

## 8 Enforcement of regulation 50(1) of the *Building Regulations 2012*

### 8.1 The role of enforcement in administering regulations

As identified at section 6.6.1, the Office found that between eight and 52 per cent of swimming pool barriers inspected by the five selected local governments did not comply with regulation 50(1) of the *Building Regulations 2012* on initial inspection. The Office further found that, in the local government survey, 72 local governments reported that they had undertaken 26,405 initial inspections and that 13,358 (51 per cent) of the swimming pool barriers inspected were found to comply at this inspection. In the context of these low compliance levels, the Office undertook a literature review of factors that affect compliance with regulation and the role of enforcement in increasing compliance. The Office also took into account that the enforcement of regulation 50(1) of the *Building Regulations 2012* falls largely to local governments and the type of enforcement measures available to local governments under the *Building Act 2011* and the *Building Regulations 2012*.

The research literature identifies that, 'regulation refers to a set of authoritative rules accompanied by a mechanism, usually administered by a public agency, for monitoring and promoting compliance with those rules'.<sup>225</sup> The research literature also identifies that the '[b]enefits from regulation can take many forms but these can be distilled down to an improvement in the welfare of an individual or group ...'<sup>226</sup>

Regulatory schemes and regulatory institutions play a vital role in preserving and advancing public interests ...

and:

All regulatory regimes, designed **and** implemented well, can deliver economic, social, cultural and environmental benefits as well as protecting communities from harm. [Original emphasis]<sup>227</sup>

Of course, well designed and implemented regulatory systems should be cost-beneficial, that is the cost of their design, implementation, and ongoing compliance should be outweighed by the benefits of the regulations.<sup>228</sup> Similarly, regulatory design should actively avoid any unintended undesirable consequences of the regulation.<sup>229</sup> The research literature identifies factors that are known to drive compliance with regulations. In particular, the 'Table of Eleven', published by the OECD, 'derives from academic literature in the areas of social psychology, sociology and criminology.'<sup>230</sup> The Table of Eleven identifies factors that increase the likelihood of compliance, as follows:

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<sup>225</sup> Johnstone, R and Sarre, R, *Regulation: Enforcement and Compliance*, Australian Institute of Criminology, Canberra, 2004, p. v.

<sup>226</sup> Guerin, K, *Encouraging Quality Regulation: Theories and Tools*, New Zealand Treasury, Wellington, 2003, p. 5.

<sup>227</sup> Patena, K, and Woolley, E, 'Effective compliance and enforcement strategies,' Meredith Connell, New Zealand Planning Institute Environmental Compliance Conference, Auckland, 2013, Perth Public Hearing, Friday 23 March 2007, 9.00am.

<sup>228</sup> Field, C, 'Recent Evolutions in Australian Ombudsmen', 2009, *AIAL Forum*, 63, pp. 4-12.

<sup>229</sup> Field, C, 'Recent Evolutions in Australian Ombudsmen', 2009, *AIAL Forum*, 63, pp. 4-12.

<sup>230</sup> Organisation for Economic Cooperation and Development, *Better Regulation in Europe: Netherlands*, OECD, Paris, 2010, p. 109.

- Aspects of spontaneous compliance:
  1. Knowledge of the regulation
  2. Costs of compliance/benefits of non-compliance
  3. Degree of business and popular acceptance of the regulation
  4. Loyalty and natural obedience of the regulated firm
  5. Extent of informal monitoring
- Aspects of monitoring
  6. Probability of report through informal channels
  7. Probability of inspection
  8. Probability of detection
  9. Selectivity of the inspector
- Aspects of sanctions
  10. Chance of sanctions
  11. Severity of sanctions<sup>231</sup>

In terms of the framework established by the Table of Eleven, the Office has analysed aspects of spontaneous compliance ‘that is, compliance that would occur in the absence of enforcement’,<sup>232</sup> in Chapter 4 of this report, and aspects of monitoring in Chapter 6 and Chapter 7. This Chapter focuses on aspects of sanctions.

By identifying the drivers of compliance, the Table of Eleven can also aid in identifying ‘the strong and weak points of enforcement of’<sup>233</sup> a particular regulation. Informed by understandings of the drivers of compliance, the effective enforcement of regulations continues to be the focus of ongoing research. Ayres and Braithwaite, whose theory of ‘responsive regulation’ ‘[has] become [a] touchstone in the contemporary study and practice of regulation’,<sup>234</sup> identify that sound regulatory enforcement policy cannot be based totally on persuasion or totally on punishment. At the core of responsive regulation is the concept that ‘compliance is most likely when a regulatory agency displays an explicit enforcement pyramid’.<sup>235</sup>

At the base are advisory and persuasive measures, in the middle are mild administrative sanctions and at the top are more punitive sanctions, determined to be sufficiently undesirable to halt the behaviour of the most determined offenders. According to its authors, regulators should focus most of their activity at the bottom and only escalate measures if absolutely necessary and de-escalate when possible. The preference for being at the bottom of the pyramid is a presumptive preference that will often be overridden. Pyramids are more likely to be effective when they have a credible enforcement peak.<sup>236</sup>

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<sup>231</sup> Hampton, P, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, 2005, Norwich, p. 57.

<sup>232</sup> Organisation for Economic Cooperation and Development, *Better Regulation in Europe: Netherlands*, OECD, Paris, 2010, p. 109.

<sup>233</sup> Dutch Ministry of Justice, *The ‘Table of Eleven’: A versatile tool*, Dutch Ministry of Justice, The Hague, 2004, p. 4.

