications for safety. 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 were efficient and effective and whether or not they should be applied to all pools or only to new pools. The key question would then appear to be whether, if a state standard was adopted, there would be a significant upgrade in the safety performance relative to the existing standards and, second, whether certain of the older pools should have their barrier fencing upgraded.

Reform options

The two options are to maintain the current multiple standards or to move to a single standard. If it was decided to move to a single standard there would need to be a transition period during which pool owners would be given time to move to the new standard. In the case of Queensland pool owners were given a five year transition period subject to the requirement to upgrade to standard at the time of a sale or lease within the five year period.

There is also the ongoing issue, if there is a move to a single standard now, of whether when the standard changes in the future the new standard is prescribed for all pools in order to maintain a single standard.

The third consideration is that even if one standard is prescribed there will continue to be the flexibility to allow exemptions where the adoption of the new standard would be impractical or infeasible. This would require an enhanced version of the section 22 exemption provision.

The advantages and disadvantages of the two options are summarised in Table 6.1.

Table 6.1: Advantages versus disadvantages of multiple versus 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 	<ul style="list-style-type: none"> • Avoids the costs and inconvenience of moving all pools to a new standard

	<ul style="list-style-type: none"> The exemption process can apply where there are significant problems in applying the standard in particular cases 	
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 	<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

The key consideration is how significantly different the new standard is from previous standards and hence how much of an improvement in pool safety is achieved.

Question

Do you believe the benefits of having a single pool barrier standard outweigh the costs of upgrading of existing pools and should be proceeded with?

6.1.3 Issues associated with interpreting the Australian Standard 1926.1-2012 and legislation

Explanation

As noted at issue 1.1, there are matters relating to the current standard that either requires clarification or where there is an in principle case for taking a different approach. In the event that it is decided to proceed with a State based standard these will need to be addressed. The main issues that have been identified to date are set out in Table 6.2 below. This list is not meant to be exhaustive but to identify the most significant of the issues in terms of potential safety impact and the level of uncertainty among certifiers.

Table 6.2: Key interpretation and dispute issues regarding AS 1926.1-2012

Issue	Issue category	Suggested approach
1. Non climbable zones(NCZ) Clause 2.2.3 states that barriers not less than 1800mm in height shall not require a NCZ and may be climbable	Interpretation and possible variation	Remove clause 2.2.3

<p>on either or both sides. There appears to be no justification for the clause as it removes the child resistant feature of a barrier. 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 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</p>		
<p>2. Boundary barriers adjoining public land 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>Greater flexibility</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 Clause 2.3.1 requires an exclusion zone of 500mm distance from a 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>Clarification and possible variation</p>	<p>Make clear that the 500mm exclusion zone applies to all barriers with a height requirement.</p>
<p>4. permitted items within a pool area The standard is silent on what is or is not permissible in a pool area. The Swimming Pools Act does address this with respect to outdoor swimming pools for moveable dwellings and tourist and visitor accommodation where all items not essential to the</p>	<p>Clarification and possible amendment of the Swimming Pools Act</p>	<p>Amend the Act to have a consistent approach to exclusions from the pool area for all properties and to have a clear statement of principles. This is to be</p>

<p>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-the area that contains the pool and is enclosed by a barrier.</p>		<p>applicable to all types of pools, outdoor and indoor.</p>
<p>5. Minimum distance between the pool barrier and the pool 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 that meet this requirement via a cantilevered pool coping.</p>	<p>Variation of standard</p>	<p>Amend the standard to define a minimum area between the pool barrier and the water.</p>
<p>6. Whether the pool area can be used for general access 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.</p>	<p>Variation of standard</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 Under clause 1.3.9 a zone consisting of a space of 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.</p>	<p>Clarification</p>	<p>Clarify that the standard excludes only climbable objects from the NCZ.</p>
<p>8. Height of latch 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</p>	<p>Variation to standard</p>	<p>It is proposed that the 2007 requirement be reinstated</p>

<p>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</p>		
<p>9. Failure of gates and latches 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. 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>Variation to the standard</p>	<p>It is proposed 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 Wet edge or infinity pools can create a safety issue due to the water been both in the water fall and the collection pond. This would appear to indicate the need for the waterfall and collection pond to have a barrier to restrict access. 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>Variation in standard</p>	<p>Require a barrier to restrict access to the water fall and collection pond for wet edge pools</p>
<p>11. 1800mm fall deterrent within standard The 1800 mm 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. <u>Boundary barrier</u> Clause 2.2.4 1800 mm fall deterrent, with NCZ 5 from top of barrier <u>Retaining wall above pool</u> clause 2.5 1800 mm fall deterrent, No NCZ <u>Window</u> clause 2.6 1800 mm fall deterrent, No NCZ</p>	<p>Interpretation and possible variation</p>	<p>Standards to review to have a consistent application of the 1800 mm height fall deterrent for all to have a NCZ or all to have no NCZ</p>

<p><u>Balcony over pool area</u> is silent in 2012AS (left out), 2007AS clause 2.9 1800 mm fall deterrent, No NCZ</p>		
<p>12 Restricting entry to a pool area 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. 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>	Clarification	Standards to provide commentary explaining the different application of a 1200mm climbing up barrier to an 1800mm climbing down barrier.

