

9 Swimming pool barriers that may not be inspected by local governments

During the Investigation, the Office identified that there were certain types, and some locations, of private swimming pools whose barriers may not be, or are not required to be, inspected by local governments. Some of these types of private swimming pools have been the location of fatal and non-fatal drowning incidents in the past or give rise to risks of these incidents in the future. The following types of private swimming pool barriers were identified by the Office as being at increased risk of not being inspected:

- temporary barriers for swimming pools that are in the process of being installed, including swimming pools that need to be filled with water during installation;
- barriers for types of swimming pools that can be constructed without a building permit, particularly portable pools and spas; and
- barriers for swimming pools that have been decommissioned and then filled with water again.

In addition, local governments are only required to inspect barriers for swimming pools in geographical areas of Western Australia where Division 2 of Part 8 of the *Building Regulations 2012* applies.

Accordingly, in addition to examining the inspection of private swimming pool barriers by local governments (discussed in Chapter 6 and Chapter 7), the Office analysed the systemic factors that mean that barriers for these types of private swimming pools may not be, or are not required to be, inspected. The Office's findings are discussed below.

9.1 Temporary barriers for swimming pools that are in the process of being constructed

9.1.1 Legislative requirements²⁶⁴

As discussed in detail in Chapter 6, in Western Australia, regulation 50(1) of the *Building Regulations 2012* requires owners and occupiers to ensure that a private swimming pool with water that is more than 300 mm deep has a barrier that restricts access by young children to the pool and its immediate surrounds, as follows:

50. Barrier to private swimming pool

- (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.

Penalty for this subregulation: a fine of \$5 000.

In addition, Chapter 6 identifies that regulation 50 of the *Building Regulations 2012* also sets out the circumstances in which a barrier to a private swimming pool is considered to

²⁶⁴ As previously noted, Division 2 of the *Building Regulations 2012* does not apply in excluded areas; this is discussed in detail in section 9.2.

be suitable for restricting access by young children to the pool and its immediate surrounds. These requirements involve compliance with AS 1926.1-1993 (for private swimming pools pre-May 2016) or compliance with a Building Code pool barrier requirement (for private swimming pools post-May 2016).²⁶⁵

The Office's review of section 2.1 of AS 1926.1-1993 (which is the standard applicable to the Investigation) identified that it requires that the barrier shall be a permanent structure. The new Australian Standard applicable to post-May 2016 swimming pools (AS 1926.1-2012 Swimming pool safety - Safety barriers for swimming pools), adopted in the Building Code of Australia, continues to require that '[a] barrier shall be a permanent structure'.²⁶⁶

AS 1926.1-1993 does not define a permanent structure. However, AS 1926.1-2012 defines a permanent structure as:

1.3.19 Permanent structure

A barrier, or part of a barrier which cannot be removed without the use of tools.

Legislation also provides for local governments to approve the use of barriers that do not meet the applicable standards in certain circumstances. In relation to barriers for pre-May 2016 private swimming pools (the subject of the Investigation), regulation 50(4) of the *Building Regulations 2012* requires that barriers must be in accordance with either AS 1926.1-1993 or approved 'alternative requirements,' as follows:

50. Barrier to private swimming pool

...

- (4) A barrier to a pre-May 2016 private swimming pool —
 - (a) may consist of a fence, wall, gate or other component, or a combination of them; and
 - (b) any fence, wall, gate or other component that is included in the barrier must be in accordance with —
 - (i) the requirements of AS 1926.1; or
 - (ii) **approved alternative requirements;**and
 - (c) any wall comprising part of the barrier must have no means of access through a building other than —
 - (i) a window that is in accordance with the requirements of AS 1926.1; or
 - (ii) an approved door.

[Emphasis added]

²⁶⁵ Amendments to the *Building Regulations 2012* took effect from 1 May 2016.

²⁶⁶ Building Commission, 'Building Amendment Regulations (No. 2) 2016 (swimming pool barriers)', *Industry Bulletin IB 067/2016*, Department of Commerce, Perth, 2016, p. 5.

Regulation 51(2) further relevantly provides the circumstances in which local governments may approve these 'alternative requirements', as follows:

51. Approvals by permit authority

...