<sup>234</sup> Kolieb, J, ‘When to punish, when to persuade and when to reward: Strengthening responsive regulation with the regulatory diamond’, *Monash University Law Review*, 2015, vol. 41, no. 1, pp. 136-162.

<sup>235</sup> Comino, V, ‘The Challenge of Corporate Law Enforcement in Australia,’ *Australian Journal of Corporate Law*, 23, 3, 2009, pp. 233-265.

<sup>236</sup> Wood, C, Ivec, M, Job, J, and Braithwaite, V, *Applications of Responsive Regulatory Theory in Australia and Overseas*, Australian National University, Canberra, 2010, p. 3.

With respect to compliance with regulation 50(1) of the *Building Regulations 2012*, legislation and regulations provide local governments with three enforcement measures to encourage and achieve compliance:

- issuing infringement notices;
- prosecution; and
- issuing building orders.

Each of these measures is discussed in more detail below.

## 8.2 Local governments may issue infringement notices to owners or occupiers for swimming pool barriers that do not comply with the *Building Regulations 2012*

### 8.2.1 Legislative requirements

Legislation provides for local governments to appoint authorised officers who may issue infringement notices to owners or occupiers when swimming pool barriers are found not to comply with regulation 50(1) of the *Building Regulations 2012*. Regulation 69 of the *Building Regulations 2012* provides for prescribed offences and modified penalties, as follows:

#### 69. Prescribed offences and modified penalties

- (1) The offences specified in Schedule 6 are offences for which an infringement notice may be issued under the *Criminal Procedure Act 2004* Part 2.
- (2) The modified penalty specified opposite an offence in Schedule 6 is the modified penalty for that offence for the purposes of the *Criminal Procedure Act 2004* section 5(3).

Schedule 6 sets out the specific offences and the associated modified penalties as follows:

#### Schedule 6 – Prescribed offences and modified penalties

[r. 69(1) and (2)]

Offences		Modified penalty (\$)
r. 50(1)	Barrier to private swimming pool	750

...

Regulation 70 of the *Building Regulations 2012* provides that a local government (as a permit authority) may appoint approved and authorised officers for the purposes of sections 6(a) and (b) of the *Criminal Procedure Act 2004 (WA)*, as follows:

## 70. Approved officers and authorised officers

- (1) A permit authority that is a local government may, in writing, appoint to be an approved officer for the purposes of the *Criminal Procedure Act 2004* section 6(a), a person appointed under the *Local Government Act 1995* section 9.10(1) and authorised for the purpose of performing functions under section 9.19 or 9.20 of that Act.
- (2) A permit authority that is a local government may, in writing, appoint to be an authorised officer for the purposes of the *Criminal Procedure Act 2004* section 6(b), a person appointed under the *Local Government Act 1995* section 9.10(1) and authorised for the purpose of performing functions under section 9.16 of that Act.
- (3) A permit authority that is a local government must issue each of its authorised officers a certificate of the person's appointment, and the person must produce the certificate whenever required to do so by a person who has been or is about to be affected by any exercise of authority by the authorised person.

Section 6 of the *Criminal Procedure Act 2004 (WA)* provides for the appointment of approved and authorised officers who may be authorised to issue infringement notices, providing:

### 6. Other matters to be prescribed by prescribed Acts

If under section 5 regulations are made under a prescribed Act and prescribe an offence, the regulations must also —

- (a) provide for the appointment of approved officers in relation to infringement notices that may be issued under this Part for the prescribed offence; and
- (b) provide for the appointment of authorised officers in relation to infringement notices that may be issued under this Part for the prescribed offence; and
- (c) provide for the means by which authorised officers can show they are authorised to issue infringement notices; and
- (d) prescribe the form of infringement notices that may be issued under this Part for the prescribed offence; and
- (e) prescribe any other forms required to be prescribed by this Part in relation to infringement notices that may be issued under this Part for the prescribed offence.

The *Building Act 2011* is a prescribed Act, pursuant to the *Criminal Procedure Regulations 2005*, Schedule 1A — Infringement notices: prescribed Acts.

### 8.2.2 Guidelines

The *Inspector Guidelines* provide advice in relation to enforcement, including infringement notices, as follows:

The local government is responsible for enforcing swimming pool safety barrier compliance and the Regulations set out specific requirements and penalties to carry out this role.

Part 10 of the Regulations sets out:

- prescribed offences and modified penalties;
- requirements for the appointment of authorised officers and approved officers, including certificates (note that this is different from an authorised person); and
- the specific forms to be used when issuing or withdrawing an infringement notice (Schedule 7).

Schedule 6 sets out the offences for which an infringement notice may be issued and the corresponding modified penalty.

Generally for swimming pool barrier non-compliance the applicable offence is Building Regulations 2012 regulation 50(1):

- Each owner and occupier of premises on which there is a private swimming pool containing water that is more than 300 mm deep must ensure that there is installed or provided around the pool a barrier that restricts access by young children to the pool and its immediate surrounds.<sup>237</sup>

### **8.2.3 Two of the five selected local governments issued infringement notices for non-compliant swimming pool barriers between 1 July 2014 to 30 June 2015**

As identified at section 6.6.1, from 1 July 2014 to 30 June 2015, between eight and 52 per cent of swimming pool barriers inspected by the five selected local governments were found not to comply with regulation 50(1) of the *Building Regulations 2012* on initial inspection. The Office also obtained information from the five selected local governments regarding their use of infringement notices in response to non-compliance with regulation 50(1) of the *Building Regulations 2012*.