Beyond addressing specific current issues with respect to the standards is the ongoing issue of how to identify and address matters relating to the standard and its interpretation that require clarification.

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.

There is a need to distinguish between issues relating to the interpretation of the Australian Standard and clarification of aspects of the legislation and regulations.

Standards Australia will 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.

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, there is a need for a State based advisory service. There has been established 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 and the ACC, the Building Policy Unit of the Department of the Environment and Planning, Home Industry Australia (HIA), University of Sydney: Centre for Local Government (UTS:CLG) 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.

Reform options

This is a broader matter than the AS 1926 standard and applies to all Australian Standards. There are two possible options for addressing interpretation issues such as the above:

1. Seek to have Standards Australia address issues through a public ruling or revision or amendment to a standard, whichever is the most appropriate approach.
2. Where a matter relating to the Australian Standard cannot be resolved with Standards Australia or involves a matter relating to the State regulatory approach, an advisory function should be established in NSW to provide advice to the industry and pool owners.

Option 2 could be progressed by giving CAAG the role on advising on the issues set out in Table 6.1 and any other issues that it is assessed as needing clarification. These clarifications can then either be incorporated in the State standard or representations made to Standards Australia to have these matters addressed.

Questions

Do you support the need for an interpretation service to answer queries about the swimming pool barrier standard and how it should be applied?

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?

6.1.4 Temporary pool fencing

Explanation

There are occasions when work on a site requires that a temporary pool fence is utilised for a period. There is no standard for a temporary pool fence though there is a standard for temporary pool fencing in Queensland.

Clearly, the general principle should be that a temporary fence should adhere to the pool barrier standard; even if it is a structure that is not established on permanent footings and it should be used for the minimum necessary time.

Reform option

Either the regulation could state the general principles that apply for temporary pool fencing or else representation could be made that it be incorporated in AS 1926.1-2012. In either case the standard for temporary pool fencing should be equivalent to that for permanent pool barriers.

Question

Do you believe it is necessary to establish an explicit standard or requirement for temporary pool fencing?

6.1.5 Pool barrier materials

There are cases of pool barrier material being sold which, while conforming to the regulated dimensions for a pool fence, fails to have the required strength and quality of material. Some retailers who stock portable pools also stock pool fencing material but display this material in close proximity to garden fencing which can have a different quality and strength.

While the ABCB does have both a Code Mark and Watermark quality identification system for building and plumbing materials respectively there is not in place a scheme that identifies pool barrier material that is compliant with the required standards.

Reform option

A possible approach is to require pool fencing material to be subject to a quality testing and identification system under the auspices of the ABCB.

Question

Do you support requiring pool barrier material being required to be tested and subject to an identification system as a product meeting the required standard?

6.2 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.

6.2.1 Legislative exemptions

Explanation

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 230 square metres where construction started before 1 July 2010
- Swimming pools on large properties, that is two hectares or more where construction started before 1 July 2010
- Swimming pools on waterfront properties, that is properties having a frontage to any large body of water where construction started before 1 July 2010

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.

Grandfathered swimming pools on large properties and waterfront properties are not required to be surrounded by a child resistant barrier provided access from the residential building is protected in accordance with the Australian Standard.

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 two hectares or more are typically in rural environments and in such environments there is 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 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.

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 2014-14, 15 or 28% 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.

Reform options

There would appear to be a strong case to remove the existing grandfathered exemptions allowing a suitable period for owners to move to the new standard. In the event that it was decided to move to a single standard for all pools, the case for removing the exemptions would be overwhelming and could be handled in the overall transitional period.

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”. However, even if it is determined that the application of the standard is “impractical or unreasonable” there needs to be a

requirement that the pool is made as safe as the standard requires by an alternative solution. This matter is addressed under the next issue.

Question

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 safety arrangements on a case by case basis subject to guidelines?

6.2.2 Section 22 exemptions

Explanation

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”. 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.