- (2) A permit authority may approve requirements alternative to the requirements of regulation 50(4)(b) if it is satisfied that the alternative requirements will restrict access by young children to the private swimming pool as effectively as if there were compliance with AS 1926.1.

...

If approved by the local government pursuant to regulation 51, the barrier that meets the alternative requirements is referred to as an 'approved barrier solution' as defined in regulation 3, as follows:

3. Terms used

In these regulations —

...

approved barrier solution, in relation to a swimming pool, means an [sic] performance solution used to comply with a Building Code pool barrier requirement that has been approved in accordance with regulation 51 by the permit authority for the swimming pool;

...

The Building Commission has informed the Office that approved barrier solutions are generally sought and granted to enable access to a swimming pool by an owner with a disability. None of the deaths of children reported to the Ombudsman involved temporary barriers that had been approved by local governments as 'an approved barrier solution'. For these reasons, this section focuses on the use of temporary barriers that have not been approved by local governments as approved barrier solutions.

9.1.2 Guidelines

The *Inspector Guidelines* state that a pool that is required to be filled with water during construction must have a compliant safety barrier, either temporary or permanent, before it can be filled with more than 300 mm of water. The *Inspector Guidelines* recognise that:

An empty pool/spa does not require a compliant pool safety barrier until it has at least 300 mm (depth) of water in it (Building Regulations 2012 regulations 3 and 50(1)).²⁶⁷

The *Inspector Guidelines* also provide for swimming pools which are required to be filled with water during construction, noting that these pools must have a compliant safety

²⁶⁷ 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>, p. 10.

barrier installed, either temporary or permanent, before being filled with more than 300 mm of water, as follows:

A pool that is required to be filled with water during construction (eg a fibreglass pool) must have a compliant safety barrier, either temporary or permanent, installed before the pool can be filled with more than 300 mm (depth) of water. A temporary barrier must not be removed until a permanent complying barrier is installed.²⁶⁸

The *Inspector Guidelines* also recognise that:

Some permit authorities may have specific requirements for temporary barriers.²⁶⁹

In this context, the *Inspector Guidelines* are referring to temporary barriers which, while they are not intended to be the permanent barriers to the swimming pools, still meet the definition of a permanent structure.

9.1.3 Two children died by drowning following an incident in a swimming pool with a temporary barrier

The Office found that, of the 16 children who died by drowning in a private swimming pool, two (13 per cent) children died by drowning following an incident in a swimming pool with a temporary barrier in place. In these instances, temporary barriers were in place because:

- a new fibreglass swimming pool had been constructed, the permanent barrier had not yet been installed and a section of the temporary barrier had been loosened to swing open; and
- an existing swimming pool was undergoing renovations, the existing permanent barrier had been removed and the temporary barrier had been propped open.

The issues raised by these scenarios are discussed further below.

9.1.4 Local governments reported that temporary barriers are used during the construction of swimming pools, particularly fibreglass swimming pools

With respect to fibreglass swimming pools, during the Investigation, the five selected local governments reported that, in practice, as fibreglass swimming pools are filled with water during their construction, a swimming pool may contain more than 300 mm of water during the construction period and permanent barriers are usually not installed until after the swimming pool has been constructed. There is therefore a period of time between the swimming pool being filled with water and the installation of the permanent barrier.

²⁶⁸ 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>, p. 36.

²⁶⁹ 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>, p. 36.

This understanding is supported by industry advice, which states as follows:

...the fibreglass swimming pool is then hooked by straps to the crane and lifted off of the truck ... Once the pool has been lowered into the excavation area, it should be pretty close to being level.

...

Simultaneously the fibreglass swimming pool will be filling with water while the backfilling occurs. This is done to ensure equal pressure and maintain stability during the backfilling process.²⁷⁰

The Office observed that this industry advice does not mean there needs to be an extended delay between the construction of a fibreglass swimming pool and the installation of its permanent barrier (which occurred in the deaths notified to the Ombudsman).