Of the five selected local governments, two local governments (the City of Canning and the City of Rockingham) reported that they had issued infringement notices from 1 July 2014 to 30 June 2015 for swimming pool barriers that did not comply with regulation 50(1), as follows:

- the City of Canning reported that it issued three infringement notices for offences pursuant to regulation 50(1) of the *Building Regulations 2012*. The City of Canning further informed the Office that, if the infringement notice is not paid within 28 days or if the owner or occupier chooses to appeal the infringement notice, then it is the City's policy to refer the matter to its solicitors; and
- the City of Rockingham reported that it issued two infringement notices for offences pursuant to regulation 50(1) of the *Building Regulations 2012*.

The City of Bayswater, City of Joondalup and City of Mandurah informed the Office that they did not issue any infringement notices from 1 July 2014 to 30 June 2015 for offences pursuant to regulation 50(1) of the *Building Regulations 2012*. The City of Joondalup further informed the Office that it does not infringe owners or occupiers for non-compliant

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<sup>237</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, p. 9.

swimming pool barriers but rather the owners are given the opportunity to ensure compliance, and if this is not done then the City will proceed directly to prosecution.

**8.2.4 Nine of the 138 survey respondents reported having issued a total of 77 infringement notices for non-compliant swimming pool barriers between 1 July 2014 and 30 June 2015**

In the local government survey, the Office requested information about whether the local government had issued an infringement notice from 1 July 2014 to 30 June 2015 for swimming pool barriers that did not comply with regulation 50(1) of the *Building Regulations 2012*. The Office found that, of the 138 survey respondents:

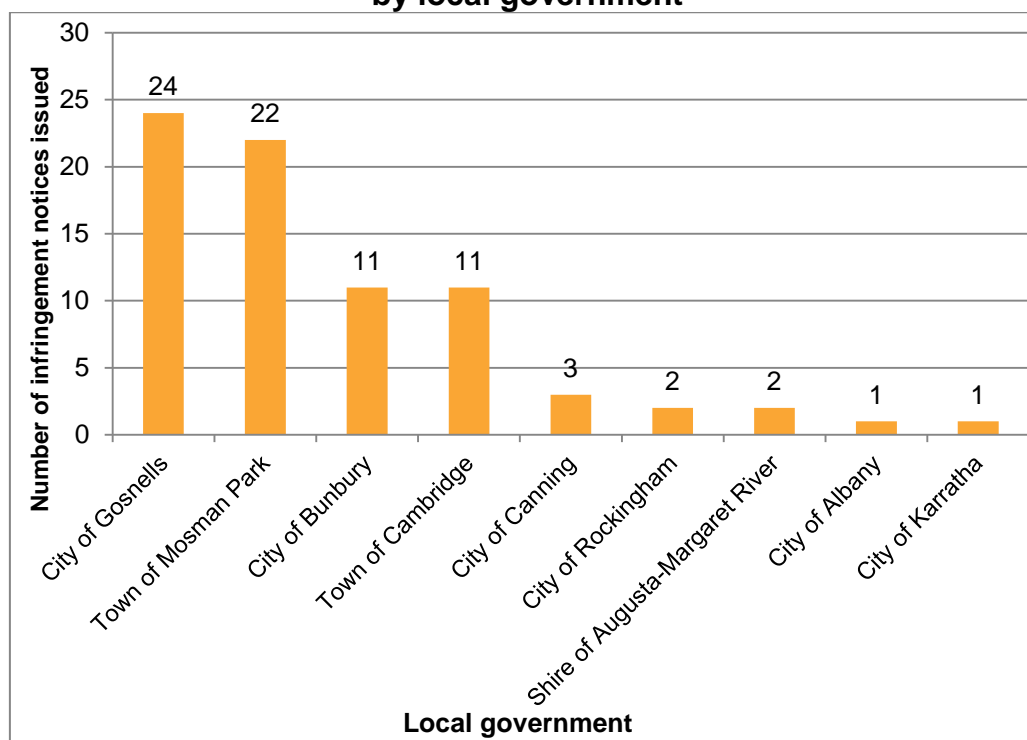
- one hundred and eight (78 per cent) local governments reported that they had not issued any infringement notices;
- nine (seven per cent) local governments reported that they had issued infringement notices;
- ten (seven per cent) local governments did not know if they had issued infringement notices;<sup>238</sup> and
- eleven (eight per cent) local governments reported that they did not have any recorded swimming pools in their district.

The nine local governments that reported that they had issued infringement notices for swimming pool barriers that did not comply with regulation 50(1) of the *Building Regulations 2012* reported that they had issued a total of 77 infringement notices between 1 July 2014 and 30 June 2015, as shown in Figure 52.

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<sup>238</sup> This includes the City of Rockingham, which was not asked this question as it took part in a pilot of the survey.

**Figure 52: Infringement notices issued from 1 July 2014 to 30 June 2015, by local government**



Source: Ombudsman Western Australia

### 8.3 Local governments may commence proceedings to prosecute owners for swimming pool barriers that do not comply with the *Building Regulations 2012*

#### 8.3.1 Legislative requirements

The *Building Act 2011* and *Building Regulations 2012* also authorise the commencement of prosecutions for failing to install or provide a swimming pool barrier that complies with regulation 50(1) of the *Building Regulations 2012*. Section 133 of the *Building Act 2011* provides for prosecutions for an offence against the Act to be commenced by a local government (as a permit authority) including, as follows:

#### 133. Prosecutions

- (1) A prosecution for an offence against this Act may be commenced by, and only by —
  - (a) a permit authority or a person authorised to do so by a permit authority; or
  - (b) a local government or a person authorised to do so by a local government.
- (2) Subsection (1) does not limit the functions of the Director of Public Prosecutions under the *Director of Public Prosecutions Act 1991* section 11.