There are certain areas requiring clarification as set out in issue 1.3 where councils should be able to exercise greater discretion than is currently the case. One case is in respect to boundary fences acting as pool barriers adjoining public lands. Indeed Sutherland council does exercise greater flexibility in this area but other councils are less inclined to do so.

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.

One defect with the current section 22 is that it expresses the situation of the application of the standard being “impractical or unreasonable” in contrast to developing an alternative solution by separating the two situations by the word “or” whereas if the standard is “impractical or unreasonable”, this requires not just an exemption but an effective alternative solution.

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.

Reform options

There is considered to be a 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.

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.

Question

Do you believe there is sufficient guidance available at present to enable councils to assess applications for exemptions from the pool barrier standards?

6.2.3 The case of portable pools and spas

Explanation

Portable pools which are capable of containing water 300mm or greater are required to be fenced. Spas are required to have a lockable cover in place whenever it is not in operation and the cover needs to be capable of being operated by a single person.

The Sydney Children's Hospitals Network has established the Portable Pool 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 safety¹⁹.

The NSWCDRT, in their study of child deaths over the period 2007 to 2014, identified that nearly a fifth (19%) of drowning deaths or 10 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.

¹⁹ Kids Health, Children's Hospital Westmead, Kids can drown without a sound, Final Report, June 2013.

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 on line. While there is a requirement for warning signs to be on 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.

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 Pool 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 would draw to the attention of the pool owner and pool users the requirements for pool safety.

Reform options

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.

The recommendations of the Working Group appear sound. In addition the following additional requirements could be added:

- Amend the SEPP (Exempt and Complying Development Codes) 2008 to require that portable pool fencing is inspected certified and registered before use
- Limit retail outlets for portable pools to those that stock conforming pool fencing which must be displayed with the portable pools and require purchasers of portable pools to sign an acknowledgement of their understanding and commitment to the requirements of pool safety.

- Require sellers of above ground pools that require a fence to not only automatically register the pool but inform the relevant council of the purchase

Question

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?

6.3 Swimming pool register

Explanation

Under the 2012 amendments to the Swimming Pools Act 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 September 2015 there were 340,361 pools registered. 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.

Its prime role 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 20% 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 communication program on pool safety and registration requirements, that new pools are not being registered as a matter of course.

There are a number of weaknesses with the registry:

- 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.
- Reflecting the current process whereby pool owners input the information onto the register, there are gaps in the information that are recorded on the register, namely: 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 no email address to facilitate communication with the owners.

- Due to the difficulties with using the register councils also maintain their own registers and these 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. 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.
- The register should act as the hub of a network for pool owners to provide information and communicate 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.

Reform options

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 protocol and with a state level portal that enables the relevant agencies to access and aggregate the data. The devolved model is in fact what is being done with e Planning, capturing information on development applications from councils IT systems with a state level portal.

However, it is considered that there is a need for a state register that is accessible by the public in a convenient way in order to facilitate the checking of the situation for sale and leases and to act as the hub of a network for communication to pool owners.

Given that, it is important that the register is further developed in order to address the deficiencies identified above. This will require funding being provided to the Office of Local Government for this purpose. It is also important that councils and other key stakeholders are fully involved in the redevelopment of the register. It would also be beneficial to examine the Queensland register as a possible model.

Question

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)?

Please provide any suggestions on how it could be improved and made more useful

6.4 The role, function, training and fees for certification

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

- There are requirements for mandatory inspections of higher risk pools
- There is a requirement from 29 April 2016 for all properties with a swimming pool being sold or leased 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.

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.

Private certifiers are able to set their own fees but councils have regulated fees.

4.1 Role and function of certifiers

Explanation

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 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 certifiers where they find minor areas of non-compliance (for example, faulty lock or an out of date CPR poster) and that is to undertake minor repairs 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, pool certifiers are able to undertake minor repairs. 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 would compromise the certifier role as the certifier is still responsible and accountable for the assessment of compliance. 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.

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 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.

Reform options

Consideration should be given to:

- allowing council and accredited private certifiers 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.

Questions

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?

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

6.4.2 Accreditation and training

Explanation

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 the requirements for accreditation
- 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

Unlike Queensland there are pre-qualifications for persons to enter the training for an E1 certifier and be considered for accreditation. There are at present three pathways for entry to becoming an E1 pool certifier:

- Pathway 1 – holding suitable qualifications being: the qualifications are A4 building certifier accreditation; or endorsed contractors 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 a A1 to A3 building certifier who registers to undertake swimming pool certification

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

There are six issues to consider:

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 persons with relevant role 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)?
6. Whether there should be some form of licensing or other regulatory control on who functions as an installer of pool barriers?