9.1.5 Approaches used in other states

The Office reviewed the approaches used in other Australian jurisdictions to ensure that temporary barriers are effective. In New South Wales, in relation to the issues associated with temporary barriers, the Independent Review Discussion Paper identified that:

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.²⁷¹

The Queensland Government has similarly specified requirements for temporary fencing, in particular that these fences may not be permanent structures but should otherwise comply with the pool safety standard:

Temporary fencing

...

Under the pool safety standard, a temporary fence means a fence which is not a permanent structure, has at least one gate, otherwise complies with the pool safety standard and is securely fixed to resist reasonably foreseeable actions to which it may be subjected, for example, high winds, collisions etc.²⁷²

The Queensland Government requirements go on to specify that temporary fences should be approved in writing and inspected by a building certifier:

²⁷⁰ Fibreglass swimming pool installation, Leisure Pools, viewed 23 May 2016, <<http://www.leisurepools.com.au/pool-ideas/fibreglass-swimming-pool-installation>>.

²⁷¹ Lambert, M, *Independent Review of NSW Swimming Pool Barrier Requirements: Discussion Paper*, 2015, viewed 10 August 2016, <<https://www.olg.nsw.gov.au/sites/default/files/Independent-Review-of-NSW-Swimming-Pool-Barrier-Requirements-Discussion-Paper-2015.pdf>>, p. 34.

²⁷² Queensland Government, Department of Housing, Pool safety inspector guideline, October 2015, viewed 31 August 2016, <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/PoolSafetyInspectorGuideline.pdf>>, p. 31.

In general a temporary fence may be used instead of a permanent barrier for a new pool, for up to three months, provided it is inspected and approved by a building certifier. It may be used for further periods of up to three months with written approval by a building certifier.²⁷³

Section 6.3.5 identifies that the Building Commissioner has a function, pursuant to section 86(b) of the *Building Services (Complaint Resolution and Administration) Act 2011*, to monitor and review the operation of the building service Acts.

Recommendation 21

The Building Commissioner reviews the requirements that are in force in other jurisdictions for temporary barriers, and, informed by cost benefit analysis, explores whether any such requirements should be considered in Western Australia, including those that relate to:

- (i) time limits on temporary barriers; and
- (ii) the need for temporary barriers to be inspected and approved by a building certifier (or equivalent).

9.2 Barriers for types of swimming pools that can be constructed without a building permit, particularly portable pools and spas

The Office found that four of the 16 children who died by drowning in a private swimming pool, drowned following an incident in a swimming pool that could be installed without the involvement of a builder, and therefore a building permit may not have been sought. These four swimming pools included three swimming pools and one spa.

The ACCC has described portable swimming pools, which can include portable spas, as coming in various sizes, shapes and water depths:

Portable swimming pools take several forms and include inflatable pools, pools incorporating a canvas or flexible plastic liner attached to a frame, and hard plastic pools such as wading pools. Depths vary from less than 150mm to over one metre.²⁷⁴

9.2.1 Legislative requirements²⁷⁵

As previously discussed at section 3.3.1, regulation 3 of the *Building Regulations 2012* defines a swimming pool as having ‘the meaning given in the Building Code Volume 1 Part 1A,’ namely:

Swimming pool means any excavation or structure containing water and principally used, or that is designed, manufactured or adapted to be principally

²⁷³ Queensland Government, Department of Housing, Pool safety inspector guideline, October 2015, viewed 31 August 2016, <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/PoolSafetyInspectorGuideline.pdf>>, p. 31.

²⁷⁴ Australian Competition and Consumer Commission, *Portable Pools – Make It Safe*, viewed 19 April 2017, <<https://www.productsafety.gov.au/news/portable-pools-make-it-safe>>.

²⁷⁵ As previously noted, Division 2 of the *Building Regulations 2012* does not apply in excluded areas; this is discussed in detail in section 8.4.

used for swimming, wading, paddling, or the like, including a bathing or wading pool, or spa.²⁷⁶

Regulation 3 of the *Building Regulations 2012* further defines a private swimming pool as follows:

private swimming pool means a swimming pool —

- (a) that is associated with —
 - (i) a Class 1a building; or
 - (ii) less than 30 sole-occupancy units in a Class 2 building; or
 - (iii) a Class 4 part of a building;
- and
- (b) which has the capacity to contain water that is more than 300 mm deep;
- ...