- (3) A prosecution for an offence against section 9, 10, 29(1) or (2), 37(1) or (2), 38(1) or (2), 76(1), 77, 78(1), (2) or (3), or 79(1) or (2) may be commenced within 6 years after the offence was allegedly committed, but not later.
- (4) A prosecution for any other offence against this Act may be commenced within 3 years after the offence was allegedly committed, but not later.
- (5) All prosecutions for offences against this Act are to be heard in a court of summary jurisdiction constituted by a magistrate.

### 8.3.2 Guidelines

The *Inspector Guidelines* do not provide any advice to local governments in relation to commencing prosecution for non-compliant swimming pool barriers, except for encouraging local governments to seek legal advice.<sup>239</sup>

### 8.3.3 Six local governments reported having commenced proceedings to prosecute owners on seven occasions for non-compliant swimming pool barriers from 1 July 2014 and 30 June 2015

Of the five selected local governments, one local government, the City of Joondalup, reported that it had commenced two prosecutions between 1 July 2014 and 30 June 2015 for failure to comply with regulation 50(1) of the *Building Regulations 2012*. The City of Joondalup informed the Office that, between July 2014 and June 2015, the City prosecuted the same owner on two occasions for separate offences relating to a non-compliant swimming pool barrier. The City of Bayswater, the City of Canning, the City of Mandurah and the City of Rockingham informed the Office that between 1 July 2014 and 30 June 2015 they did not commence any prosecutions for failure to comply with regulation 50(1) of the *Building Regulations 2012*.

As part of the local government survey, all local governments were asked to identify the number of prosecutions that they had commenced between 1 July 2014 and 30 June 2015 for failure to comply with regulation 50(1) of the *Building Regulations 2012*. The Office found that, of the 138 survey respondents:

- six (four per cent) local governments (including the City of Joondalup) reported that they had commenced a total of seven prosecutions between 1 July 2014 and 30 June 2015;
- 123 (89 per cent) local governments reported that they had not commenced any prosecutions between 1 July 2014 and 30 June 2015 (including 11 local governments that did not have any recorded swimming pools in their district); and
- nine (seven per cent) local governments reported that they did not know whether they had commenced prosecutions between 1 July 2014 and 30 June 2015.

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<sup>239</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, p. 9.



The six local governments who reported having commenced seven prosecutions between 1 July 2014 and 30 June 2015 were:

- the Town of Cambridge, which reported having commenced one prosecution;
- the City of Greater Geraldton, which reported having commenced one prosecution;
- the City of Gosnells, which reported having commenced one prosecution;
- the City of Kwinana, which reported having commenced one prosecution;
- the Town of Victoria Park, which reported having commenced one prosecution; and
- the City of Joondalup, which reported having commenced two prosecutions.

## 8.4 Local governments may make a building order so that the person named must take action to ensure the swimming pool barrier complies with the *Building Regulations 2012*

### 8.4.1 Legislative requirements

During the Investigation, local governments informed the Office that, as an alternative to infringement notices and prosecutions for offences pursuant to regulation 50(1) of the *Building Regulations 2012*, local governments may make building orders in relation to swimming pool barriers.

Section 110(1) of the *Building Act 2011* provides that building orders may be made by local governments (as permit authorities) as follows:

#### 110. Building orders

- (1) A permit authority may make an order (a **building order**) in respect of one or more of the following —
  - (a) particular building work;
  - (b) particular demolition work;
  - (c) a particular building or incidental structure, whether completed before or after commencement day.
- (2) A building order must be in an approved form and must be directed to any one or more of the following persons as is appropriate in the case —
  - (a) if a building permit is in effect for the particular building work, the person named as the builder on the permit;
  - (b) if a demolition permit is in effect for the particular demolition work, the person named as the demolition contractor on the permit;
  - (c) a person who is an owner of the land on which the particular building or demolition work is being, or has been, done;

- (d) a person who is an owner or occupier of the land on which the particular building or incidental structure is located.

Section 112 of the *Building Act 2011* provides that a building order may require a person to do one or more specified actions, including specified building or demolition work to swimming pool barriers (as incidental structures) so as to prevent or stop a suspected contravention of the Act, as follows:

**112. Content of building order**

...

- (2) A building order may require a person to whom the order is directed to do any one or more of the following within the specified time —

...

- (c) to do specified building or demolition work, or alter a building or incidental structure in a specified way, so as to prevent or stop a suspected contravention of this Act;
- (d) to take or not take specified action so as to prevent or stop a suspected contravention of this Act:

...

Section 115 of the *Building Act 2011* provides the penalties for failing to comply with a building order as follows:

**115. Compliance with building order**

A person who is served with a copy of a building order must not without reasonable excuse fail to comply with the order.

Penalty:

- (a) for a first offence, a fine of \$50 000;
- (b) for a second offence, a fine of \$75 000;
- (c) for a third or subsequent offence, a fine of \$100 000 and imprisonment for 12 months.

Section 118 of the *Building Act 2011* further provides that, if there is non-compliance with the building order, a local government (as a permit authority) may give effect to the building order and then recover the reasonable costs and expenses of doing so, as follows:

**118. Permit authority may give effect to building order if non-compliance**

...

- (2) If there is non-compliance with an order the permit authority that made the relevant building order may cause an authorised person —
  - (a) to take any action specified in the order; or
  - (b) to commence or complete any work specified in the order; or
  - (c) if any specified action was required by the order to cease, to take such steps as are reasonable in the circumstances to cause the action to cease.
- (3) The permit authority may, in a court of competent jurisdiction, recover as a debt from a person who has been served with a copy of a building order the reasonable costs and expenses incurred in doing anything under subsection (2) in relation to the order.
- (4) In a proceeding under subsection (3), a document apparently signed by an authorised certifier in relation to the permit authority, as defined by section 140(2), specifying details of the reasonable costs and expenses incurred is, in the absence of evidence to the contrary, proof of the details specified.