Mutual recognition

Under the Mutual Recognition Act Queensland pool certifiers or indeed pool certifiers from any Australian jurisdiction can obtain accreditation to practice in NSW. The problem is that, for example, Queensland certifiers only have to deal with assessing pools against one standard, the Queensland pool barrier standard, whereas in NSW there are various standards that apply, all different to the Queensland standard that apply depending on the period of construction of the pool. Further there is different legislation and regulation. However if certifiers are considered equivalent occupations in NSW and Queensland then it would appear that conditions cannot apply to Queensland certifiers seeking to practice in NSW, such as obtaining training in the NSW standards and legislation.

The problem here is that Queensland certifiers need training to be able to assess NSW standards and interpret the legislation but the principles of mutual recognition do not allow for imposing requirements on the accreditation of interstate certifiers. This creates the risk of certifiers with insufficient knowledge undertaking pool compliance assessment. The issue is not one of restricting entry to NSW of pool certifiers from other jurisdictions but of ensuring that they have the right level of training and information to undertake the role effectively.

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.

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. Merit is seen in having building certifiers who wish to undertake pool compliance work undertaking 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 establishing pre-requisites for both E1 training and for accreditation as an E1 certifier. However, the issue is whether the current pre-requisites are too restrictive and are excluding persons for whom pool certification would be a good match with their work experience.

It has been argued that a natural extension of the role of pool and spa technicians and consultants who work in the swimming pool industry is to undertake the certification role. This would assess persons who operate in the industry and would also broaden the number of persons undertaking the role, increase competition and potentially place downward pressure on fees for consumers.

The problem with this proposition is that pool technicians and consultants do not have experience of the BCA and the Australian Standards. While aspects of this are covered in the E1 training course, the course assumes a reasonable level of familiarity with these matters. This would not be such an issue if there was a single state standard as is the case in Queensland. A possible approach would be to allow pool professionals such as pool technicians and consultants and other relevant persons working in the industry to undertake the E1 course provided that they undertook pre training in an approved course that provided additional training on such matters as the BCA, Australian Standards and the swimming pool regulatory approach.

Accreditation of the E1 training course by ASQA

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 national recognised qualifications. ASQA is also responsible for accrediting national qualifications under the Australian Qualifications

Framework (AQF). The AQF has 10 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 necessary to deliver the training and a course that meets 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
- 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.

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.

Licensing or other form of regulatory oversight of pool barrier installers

Under the current licensing rules under 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.

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. There needs to be a means of ensuring persons installing pool barriers have full knowledge of the relevant standard and install the barriers in line with the legislation and the Australian Standard.

Reform options

Consideration is being given to the following changes in respect to accreditation and training:-

- Exploring whether a condition on mutual recognition applicants can be applied to require them to undertake training on the NSW pool barrier standards and the legislative framework;

- Requiring as a condition of accreditation that E1 pool certifiers undertake a required number of hours each year of Continuing Professional Development.
- Requiring all council pool inspectors and A1 to A3 certifiers who wish to undertake pool certification work to undertake the E1 course and be accredited as E1 certifiers;
- Broadening the entry requirements for the E1 course to allow those with relevant experience in the building and swimming pools area to participate provided they have undertaken an appropriate level of training and assessment in the NSW pool barrier standards and legislative requirements.
- Having the E1 course submitted for national recognition and oversight by the ASQA.
- Seeking to ensure that pool barrier fencing tradespersons have the necessary training as well as the responsibility to install pool barriers in line with the relevant NSW standard.

Questions

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

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?

Is there merit in broadening the prequalification requirements for entry to the E1 course and possible accreditation as a pool certifier provided there is relevant experience in the building and swimming pools area and a requirement for pre training in the Building Code of Australia and swimming pool standards as a pre-requisite?

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

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?

6.4.3 Support and accountability of accredited certifiers

Explanation

Accredited certifiers undertake a regulatory role even though they are undertaking certification as a commercial business. In undertaking the role they operate as sole traders and need support, including ability to obtain advice and to be provided with guidance on issues associated with certification.

As noted above there is at present no Continuing Professional Development 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 to assist with an assessment 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 constitute 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 include the following:

- A help line that certifiers can call when they have a query regarding the regulation and its application.
- 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 oversighted by a committee of suitably qualified persons from both government and the industry and the guide would be subject to ongoing review and update.
- A Review Panel that could have complex matters referred to it which need expert consideration as the matter may create a significant precedent.

In addition there is a need for an audit program to be conducted by the BPB to review a sample of assessments made by E1 certifiers and provide feedback to certifiers. The audit program should also be linked to the training program for there may be best practice examples identified or areas of poor practice that need to be drawn to the attention of all certifiers.