Portable swimming pools and portable spas are within the definition of a private swimming pool set out above. Such pools are therefore subject to the requirements of the *Building Regulations 2012*. In particular, the requirement of regulation 50(1) to ensure that a barrier to a private swimming pool is installed or provided around the swimming pool that restricts access by young children to the pool and its immediate surrounds applies to portable swimming pools that meet the definition of a private swimming pool.

However, section 69 of the *Building Act 2011* requires a building permit to be obtained only for a private swimming pool, including a portable swimming pool or spa, that will remain erected for more than a month, as follows:

69. Temporary buildings

- (1) A permit is not required for a building or an incidental structure that is to remain erected for no longer than one month.
- (2) However, the permit requirement provisions apply to a building or incidental structure of a kind mentioned in subsection (1) —
 - (a) that members of the public normally use; or
 - (b) to which members of the public are permitted access.

Section 3 of the *Building Act 2011* defines an incidental structure as follows:

incidental structure means a structure attached to or incidental to a building and includes —

- (a) a chimney, mast, swimming pool, fence, free-standing wall, retaining wall or permanent protection structure; and

²⁷⁶ Australian Building Codes Board, *National Construction Code 2016: Volume One Building Code of Australia Class 2 to Class 9 Buildings*, February 2016, p. 32.

- (b) a part of a structure;

The implications of these requirements are discussed further below.

9.2.2 Guidelines

The *Inspector Guidelines* state that:

A building permit is required for a portable swimming and spa pool that will remain erected for a period of more than one month (*Building Act 2011* section 69).²⁷⁷

9.2.3 Local governments reported that few portable swimming pools and portable spas are enclosed by a barrier and it is difficult for them to identify if non-compliance is occurring

The five selected local governments reported that it is difficult to identify portable swimming pools or spas within their districts, as a precursor to ensuring that they are inspected. Local governments reported that they will inspect a portable swimming pool if they are informed by owners, neighbours or other parties that a portable swimming pool has been erected.

In relation to these issues, the 138 survey respondents reported that:

- few portable swimming pools and spas are enclosed with a barrier; and
- it is difficult or impossible to determine how many portable swimming pools or spas are located within each local government district and to ensure these types of swimming pools are inspected.

As discussed in detail in Chapter 6, the building permit process provides a mechanism for advising the local government that a swimming pool and its barrier are to be installed, that the barrier has been installed, and that it has been certified as complying with all applicable standards. However, portable swimming pools and portable spas do not necessarily require professional construction by a builder or swimming pool installer, which means that it can fall to owners and occupiers to obtain building permits. However, owners and occupiers may not be aware of the requirement to apply for building permits, may choose not to apply for building permits, or may not intend that their swimming pools will remain in place for more than one month. In each of these cases, the building permit process will not be set in motion. This creates the risk that the local government is not aware that the portable swimming pool exists, the barrier is not installed, the local government's inspection of the barrier is not triggered and, ultimately, instances of non-compliance (that is, the lack of barriers where required) are not identified and rectified.

²⁷⁷ Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, p. 7, 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>.

9.2.4 From 30 March 2014, portable swimming pools, including portable spas, were required to contain warning messages and advice that barrier laws apply

The ACCC *Consumer Goods (Portable Swimming Pools) Safety Standard 2013 (the Portable Swimming Pools Standard)* came into effect in Western Australia from 30 March 2014. Product Safety Australia, within the ACCC, states that this standard is mandatory and applies to portable swimming pools (including spa pools) as follows:

The mandatory standard applies to portable swimming pools that are both:

- intended for personal, domestic or household use
- one of the following:
 - an inflatable swimming pool, of any depth
 - a soft-sided swimming pool, of any depth
 - a rigid-sided swimming pool that is not deeper than 300 mm.

The mandatory standard applies to spas, hot tubs or whirlpool tubs that meet the definition above. For example if a spa is inflatable, it is captured by the mandatory standard.²⁷⁸

The ACCC provides the following advice regarding safety labelling required by the Portable Swimming Pools Standard:

Safety labelling

A portable swimming pool and its retail packaging must display a warning message that is:

- permanent
- legible
- of a certain height
- in contrast to the background colour of the packaging
- on front of the package.