In summary, section 118 of the *Building Act 2011* provides local governments with a powerful enforcement mechanism, in particular as it permits a local government (as a permit authority) to take the actions specified in the building order (where the order has not been complied with) without having to apply to the court to do so.<sup>240</sup>

#### **8.4.2 Guidelines**

The *Inspector Guidelines* provide advice in relation to making building orders, as follows:

The Act sets out specific requirements regarding the making of building orders.

...

Section 110(1) of the Act allows orders to be made in respect of building or demolition work (ie work that is currently under way) or in respect of a building or incidental structure, whether completed or not, and whether completed before or after commencement day.

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<sup>240</sup> For example see *Laurent v City Of Greater Geraldton* [2016] WASC 48.

Section 110(2) of the Act requires building orders to be in a consistent form and to be given to the person best able to respond to the order. Where building or demolition work is under way and a building or demolition permit is in place, the most appropriate person will be the builder or demolition contractor named on the permit. Where no permit is in place, or where the builder or demolition contractor is not available, the most appropriate person is the owner, or is in some cases, the occupier.

Section 111(1) of the Act requires an authorised person to give 14 days' notice of a proposed building order and why it is proposed to be issued. A person given notice can respond and the response must be considered before the building order has effect.

In any case, permit authorities may seek legal advice in regards to the use of building orders to ensure compliance with the legislation.<sup>241</sup>

### **8.4.3 Local governments reported that building orders are more effective than infringement notices or prosecutions in achieving compliance with regulation 50(1) of the *Building Regulations 2012***

One of the five selected local governments (the City of Canning) stated that it had issued one building order from 1 July 2014 to 30 June 2015. The City of Canning informed the Office that it had issued a building order rather than prosecuting the owner as the maximum penalty for a first offence for failing to comply with a building order is \$50,000 compared with \$5,000 for failing to comply with regulation 50(1) of the *Building Regulations 2012*.

In response to questions regarding enforcement, two of the 138 survey respondents also stated that they issue building orders, rather than infringement notices, when a swimming pool barrier is found not to comply with regulation 50(1) of the *Building Regulations 2012*. These local governments also reported that building orders are more effective in ensuring compliance because of the higher maximum penalties. Comments received in the survey from local governments included:

Penalties and infringements need to be given horsepower to make them effectively enforceable.

and:

The City ... prefers to use the Building Order option rather than issuing infringements to address owners who fail to comply with requests to make their pool barriers compliant. Our preferred option has more weight and its threat has proven to be more effective in achieving compliance. The City has found it necessary to issue 2 Building Orders during the reporting period.

The view expressed by these local governments, that the higher maximum penalties associated with a building order makes it a more effective enforcement strategy than infringements and prosecutions, is consistent with the regulatory theory discussed in the research literature.

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<sup>241</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, pp. 8- 9.

8.5 Overall, the sanctions available to enforce regulation 50(1) of the *Building Regulations 2012* are not being used as effectively as they could be and this could be undermining the effectiveness of the regulations

**8.5.1 Local governments have used the re-inspection process effectively as a persuasive enforcement measure**

As discussed in section 6.7, local governments may re-inspect a swimming pool barrier if the initial inspection identifies that the swimming pool barrier does not comply with regulation 50(1) of the *Building Regulations 2012*. As identified in the *Inspector Guidelines*, '[i]t is commonplace for the pool inspector to reinspect a non-compliant safety barrier to ensure compliance has been achieved.'<sup>242</sup>

As also identified in section 6.7, the Office analysed the 485 inspection forms obtained from the five selected local governments to determine if barriers that were found not to comply with the *Building Regulations 2012* on initial inspection were subsequently re-inspected. Of the 485 barriers, 159 swimming pool barriers were found not to comply on initial inspection. The Office found that 128 of the 159 barriers were re-inspected (81 per cent). The Office undertook further analysis to determine whether the re-inspections resulted in compliance with the *Building Regulations 2012*. Overall, the Office found that the re-inspection process increased the percentage of private swimming pools that ultimately complied with the *Building Regulations 2012*.

As identified in section 6.6.1, of the 138 survey respondents, 75 local governments reported that they had undertaken 37,363 initial inspections between 1 July 2014 and 30 June 2015. Of these 75 local governments, 72 local governments were able to report on how many swimming pool barriers were found to be compliant with the *Building Regulations 2012* at initial inspection. These 72 local governments reported that they had undertaken 26,405 initial inspections and that 13,358 (51 per cent) of these swimming pool barriers were found to comply at the initial inspection and 13,047 swimming pool barriers were found not to comply.

Of the 75 local governments that reported the number of initial inspections undertaken, 55 local governments (73 per cent) reported that they undertook 12,087 first re-inspections. That is, 93 per cent of swimming pool barriers that were found to be non-compliant at the initial inspection (13,047 barriers) were re-inspected. Fifty-three of these 55 survey respondents reported that they had found a further 6,330 barriers to be compliant after the first re-inspection, with 6,717 barriers found to be non-compliant.

The Office's findings indicate that the re-inspection process is being used effectively by some local governments as a persuasive enforcement measure to improve compliance with regulation 50(1) of the *Building Regulations 2012*. This effectiveness could potentially be enhanced further by the introduction of fees for re-inspections, as discussed at section 6.8.

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<sup>242</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, p. 8.