Reform options

A possible approach to provide both support and enhance accountability for E1 certifiers would include the following elements:

- A hot line to provide over the phone advice;
- Peer review service where a complex issue requires expert input;
- 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;
- Audit program conducted by BPB that reviews the performance of selected certifiers providing feedback to certifiers and using the program to provide input to the CPD program

Question

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

- Help line
- Peer Review Panel
- Practice Guide
- Audit Program

6.4.4 Fees

Explanation

Under the current arrangements private certifiers are not regulated with respect to the fees they charge but are free to set their own fee structure. 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.

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 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-complaint pool complaint, thus creating a disincentive for the council undertaking an active inspection program
- The structure of the charges do not give any incentive to pool owners with non-complaint 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 addition, various councils have raised the matter of recovering from resident's fees that are due for inspecting pools. 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.

Reform options

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 are subject to review by the external auditor to certify 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

In regard to recovery of due but unpaid inspection fees and indeed unrecovered charges in general, consideration could be given to amending the *Local Government Act 1993* to allow for charging such debts against the property and recovering on sale of the property.

Question

Do you support giving council's greater flexibility in setting fees for pool certification and assessing applications for exemptions, subject to the fee being a cost recovery charge and being subject to periodic independent review?

6.5 Certification requirements

This section explores both the required compliance certification process with sale and lease transactions and associated issues as well as looking at an alternative approach to achieving compliance.

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 every three years swimming pools on property where there is a tourist or visitor accommodation or multiple dwellings. 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.

Under the sale and lease provisions, commencing on 29 April 2016, all sale and lease transactions that includes 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. It is noted that the period starting in late April is at or near the peak period for undertaking residential sales and that the period from about mid-December through to early February is normally a difficult time to engage tradespersons.

There are a number of issues to be considered.

6.5.1 Preparedness to commence the sale and lease provisions

Explanation

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

It is estimated that there will be between 35,000 and 40,000 properties with swimming pools leased or sold in a typical year. This assessment is based on data for 2013, there were about 10,000 houses or units with pools sold and an estimated 25,000 houses or units with pools leased, providing a total of about 35,000 properties sold or leased with pools in a typical year. This would imply that in an average month about 3000 certificates of compliance would need to be issued. 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 150 working full time. It should be noted that these numbers do not allow for pools that have already being certified.

At the time of consultations a total of 79 persons have being accredited as E1 certifiers, 59 who have done the course and being accredited and 20 who have been accredited through mutual recognition. In total 144 persons have done the course, so 85 have yet to apply for accreditation and may be waiting for an announcement by the government confirming the 29 April 2016 commencement date. In addition 142 A1 to A3 certifiers have registered their interest in undertaking pool certification work out of 380 who indicated an initial interest. Finally, there are about 400 council officers who are engaged in pool inspections.

While the A1 to A3 certifiers may not proceed with pool certification and are unlikely to want to work full time on pools, the numbers would appear to indicate there are sufficient qualified certifiers to undertake the role. 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 95% 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. This would indicate that there could be some impact on the timing of conveyancing transactions due to the need for sellers and leasers to have corrective work undertake on pool barriers.

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 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 provisions six months. This will address up front the higher risk area of leasing properties with pools, provide a definite date for commencement for the sale provision and hopefully encourage prospective sellers to obtain compliance certificates in advance of sale; and time the commencement for a quieter period in the year for property sales.

The third option is to proceed on the 29 April timetable, which will encourage all prospective owners to seek compliance certificates. This could be combined with providing greater timing flexibility for the compliance certification which is addressed under the next issue.

Question

Which do you believe is the most appropriate course of action for commencing the sale and lease provisions;

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

Please provide reasons for your view?

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

Explanation

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 complaint. There are two benefits with this approach:

- Avoids a significant delay in the sale until the pool is made compliant
- 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

The difficulty with this approach is that in Queensland there is not 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.

Reform options

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 how it needs to be addressed
- Vendor and purchaser must mutually agree on whether the vendor will make the pool compliant or the purchaser will take on the responsibility
- 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 complaint 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

Question

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?

6.5.3 Sale and lease model versus a periodic inspection model**Explanation**

An alternative to the sale and lease compliance model is to adopt 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 NSW²⁰. On the basis of 35,000 sales or leases per year it would take 86 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% 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
- The rate of drowning deaths in Western Australia is amongst the lowest in the country and that may be linked to the periodic checking of pools

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 pools²¹.