If the depth of the portable swimming pool is less than 300 mm, the warning message must include the following statement:

 **'WARNING!**
Children have drowned in portable swimming pools.
Ensure active adult supervision at all times.
Do not leave children unsupervised in or around the pool—keep them within arm's reach.
Empty and store safely after use.'

If the depth of the portable swimming pool is 300 mm or more, the warning message must include the following statement:

²⁷⁸ Australian Competition and Consumer Commission, 'Portable swimming pools', viewed 8 December 2016, <<https://www.productsafety.gov.au/standards/portable-swimming-pools>>.

ⓘ 'WARNING!
Children have drowned in portable swimming pools.
Ensure active adult supervision at all times.
Do not leave children unsupervised in or around the pool—keep them within arm's reach.
Pool fencing laws apply to this pool. Consult your local government authority for fencing requirements.'

All portable swimming pools must display this safety sign:²⁷⁹



The new Department of Mines, Industry Regulation and Safety has a role in monitoring compliance with consumer protection legislation including monitoring safety labelling required by the Portable Swimming Pools Standard, described by the (then) Department of Commerce as follows:

Consumer Protection:

- provides information and advice to consumers and traders about their rights and responsibilities;
- helps consumers resolve disputes with traders;
- monitors compliance with consumer protection legislation;
- investigates complaints about unfair trading practices;
- prosecutes unscrupulous traders;
- regulates and licenses a range of business activities; and
- develops, reviews and prepares amendments to legislation that protects consumers.²⁸⁰

²⁷⁹ Australian Competition and Consumer Commission, 'Portable swimming pools', viewed 8 December 2016, <<https://www.productsafety.gov.au/standards/portable-swimming-pools>>.

²⁸⁰ Government of Western Australia, Department of Commerce, Annual Report 2015–16, 2016, viewed 27 April 2017, < https://www.commerce.wa.gov.au/sites/default/files/atoms/files/doc_ar_2015-2016.pdf >, p. 7.

9.2.5 The Department of Mines, Industry Regulation and Safety could take further steps to address the lack of barriers for portable swimming pools and spas

As discussed above, the current regulatory arrangements are predicated upon the need for a building permit. For similar reasons, government agencies in New South Wales have established a Portable Pool Safety Working Group which comprises representatives of the Children's Hospital at Westmead, Sydney Children's Hospital, Australian Medical Association NSW, Royal Life Saving Society NSW, Samuel Morris Foundation, Ambulance NSW, NSW Police, Fair Trading, Local Councils, Local Government and Shires Association of Australia, Swimming Pool and Spa Alliance, Coroner's Office and Kidsafe NSW.²⁸¹ The Portable Pool Safety Working Group has made a number of recommendations for portable pools and spas, 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 300 mm 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.²⁸²

Other suggestions, identified in the Independent Review Discussion Paper, include:

- establishing regulatory requirements that purchasers of above ground swimming pools be advised at point of sale of the requirements for barriers; and
- that retailers of the portable pools advise the relevant local government of the address of delivery of an above ground pool.²⁸³

Recommendation 22

The Building Commissioner collaborates with relevant state government agencies, local governments and other stakeholders, through a senior working group or other appropriate mechanism, to develop strategies for ensuring compliance by owners of portable swimming pools and spas with the requirements of the *Building Regulations 2012*, including strategies to:

- (i) ensure owners and occupiers are aware of the requirements of regulation 50(1) of the *Building Regulations 2012*, and how these requirements apply to portable swimming pools and spas; and
- (ii) assist local governments to identify when portable swimming pools and spas may require inspection.

²⁸¹ Kid Health, The Children's Hospital Westmead, *Kids can drown without a sound: final report*, 2013, viewed 23 September 2016, <https://kidshealth.schn.health.nsw.gov.au/sites/default/files/report_inflatable_and_portable_swimming_pool_safety_final.pdf>, p. 6.