**8.5.2 Collectively, 84 sanctions were issued by local governments in response to 13,047 potential offences pursuant to regulation 50(1) of the *Building Regulations 2012*; this equates to a 1 in 155 chance of a sanction being imposed**

Local governments' focus on using re-inspection, while effective in increasing compliance, also gives rise to risks. As discussed in detail at section 6.7 and above, the Office found that, upon initial inspection, 8 per cent to 52 per cent of swimming pool barriers were found to be non-compliant with regulation 50(1) of the *Building Regulations 2012*. This meant that, while many of these barriers were later made compliant through subsequent re-inspections, at any point over the four year period between inspections (or longer, as set out at section 6.5.4 that the five selected local governments had inspected between 12 per cent and 54 per cent of swimming pool barriers due for inspection over the four year period), up to 52 per cent of all swimming pool barriers may have been non-compliant with regulation 50(1) and were therefore not restricting access by young children to the pool and its immediate surrounds (as set out at section 6.6.1).

This situation is reflected in the research literature discussed at section 8.1, which recognises that effective regulatory enforcement cannot be based solely on persuasion. The research literature suggests that, in an enforcement pyramid, persuasive measures should be the focus and make up the base of the pyramid.<sup>243</sup> However, for these persuasive mechanisms to be effective, the pyramid must also have a 'credible enforcement peak',<sup>244</sup> that is, punitive mechanisms or sanctions. The research literature further suggests that the credibility of the enforcement peak is influenced by two factors; the chance and severity of sanctions. The Office has identified issues in relation to both of these factors in relation to the inspection of swimming pool barriers.

In relation to the chance of sanctions, the Office found that 72 local governments reported that of 26,405 initial inspections they identified 13,047 swimming pool barriers that did not comply with regulation 50(1) of the *Building Regulations 2012*. However, sanctions were rarely imposed, with the 138 survey respondents reporting that, in the same period, they:

- issued a total of 77 infringement notices; and
- commenced proceedings to prosecute owners on seven occasions.<sup>245</sup>

Collectively, this indicates that 84 sanctions were imposed by local governments in response to 13,047 potential offences pursuant to regulation 50(1) of the *Building Regulations 2012* (that is, in response to 0.7 per cent of potential offences). The probability of a sanction being imposed was one in 155.

In relation to the severity of sanctions, during the Investigation, the five selected local governments reported that one reason they do not make use of these sanctions is that the severity of the sanction is not sufficient to achieve compliance, with local governments expressing views, for example, that:

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<sup>243</sup> Wood, C, Ivec, M, Job, J, and Braithwaite, V, *Applications of Responsive Regulatory Theory in Australia and Overseas*, Australian National University, Canberra, 2010, p. 3.

<sup>244</sup> Wood, C, Ivec, M, Job, J, and Braithwaite, V, *Applications of Responsive Regulatory Theory in Australia and Overseas*, Australian National University, Canberra, 2010, p. 3.

<sup>245</sup> This includes the two prosecutions commenced by the City of Joondalup.

The modified penalty of \$750 (associated with an infringement notice) is so modest compared to the construction of a swimming pool barrier, which can amount to several thousand dollars, that infringement notices are ineffective and therefore it is a waste of time issuing them.

and:

Even when prosecutions are successful, the penalties are so low that they are ineffective, so it is a waste of time and money commencing them.

The Office has also found that, as an alternative to infringement notices and prosecutions, which specifically relate to offences pursuant to regulation 50(1), some local governments make building orders. These local governments reported that the penalties for non-compliance with a building order are more effective than penalties imposed by the court or associated with an infringement notice. However, of the five selected local governments, only one local government reported making one building order.

### **8.5.3 An evidence-based enforcement strategy for the local government sector needs to be developed to improve compliance with regulation 50(1) of the *Building Regulations 2012***

The 2002 *Report of the Standing Committee on Environment and Public Affairs in Relation to Swimming Pool Fencing (the Parliamentary Report)* identified that '[t]here is considerable scope for an improvement in swimming pool fencing inspection, enforcement and public education'<sup>246</sup> in Western Australia, with submissions identifying 'significant problems with interpretation, enforcement and implementation of Acts and Regulations relating to swimming pool fencing and pool safety generally.'<sup>247</sup> The Parliamentary Report identified the need for the 'development of enforcement protocols' in Western Australia.<sup>248</sup> The RLSSA has similarly identified that '[c]ompliance levels would be improved by a common approach to monitoring and enforcement'.<sup>249</sup>

While the *Inspector Guidelines* make reference to the legislation applicable to each enforcement option, they provide no guidance to local governments on how these options should be used effectively, instead they merely instruct local governments to seek legal advice. In summary, there is currently no model or broadly applicable strategy for the enforcement of regulations regarding swimming pool barriers in Western Australia.

As identified in the research literature discussed in this Chapter, 'a regulatory framework relies on effective enforcement by the regulator',<sup>250</sup> and even the best regulation is 'ineffective without means of enforcement.'<sup>251</sup> In this context, under-enforcement of

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<sup>246</sup> Western Australian Parliament, *Report of the Standing Committee on Environment and Public Affairs in Relation to Swimming Pool Fencing*, Western Australian Parliament, 2002, Perth, p. ii.

<sup>247</sup> Western Australian Parliament, *Report of the Standing Committee on Environment and Public Affairs in Relation to Swimming Pool Fencing*, Western Australian Parliament, 2002, Perth, p. 8.

<sup>248</sup> Western Australian Parliament, *Report of the Standing Committee on Environment and Public Affairs in Relation to Swimming Pool Fencing*, Western Australian Parliament, 2002, Perth, p. iv.