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 three year cycle, combined with the continuing requirement for ant sale or sale to be accompanied by a compliance certificate where the property has a pool

²⁰ 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.

²¹ Kids Health, Children's Hospital Westmead, Swimming Pool Safety, March 2011

- 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. There is a need to have a more consistent approach across councils than is the current situation.

In both cases the program could be funded by local councils with a surcharge on the rate for pool owners. Councils should be encouraged to adopt the approach followed in Western Australia of contracting out the inspection program to private pool certifiers. The advantage of this approach in NSW is that pool certifiers are accredited by the State, unlike the situation in Western Australia and hence there is a consistent level of training and expertise for certifiers.

It is suggested that the cost benefit assessment of a periodic inspection of a pools be undertaken, assessing both models comparing the costs and benefits against the sale and lease approach.

Questions

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?

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);
- an expanded and more consistent risk based inspection program undertaken by councils;
- other.

6.6 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 which is addressed below.

6.6.1 Documenting non-compliance

Explanation

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 any indication of how to make it compliant. Some private certifiers are also reluctant to document the details of non-compliance. 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.

Reform option

One approach would be for the legislation and practice guide to make clear that both council inspectors and accredited certifiers have a responsibility, where a pool is non-compliant, to clearly explain why it is non-compliant and identify the options to address the non-compliance, while noting that there may be other options and encouraging the pool owner to consider what would be the best solution.

Question

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?

6.6.2 Greater discipline with the section 22E process

Explanation

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, the certifier must then 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.

Reform options

Consideration is being given to the following approach:

- Require that a pool owner cannot remove a certifier 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;
- 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 time frame.

Question

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?

6.6.3 Council compliance program

Explanation

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.

Reform option

Consideration could be given to 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.

Question

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?

6.7 Supervision, education and training of pool owners and users

No level of regulation can 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 both active supervision of young children and 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

It is noted that at the time of the last changes in the Swimming Pools Act 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. In the lead up to the 29 April 2016, it is considered this program should be reactivated.

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. 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.

Pool safety measures need to be evidence based and hence there needs to be a feedback loop from child drowning incidents, including non-fatal drownings, to inform policy and practice. A program along the lines of that applying in Queensland should be considered whereby all swimming pool drownings, fatal and non-fatal, 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. This information also needs to be compiled and analysed each year. This could be undertaken by NSWCDRT or by CTCPER.

Another initiative that is worthy of consideration is the establishment of a NSW Pool Safety Council. Such a council operated in Queensland until recently when its role and responsibility was absorbed into the QBCC. 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 but in November 2014 it was abolished and its functions transferred to the QBCC. Previously in NSW there was a Swimming Pool subcommittee of the Water Safety Committee but that no longer exists. A NSW PSC would provide a forum to bring together all relevant stakeholders to discuss and seek to progress the issues associated with pool safety. This would provide a convenient forum for considering and giving advice to the Government on any initiatives being considered in the area of pool safety and regulation and it could advise the Government on the Australian Standard 1926.

Reform options

It is considered essential that there is an active program of communication and education on pool safety and child supervision around water as well as active engagement of key stakeholders in the design and delivery of pool safety initiatives.

Key elements in any such program would include the following:

- An education program on pool safety and active child supervision
- The establishment of a Pool Safety Council, composed of all relevant stakeholders with the function of advising the Government on pool safety policy and practice
- Engagement of the pool industry, including retailers, builders, suppliers and service providers in delivering a consistent message about pool safety and how to achieve and maintain it.
- Requiring notification and follow up not just on fatal drownings but non-fatal drownings that involve hospitals or the ambulance service and incorporating an analysis of both child fatal and non-fatal drownings in an annual report.

Questions

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?

What more needs to be done in the area of educating the community in both the importance and the approach to pool safety?

6.8 Responsibility for and clarity of the Swimming Pool Act

6.8.1 Clarity of the Swimming Pool 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 8.1 are suggested changes and improvements to the Act, additional to the more structural changes identified in other parts of this chapter.

Table 8.1: Possible changes to the Swimming Pool Act and Regulation

Relevant section	Possible change and rationale
Swimming Pool Act	
Clarification of residential building definition and inclusion of a pool area definition	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.
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.
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 essential 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	Section 22 at present presents two situations that can be considered by councils: <ul style="list-style-type: none"> • That application of the standard is impractical or unreasonable or <ul style="list-style-type: none"> • That an alternative solution exists This mischaracterises the issue as if the standard is impractical or unreasonable, it should be required that an alternative solution is developed. The “or” should be an “and”

	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.
Section 22A definition	Include E1
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.
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
Clause 4	This clause contradicts section 23 of the Act which requires an upgrade to the latest standard
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.
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.
Clause 23 Existing complying swimming pools may continue to comply with earlier standards	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.