²⁸² Lambert, M, *Independent Review of NSW Swimming Pool Barrier Requirements: Discussion Paper*, 2015, viewed 10 August 2016, <<https://www.olg.nsw.gov.au/sites/default/files/Independent-Review-of-NSW-Swimming-Pool-Barrier-Requirements-Discussion-Paper-2015.pdf>>, p. 39.

²⁸³ Lambert, M, *Independent Review of NSW Swimming Pool Barrier Requirements: Discussion Paper*, 2015, viewed 10 August 2016, <<https://www.olg.nsw.gov.au/sites/default/files/Independent-Review-of-NSW-Swimming-Pool-Barrier-Requirements-Discussion-Paper-2015.pdf>>, p. 12.

In the meantime, the current requirements for warning messages on portable swimming pools and their retail packaging could be reinforced by complementary advice and education and point of sale education.

Recommendation 23:

The Department of Mines, Industry Regulation and Safety considers appropriate community education regarding the specific risks of children drowning in portable pools and spas and the need for these portable pools and spas to comply with the *Building Regulations 2012*, including exploring, subject to appropriate consideration of seeking to limit as far as possible costs imposed on business by regulation, opportunities for retailers and suppliers to inform purchasers at the point of sale of the risks of children drowning in portable pools and spas and the need to comply with legislative requirements.

9.2.5.1 Some local governments run ‘Spa Amnesty’ events to encourage owners and occupiers to come forward and receive advice about barriers

Several of the 138 survey respondents reported running ‘Spa Amnesty’ events, in which the local government invites owners and occupiers to come forward and provide information about swimming pools (including spas) that were not previously known to the local government. These events also provide free information and advice on barriers, compliance requirements and inspections while raising awareness about swimming pool safety.

For example, the City of Albany issued the following media release in September 2015:

Spa Amnesty

As a community safety initiative, with the aim to prevent drowning, the City is inviting owners of spas, jacuzzis and outdoor hot tubs to contact the City of Albany if they do not have a safety barrier and/or Building Licence/Permit for their spa, jacuzzi or outdoor hot tub.

This will be an opportunity for residents to receive advice on safety barriers. Drowning is the most common cause of preventable death for children aged 0-5.

There will be no charge for an inspection.

Spas, jacuzzis and outdoor hot tubs require a Building Licence/Permit to ensure that they have been installed safely, have safety barriers, are compliant for electrical and plumbing work, and if in the ground, have the necessary strength to withstand the pressure of the surrounding earth.

If a landowner has a spa, jacuzzi or outdoor hot tub without a Building Permit and/or without a compliant safety barrier they are encouraged to contact City of Albany’s Senior Building Compliance Officer on [telephone number] for advice and assistance.²⁸⁴

²⁸⁴ City of Albany, Media Release, ‘Spa Amnesty’, City of Albany, 18 September 2015, p. 1.

Once the Office's findings and recommendations regarding ensuring compliance with regulations 50(1) and 53(1) of the *Building Regulations 2012* have been considered and acted on, it may be useful for local governments to consider a 'Spa Amnesty' event.

9.3 Barriers for swimming pools that have been drained of water but still have the capacity to contain water that is more than 300 mm deep

9.3.1 Swimming pools that have been drained of water can be refilled without notifying the local government

During the Investigation, the five selected local governments, and other stakeholders who were interviewed, reported that swimming pools may be 'decommissioned' by draining the water from the swimming pool. The 138 survey respondents provided estimates of the number of swimming pools that were decommissioned in 2014-2015, as shown in Figure 53.

Once a swimming pool has been completely drained of water, a barrier is no longer required (since, as per regulation 50(1), barriers are only required for a swimming pool containing water that is more than 300 mm deep). Accordingly, the five selected local governments reported that they do not inspect swimming pools that have been recorded as emptied.

However, owners and occupiers are able to easily refill swimming pools without notifying the local government. Rain can also create a water level above 300 mm. One survey respondent reported that, for these reasons, they maintain a record of this type of swimming pool and conduct random inspections to ensure that the swimming pool has not been refilled without this being recorded by the local government. This is an example of good practice that could be considered for wider adoption by other local governments.