<sup>249</sup> Royal Life Saving Society Australia, *Position Paper: Nationally consistent regulation of pool barriers*, Royal Life Saving Society Australia, 2007, Broadway, p. 5.

<sup>250</sup> Financial System Inquiry, *Financial System Inquiry – Interim Report*, Commonwealth of Australia, Canberra, 2014, pp. 3-54.

<sup>251</sup> United Nations Environment Programme, *Africa-Asia Expert Meeting on Enforcement of Environmental Law*, UNEP, Beijing, 2014, p. 1.

regulations for swimming pool barriers could be undermining the effectiveness of a key mechanism for reducing the number of drowning incidents involving children.

Pursuant to section 86 of the *Building Services (Complaint Resolution and Administration) Act 2011*, the Building Commissioner has a role to monitor developments relevant to the regulation of building services in Western Australia, as follows:

**86. Functions**

The Building Commissioner has the following functions —

(a) to monitor developments relevant to the regulation of building services in the State;

...

[and]

...

(h) to provide, or facilitate the provision of, advice, information, education and training in relation to —

(i) building standards and codes; and

(ii) consumer protection in relation to building services;

On this basis, it is proposed that the Building Commissioner work with local governments and other stakeholders to develop and implement an evidence-based enforcement strategy, which includes measures at all levels of the enforcement pyramid, including the use of sanctions, for application by local governments.

In developing an evidence-based enforcement strategy, the Building Commissioner should take into account the Office's earlier findings and recommendations regarding:

- the effectiveness of re-inspections as a persuasive mechanism for encouraging and achieving compliance with regulation 50(1) of the *Building Regulations 2012* (discussed at section 6.7); and
- establishing a fee specifically to cover the cost of re-inspections to further enhance the effectiveness of this mechanism (discussed at section 6.8).

The New South Wales Ombudsman's publication, *Enforcement Guidelines for Councils*, which includes 'a comprehensive model enforcement policy that has been compiled from best practice examples from a number of councils and other relevant agencies'<sup>252</sup> could provide a useful starting point for such a strategy.

Bearing in mind the research literature regarding the importance of a credible enforcement peak, the Office's findings, and the views expressed by local governments regarding the effectiveness of the currently available sanctions, the Building Commissioner should also determine whether legislative amendments are required to support the effectiveness of the new enforcement strategy.

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<sup>252</sup> New South Wales Ombudsman, 'Enforcement Guidelines for Councils', December 2015, p. iii.



Finally, the research literature acknowledges that ‘competent authorities need adequate resources (human, material and financial) to carry out their functions effectively and efficiently’,<sup>253</sup> further identifying that ‘even most skilled experts cannot fulfil their roles without adequate funding and support facilities.’<sup>254</sup> Regulatory effectiveness is intrinsically linked to resources, with the literature observing that ‘[one] reason for a lack of enforcement is that the regulator does not have the capability to actually enforce the regime. This capability may not be available because the regulator has insufficient skilled people, inadequate financial resources, [or] ineffective powers’.<sup>255</sup> The OECD further identifies funding as a key principle in best practice by regulators, stating:

Funding levels should be adequate to enable the regulator, operating efficiently, to effectively fulfil the objectives set by government, including obligations imposed by other legislation.<sup>256</sup>

### **Recommendation 18**

Taking into account the findings of the Investigation, the Building Commissioner, in consultation with local governments and other stakeholders:

- (i) develops an evidence-based enforcement strategy to improve compliance with the *Building Act 2011* and the *Building Regulations 2012* for use across local governments, taking into account:
  - a. the resourcing available to local governments to implement the enforcement strategy;
  - b. that any regulatory compliance model is done, as a matter of principle, in a cost-beneficial way, that is, at least cost to local governments (and, by extension, to ratepayers); and
  - c. that costs for inspections represent benchmarked efficient costing that is transparently passed on to pool-owning ratepayers who cause these costs to be incurred rather than subsidised by ratepayers who do not own a swimming pool; and
- (ii) determines whether legislative amendments are required to support the effectiveness of the enforcement strategy and, if so, seeks these amendments.

### **Recommendation 19**

The Building Commissioner, in consultation with local governments and other stakeholders:

- (i) includes the use of re-inspection of barriers to swimming pools that do not initially comply with the *Building Regulations 2012*, as part of an evidence-based enforcement strategy to improve compliance with the *Building Act 2011* and the *Building Regulations 2012* for use across local governments; and
- (ii) if necessary, seeks an amendment to the *Building Regulations 2012* to provide a specific basis for these re-inspections.

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<sup>253</sup> United Nations, Economic Commission for Europe, 2<sup>nd</sup> *Environmental Performance Review: Kazakhstan*, United Nations, Switzerland, 2008, p. 51.

<sup>254</sup> United Nations, Economic Commission for Europe, 2<sup>nd</sup> *Environmental Performance Review: Kazakhstan*, United Nations, Switzerland, 2008, p. 51.

<sup>255</sup> Yates, A, *The Nexus Between Regulation Enforcement and Catastrophic Engineering Failures*, Australian Institute of Criminology, Paper presented at the *Current Issues in Regulation: Enforcement and Compliance Conference Convened by the Australian Institute of Criminology*, Melbourne, 2-3 September 2002, p. 5.

<sup>256</sup> Organisation for Economic Cooperation and Development, *Principles for the Governance of Regulators: Public Consultation Draft*, Paris, 21 June 2013, p. 13.