Questions

On a scale of 0 to 10 (0 being totally unclear and 10 being totally clear) how would you rate the Swimming Pool Act 1992 and the Swimming Pool Regulation 2008 in regards to ease of understanding and use?

If you have any additional suggestions to improve the clarity of the Act and Regulation please let us know.

6.8.2 Ministerial responsibility for the Swimming Pools Act and Regulation

Consideration is also being given to the appropriate ministerial responsibility arrangements for the Swimming Pools Act and Regulation. In the event that the Government decides to designate a Minister for Building Regulation and establish an Office with this function, there would be a case for transferring the responsibility for the Swimming Pools Act and Regulation to this Minister and agency.

6.9 Resourcing the swimming pool safety function

Explanation

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

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

- Review and advise on the legislation and regulations
- Assess and advise on 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
- 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

While each of the above functions is the responsibility of councils, there is no need for councils to staff all these functions. An option available to councils is to contract with accredited certifiers to undertake pool inspections. This is in fact the approach taken in Western Australia where councils have the responsibility to have all pools inspected over a four year cycle but tend to contract out the actual inspection to private 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 Regulation²², 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.

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

²² 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 their young children rather than the general community

It is suggested that any incremental funding of the State's functions could be sourced from both the budget and appropriately targeted user charges. One area where a user charge would be appropriate would be in handling disputes.

The local government function with respect to pool safety was not subject to additional resourcing and as a consequence councils have generally limited the scale of the compliance and education program. 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
- The option of 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.

Reform options

The resourcing of the State's role in swimming pool regulation could be considered as part of the resourcing of the Office of Building Regulation and the BPB, if the function is transferred to these bodies.

Councils should be given the funding flexibility to be able to self-fund their functions in respect to swimming pool safety regulation and education.

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

Conclusion

The final chapter explains how you can let your views be known on all the issues identified in this paper. If you believe there is other issues which have not been addressed which you believe need to be, to enhance pool safety, please let us know.

7. How to let your views be known

The review would very much like to obtain your views and suggestions, whether you are a pool owner, a council inspector, a pool certifier, involved in the building and swimming pool industry or a member of the general community. Set out below is a questionnaire (Table 7.1) which we encourage you to fill out on line. Just go to the following web address www.olg.nsw.gov.au and follow the prompts to the **2015 Swimming Pool Barrier Review** webpage to find the Discussion Paper and to make a submission. If you or the organisation you represent would like to make an alternate submission, we would still encourage you to complete the online questionnaire and attach your submission in pdf or word format at the end of the questionnaire.

Your submission can be lodged in the following ways:

By email to: olg@olg.nsw.gov.au

By post to: Swimming Pools 2015 Review
Office of Local Government

Locked Bag 3015

NOWRA NSW 2541

By fax to: 02 4428 4199

The closing date for questionnaires and submissions is 5pm Friday 23rd October 2015.

All submissions may be made publicly available. If you do not want your personal details or any part of the submission released, please indicate this clearly in your submission together with reasons. You should be aware, however, that even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*).

Submissions will be analysed and a report on the findings provided to the Minister for Local Government.

Table 7.1 - Questionnaire

Set out below is the questionnaire which is shown here to assist you in responding. Please use the on line questionnaire at www.olg.nsw.gov.au to express your views.

Name: _____

Organisation: _____

Your role (please tick the applicable box below):

- | | |
|------------------------------|--------------------------|
| Pool owner | <input type="checkbox"/> |
| Council employee | <input type="checkbox"/> |
| Water safety advocacy member | <input type="checkbox"/> |
| Industry member | <input type="checkbox"/> |
| State agency employee | <input type="checkbox"/> |
| Other: | <input type="checkbox"/> |

If 'Other', please specify:

Postal Address:

Email Address (if applicable):

QUESTIONS ON POOL SAFETY STANDARDS

1. Do you support the following possible approaches to a pool barrier standard?

- Control of when and if the State adopts a revised national standard

Yes No Unsure

- Provide ready access to pool professionals to the standard

Yes No Unsure

- Provide an easy to understand explanation for the general public

Yes No Unsure

Comment

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

No

Unsure

Comment

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

No

Unsure

Comment

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

No

If yes, please provide information on these additional matters requiring clarification

5. Do you believe it is necessary to establish an explicit standard or requirement for temporary pool fencing?

Yes

No

Unsure

Comment

6. Do you support requiring pool barrier material being required to be tested and subject to an identification system as a product meeting the required standard?