Figure 53: Number of swimming pools that were decommissioned between 1 July 2014 and 30 June 2015, by region

Region	Number of swimming pools decommissioned
Christmas/Cocos (Keeling) Islands	1
Gascoyne	2
Goldfields-Esperance	33
Great Southern	1
Kimberley	15
Metropolitan	1849
Mid-West	314
Peel	105
Pilbara	196
South West	70
Wheatbelt	88
Total	2674

Source: Ombudsman Western Australia

Recommendation 24

The Building Commissioner promotes to local governments the good practice of conducting random inspections of swimming pools that have been recorded as decommissioned to ensure that these swimming pools have not been recommissioned, and therefore require a swimming pool barrier pursuant to regulation 50(1) of the *Building Regulations 2012*.

In order to address the issue of decommissioned swimming pools being refilled, the Queensland Government outlines in its *Guidelines for pool owners and property agents* that, to decommission a swimming pool, the swimming pool structure must be altered so that the swimming pool is incapable of being filled to a depth of 300 millimetres:

There will be occasions where a pool owner will decide that they no longer want a swimming pool and will decommission their swimming pool as an alternative to complying with the pool safety standard. For this to occur, the swimming pool structure must be altered in a way that makes the pool incapable of being filled to a depth of 300 millimetres. For example, the floor of a spa may have holes drilled into the water receptacle component to permit water to drain out, or one side of a swimming pool may be removed. For swimming pools (including portable spa pools) to be decommissioned the work must result in the swimming pool (including portable spa pools) requiring some repairs to render it incapable of holding water to a depth of 300 millimetres.²⁸⁵

²⁸⁵ Queensland Government, Building Industry and Policy, *Guidelines for pool owners and property agents*, 2015, viewed 23 September 2016, <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/GuidelinesForPoolOwnersAndPropertyAgents.pdf>>, p. 9.

9.4 Barriers for swimming pools in areas of Western Australia where parts of the *Building Regulations 2012* do not apply

9.4.1 Legislative requirements

9.4.1.1 Requirements to install barriers

As previously identified, Part 8, Division 2, regulation 50(1) of the *Building Regulations 2012* requires that:

50. Barrier to private swimming pool

- (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.

Penalty for this subregulation: a fine of \$5 000.

Regulation 49 of the *Building Regulations 2012* states that Division 2, including regulation 50, applies to certain local government districts and areas that form part of local government districts, as follows:

49. Application of this Division

This Division applies in respect of a private swimming pool that is located in a local government district specified in column 1 of the Table in Schedule 5 in the area specified for that district in column 2 of that Table.

That is, regulation 49 provides that the requirement for each owner and occupier to install or provide a swimming pool barrier that restricts access by young children to the pool and its immediate surrounds, pursuant to regulation 50(1) only applies to those local government districts as specified in the Table in Schedule 5. Those areas that are not specified are not subject to regulation 50(1) (and are referred to as **excluded areas**).

The Office reviewed the Table in Schedule 5 to identify included and excluded areas and found that, in summary, Part 8, Division 2 applies to the 140 local governments in Western Australia in the following manner:

- sixty seven local governments – whole district;
- fifteen local governments – partial district: only specified areas within the district;
- one local government – no area within the district; and
- for the remaining (currently 57) local governments – all town sites within the district.

Notwithstanding regulation 49, there are other provisions in the *Building Act 2011* and the *Building Regulations 2012*, which set out the requirements for building permits and the applicable building standards for the construction of swimming pools. These requirements, which were discussed in detail in Chapter 6, can be summarised as follows:

- the requirement to obtain a building permit (section 9 of the *Building Act 2011*);

- the requirement for a certificate of design compliance (section 19(3) and (4) of the *Building Act 2011*);
- the requirement to specify inspections (regulation 28 of the *Building Regulations 2012*); and
- the requirement to ensure that the swimming pool barrier, 'when completed', complies with the applicable building standard (section 37 of the *Building Act 2011*).

There is nothing in the *Building Act 2011* or the *Building Regulations 2012* that states that these requirements do not apply to swimming pools being built in excluded areas.