### **Recommendation 20**

The Building Commissioner, in consultation with local governments and other stakeholders:

- (i) considers a charge for re-inspection of barriers to swimming pools that do not initially comply with the *Building Regulations 2012*, in an evidence-based enforcement strategy to improve compliance with the *Building Act 2011* and the *Building Regulations 2012* for use across local governments; and
- (ii) if necessary, seeks an amendment to the *Building Regulations 2012* to provide the basis for these charges.

#### **8.5.4 The requirements for swimming pool barriers are available to those who are required to comply with them via the Building Commission's *Rules for Pools and Spas* publication**

As identified in Chapter 6, regulation 50(1) of the *Building Regulations 2012* requires owners and occupiers of premises to ensure that a swimming pool barrier is installed or provided around a private swimming pool. As discussed above, the Table of Eleven identifies factors that influence spontaneous compliance, which occurs in the absence of active enforcement.<sup>257</sup> The first dimension of spontaneous compliance is 'knowledge of the regulation',<sup>258</sup> as follows:

Knowledge of the regulation: *the acquaintance with and clarity of the regulation within the regulatee group.*

Does the regulatee know the rules? Is the regulation not too extensive? What should the regulatee do in order to know the regulation?

Is there a possible doubt (within the regulatee group) about the applicability of the regulation? Does the regulatee understand what is meant by the regulation? Is a certain level of (technical or juridical) expertise necessary to understand the regulation?<sup>259</sup> [Original emphasis]

The OECD further identifies that '[p]eople cannot comply with regulations if they do not understand what is required' further suggesting that non-compliance with a regulatory framework can be related to a lack of regulatory knowledge or comprehension by the target group.<sup>260</sup>

Home owners are likely to be aware through the building permit process that a swimming pool barrier is required when installing a swimming pool (risks associated with swimming pools where the building permit process does not apply, and associated strategies, are discussed in Chapter 9).

<sup>257</sup> Organisation for Economic Cooperation and Development, *Better Regulation in Europe: The Netherlands*, OECD, Paris, 2010, p. 109.

<sup>258</sup> van der Schraaf, A and Roessen, A, *Incentive framework to comply with regulations*, Paper for the OECD conference on Economic Aspects of Environmental Compliance Assurance Paris, Paris, 2-3 December 2004, p. 4.

<sup>259</sup> van der Schraaf, A and Roessen, A, *Incentive framework to comply with regulations*, Paper for the OECD conference on Economic Aspects of Environmental Compliance Assurance Paris, Paris, 2-3 December 2004, p. 4.

<sup>260</sup> Organisation for Economic Cooperation and Development, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, OECD, Paris, 2000, p. 14.

Regulation 50(1) of the *Building Regulations 2012* identifies that the specific requirements that owners are required to comply with when installing or providing a swimming pool barrier are set out in the applicable Australian Standards. The Australian Standards themselves are not freely available, and need to be purchased from SAI Global. At the time of publication of the Australian Standards, prices for the relevant Australian Standards, for personal use, commenced at \$52.18 for an electronic document.<sup>261</sup> However, the requirements of the relevant Australian Standards have been summarised in the Building Commissioner's *Rules for Pools and Spas*,<sup>262</sup> which is available electronically and provides 'a set of guidelines for residential swimming pool owners, pool contractors, fencing suppliers and installers'.<sup>263</sup>

Section 150(5) of the *Building Act 2011* specifies that the Building Commission must make the Australian Standards available to the public for inspection at its office:

**150. Regulations may refer to published documents**

- (1) Regulations made for the purposes of this Act may adopt the text of any published document specified in the regulations —
  - (a) as that text exists at a particular date; or
  - (b) as that text may from time to time be amended.
- (2) The text may be adopted —
  - (a) wholly or in part; or
  - (b) as modified by the regulations.
- (3) The adoption may be direct (by reference made in the regulations), or indirect (by reference made in the text that is itself directly or indirectly adopted).
- (4) The adoption of a text is of no effect unless —
  - (a) the adopted text; and
  - (b) if the text is adopted as it may be amended from time to time, either —
    - (i) the amendments to the text; or
    - (ii) the text as amended,

can at all reasonable times be inspected or purchased by the public.
- (5) The Building Commissioner must ensure that text mentioned in subsection (4)(a) and (b) —

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<sup>261</sup> SAI Global, 'InfoStore: AS 1926.1-1993 Swimming pool safety - Fencing for swimming pools', viewed 12 December 2016, <<http://infostore.saiglobal.com/store/details.aspx?ProductID=252975>>.

<sup>262</sup> Government of Western Australia, Department of Commerce, *Rules for Pools and Spas*, Building Commission, Perth, May 2016.

<sup>263</sup> Government of Western Australia, *Rules for Pools' launched*, 16 October 2005, viewed 29 November 2016, <<https://www.mediastatements.wa.gov.au/Pages/Gallop/2005/10/Rules-for-Pools'-launched.aspx>>.

- (a) can be inspected by the public at the Commissioner's office during business hours;  
and
  - (b) can be purchased by the public.
- (6) Regulations that adopt the text of a published document may contain provisions that are necessary or convenient for dealing with transitional matters related to the provisions that change or cease to have effect in relation to the text.

The Building Commission informed the Office that the Australian Standards are freely available for viewing during business hours at the new Department of Mines, Industry Regulation and Safety's public library (the Building Commissioner is within the new Department of Mines, Industry Regulation and Safety), located at its office in Cannington. This satisfies the requirements under the *Building Act 2011*. However, the location of the Building Commission office in Cannington, a southern suburb of Perth, raises accessibility issues for owners and occupiers who may seek access to the Australian Standards free of charge and reside in other areas of Western Australia. Accordingly, it may be useful for local governments to provide access to the Australian Standards for members of the public in their districts.