Yes

No

Unsure

Comment

QUESTIONS ON EXEMPTIONS FROM THE POOL BARRIER STANDARDS

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 safety arrangements on a case by case basis subject to guidelines?

Yes

No

Unsure

Comment

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

No

Unsure

Comment

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

No

Unsure

Comment

QUESTION ON THE SWIMMING POOL REGISTER

This question should only be answered by those who have used the state swimming pool register. If you have not please go to question 11

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

Not very useful

Average

Very useful

Please provide any suggestions on how it could be improved and made more useful.

QUESTIONS ON THE ROLE, FUNCTION, TRAINING AND FEES FOR CERTIFICATION

11. Do you believe there is merit in accredited pool certifiers being able to undertake minor repairs where there are non-complaint matters that can be rectified relatively easily?

Yes

No

Unsure

Comment

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

Yes

No

Unsure

Comment

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

Yes

No

Unsure

Comment

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

No

Unsure

Comment

15. Is there merit in broadening the prequalification requirements for entry to the E1 course and possible accreditation as a pool certifier provided there is relevant experience in the building and swimming pools area and a requirement for pre training in the Building Code of Australia and swimming pool standards as a pre-requisite?

Yes

No

Unsure

Comment

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

Yes

No

Unsure

Comment

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

No

Unsure

Comment

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

- Help line

Yes No Unsure

- Peer Review Panel

Yes No Unsure

- Practice Guide

Yes No Unsure

- Audit program

Yes No Unsure

Comment

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

No

Unsure

Comment

QUESTIONS ON SALE AND LEASE CERTIFICATION REQUIREMENTS

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
- Commence the lease provision as planned and the sale provision six months later
- Commence sale and lease provision as planned, with or without flexibility in timing of the compliance certificate
- Other (please specify in comment)

Please provide reasons for your view;

21. Is there merit in allowing the purchaser of a property to take responsibility for ensuring a non-compliant pool is made complaint in a reasonable time after settlement and with the council to have an enforcement role to ensure this occurs?

Yes

No

Unsure

Comment

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

No

Unsure

Comment

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

Comment

QUESTIONS ON COMPLIANCE AND ENFORCEMENT

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

No

Unsure

Comment

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

No

Unsure

Comment

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

No

Unsure

Comment

QUESTIONS ON SUPERVISION AND THE EDUCATION OF POOL OWNERS AND USERS

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

No

Unsure

Comment

28. Is enough being done in the area of educating the community in both the importance and the approach to pool safety?

Yes

No

Unsure

Comment

29. What more needs to be done in the area of educating the community in both the importance and the approach to pool safety?

QUESTIONS ON THE SWIMMING POOL 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 Pool 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

Totally unclear

Very clear

31. If you have any additional suggestions to improve the clarity of the Act and Regulation please let us know.

Please provide any additional comments you have.

- *After completing the 2015 Swimming Pool Discussion Paper on-line questionnaire found at www.olg.nsw.gov.au you will have the ability to attach a supporting document (pdf or word) to support your answers to this questionnaire*

Appendix A: Terms of reference for the review

Swimming Pool Review -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:

1. Inspection and certification framework, in particular the requirement for compliance certificates for properties sold and leased;
2. Enforcement framework, including consideration of the relevant recommendations of the NSW Coroner and Child Death Safety Review Team;
3. 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
4. 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:

1. Is underpinned by swimming pool barrier standards that are simple and effective
2. Facilitates the application of a uniform standard wherever possible, including to existing swimming pools
3. Is proportionate to the risk being managed, including consideration of the *Guide to Better Regulation* principles;
4. Ensures responsibility for maintaining and installing a compliant swimming pool barrier remains with the swimming pool owner; and
5. 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.

Appendix B: References

- Australian Water Safety Council, Australian Water Safety Strategy 2016-2020
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- Coronial Inquiry into the death of Sebastian Yeomans, Armidale Local Court, April 2015
- Department of Local Government, Review of the Swimming Pools Act 1992: Discussion Paper, August 2006
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- Draft Report of the Independent Review of the Building Professionals Act 2005, August 2015
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- Independent Pricing and Regulatory Tribunal, 'Reforming Licensing in NSW-Review of Licence Rationale and Design, Final Report, August 2015
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- Kids Health, Children's Hospital Westmead, What do pool owners think about pool safety, August 2010
- Kids Health, Children's Hospital Westmead, Swimming Pool Safety, March 2011
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- NSW Child Death Review Team, Annual Report 2013

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Office of Local Government, Practice Note 17, Application of section 22 of the Swimming Pools Act, 1992, March 2014

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