In summary, a private swimming pool constructed in an excluded area needs to have a barrier that is compliant with the applicable building standard under the *Building Act 2011* and the *Building Regulations 2012*. However, this is required indirectly, through the regulatory provisions for building permits, not directly, through the regulatory provisions for barriers.

9.4.1.2 Requirements to inspect barriers

With respect to the inspection of private swimming pool barriers by local governments, regulation 53, which provides the requirement for local governments to do so, is also located in Division 2 of the *Building Regulations 2012*. Accordingly, there is no requirement for local governments to inspect swimming pool barriers in excluded areas. Applying the above regulatory scheme therefore means that there are currently 73 (out of a total of 140) local government districts in which, in whole or in part, local governments are not required to arrange inspections. The Office identified that none of the 16 children who died by drowning, drowned in a private swimming pool located in an excluded area.

9.4.2 Guidelines

The *Inspector Guidelines* state that swimming pools that are located in an excluded area require a compliant swimming pool barrier but do not require a four yearly inspection:

Swimming pools that are not located in a local government district specified in Building Regulations 2012 – column 1 of the Table in Schedule 5, in the area specified for that district in column 2 of that Table, do not require a four yearly inspection, but must still have a compliant pool barrier installed prior to filling with more than 300 mm in depth of water (Building Regulations 2012 regulation 49).²⁸⁶

9.4.3 The Investigation observed the provision of inaccurate advice by some local governments in excluded areas that a swimming pool barrier is not required

As set out above, the current situation in which the direct requirement for a swimming pool barrier (pursuant to regulation 50(1)) does not apply to excluded areas, but the indirect requirement for a swimming pool barrier to be included in a building permit application

²⁸⁶ Government of Western Australia, Department of Commerce, Building Commission, *Private swimming and spa pool inspector guidelines*, 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>, p. 7.

(pursuant to other sections of the *Building Act 2011* and the *Building Regulations 2012*, discussed above) applies to all areas of Western Australia.

Survey respondents identified that they provide different advice to residents in excluded areas regarding requirements for swimming pool barriers. For example, one of the 138 survey respondents reported that there are a significant number of swimming pools without barriers located on rural living estates within their district. This local government provides advice to residents that there are no provisions for a barrier around swimming pools in excluded areas but it is strongly recommended that one is constructed. While, as discussed above, regulation 50(1) does not apply to owners and occupiers in excluded areas, the *Building Act 2011* and *Building Regulations 2012* still require a compliant barrier to be installed or provided at the time of the swimming pool construction.

The *Swimming Pool Fencing* report (**the Report**), tabled by the Standing Committee on Environment and Public Affairs (**the Committee**) in December 2002, also raises this issue. The Committee refers to the submission by the RLSSA that states:

These regulations [the *Building Amendment Regulations 2002*] provide exemptions for properties within rural areas. RLSSA is not aware of why these areas have been exempt and understands that knowledge of these exemptions is low within local governments.²⁸⁷

The Report summarises the issues that RLSSA (and the Western Australia Local Government Association) ‘... believed need to be addressed’ and includes ‘Exemptions for pools in rural areas needs (sic) to be reviewed’.²⁸⁸

The Committee also made Recommendation 6 which states:

The Committee recommends that the Government have the new home swimming pool advisory group initiate among other things:

...

(h) review requirements for swimming pools in regional areas...²⁸⁹

Recommendation 25

The Building Commissioner considers an amendment to the *Building Regulations 2012* to remove excluded areas so that regulation 50(1) of the *Building Regulations 2012* applies to all owners and occupiers of premises throughout Western Australia. Alternatively, if such an amendment is not considered appropriate, the Building Commissioner works with relevant local governments in excluded areas to provide accurate advice regarding the need to provide swimming pool barriers as part of the relevant building permit.

²⁸⁷ Standing Committee on Environment and Public Affairs, *Swimming Pool Fencing*, December 2002, p. 35.

²⁸⁸ Standing Committee on Environment and Public Affairs, *Swimming Pool Fencing*, December 2002, pp. 10-11.

²⁸⁹ Standing Committee on Environment and Public Affairs, *Swimming Pool Fencing*, December 2002, p. iv.

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