



A report on giving effect to the recommendations
arising from *Investigation into ways to prevent or
reduce deaths of children by drowning*

Ombudsman Western Australia
Serving Parliament – Serving Western Australians

About this Report

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The office of the Ombudsman acknowledges Aboriginal and Torres Strait Islander people of Australia as the traditional custodians of Australia. We recognise and respect the exceptionally long history and ongoing cultural connection Aboriginal and Torres Strait Islander people have to Australia, recognise the strength, resilience and capacity of Aboriginal and Torres Strait Islander people and pay respect to Elders past, present and future.

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Ombudsman's Foreword

As Ombudsman, I have an important responsibility to review certain child deaths, identify patterns and trends arising from these reviews and make recommendations about ways to prevent or reduce child deaths.

On 23 November 2017, the *Investigation into ways to prevent or reduce deaths of children by drowning (the Report)*, was tabled in Parliament. In the Foreword of the Report I noted:

I have found that a range of work has been undertaken by the Department of Mines, Industry Regulation and Safety and the Building Commissioner to administer their respective responsibilities in relation to swimming pool safety. I also found, that there was important further work that should be done. This work is detailed in the findings of this report. It will be critical that this work is undertaken with strong cooperation between the Department of Mines, Industry Regulation and Safety, the Building Commissioner, local governments and other key stakeholders, including intra-agency, inter-agency and cross-sectoral arrangements – this is the most efficient and effective way to achieve positive change.

Arising from my findings in the Report, I made 25 recommendations about ways to prevent or reduce deaths of children by drowning. The Department of Mines, Industry Regulation and Safety and the Building Commissioner agreed to these recommendations.

In 2016-17, I gave a commitment to Parliament that, following the tabling of each major own motion investigation, the Office would undertake a comprehensive review of the steps taken by government agencies to give effect to our recommendations and then table the results of this review in Parliament.

Accordingly, I am now pleased to provide Parliament with 'A report on giving effect to the recommendations arising from the *Investigation into ways to prevent or reduce deaths of children by drowning*'.

I am very pleased that in relation to all of the recommendations, the Department of Mines, Industry Regulation and Safety and the Building Commissioner have either taken steps, or propose to take steps (or both) to give effect to the recommendations. In no instance has the Office found that no steps have been taken to give effect to the recommendations.

Following the Report, the Department of Mines, Industry Regulation and Safety, the Building Commissioner and local governments have made particularly positive progress in the areas of improving consistency and quality of swimming pool inspections and the training and professional development of swimming pool inspectors. The very evident level of national collaboration in relation to portable swimming pools, and Western Australian leadership in relation to this, is also very pleasing.

The death of a child by drowning is a tragedy – for the child's life lost and for the parents, families and communities who have been personally affected by the tragic death. It is my sincerest hope that the recommendations of the Report, and the positive steps that have been taken to give effect to the recommendations, will contribute to preventing and reducing these tragic deaths in the future.

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1 About the report

1.1 The Western Australian Ombudsman

1.1.1 The Ombudsman

The Ombudsman is an independent and impartial statutory officer who reports directly to Parliament, rather than the government of the day.

1.1.2 The role of the Ombudsman

The Ombudsman has functions in relation to the investigation of state government departments, local governments and universities. These investigations may arise from complaints received by the Ombudsman, of the Ombudsman's own motion or by reference from Parliament.

The Ombudsman also has an important function to review certain child deaths and family and domestic violence fatalities as well as a range of additional functions, as set out in legislation, including inspection, monitoring, scrutiny and reporting.

1.1.3 The Ombudsman's child death review function

The Ombudsman commenced the review of certain child deaths on 30 June 2009 following the passage of the *Parliamentary Commissioner Amendment Act 2009*. The Ombudsman reviews investigable child deaths. Section 19A(3) of the *Parliamentary Commissioner Act 1971* (**the Act**) defines an investigable death as follows:

An investigable death occurs if a child dies and any of the following circumstances exists –

- (a) in the 2 years before the date of the child's death, the CEO [the Chief Executive Officer of Department of Communities] had received information that raised concerns about the wellbeing of the child or a child relative of the child;
- (b) in the 2 years before the date of the child's death, the CEO, under section 32(1) of the CCS Act [*Children and Community Services Act 2004*], had determined that action should be taken to safeguard or promote the wellbeing of the child or a child relative of the child;
- (c) in the 2 years before the date of the child's death, any of the actions listed in section 32(1) of the CCS Act was done in respect of the child or a child relative of the child;
- (d) protection proceedings are pending in respect of the child or a child relative of the child;
- (e) the child or a child relative of the child is in the CEO's care.

For these investigable deaths, the Ombudsman's functions are outlined in section 19B(3) of the Act, as follows:

- (a) to review the circumstances in which and why the deaths occurred;
- (b) to identify any patterns or trends in relation to the deaths;
- (c) to make recommendations to any department or authority about ways to prevent or reduce investigable deaths.

The Department of Communities (**Communities**) receives information from the Coroner on reportable deaths of children and notifies the Ombudsman of these deaths. The notification provides the Ombudsman with a copy of the information provided to Communities by the Coroner about the circumstances of the child's death together with a summary outlining the past involvement of Communities with the child.

The Ombudsman assesses all child death notifications received to determine if the death is, or is not, an investigable death. If the death is an investigable death, it must be reviewed. If the death is a non-investigable death, it can be reviewed. The extent of a review depends on a number of factors, including the circumstances surrounding the child's death and the level of involvement of Communities or other public authorities in the child's life. Confidentiality of the child, family members and other persons involved with the case is strictly observed.

The child death review process is intended to identify key learnings that will positively contribute to ways to prevent or reduce child deaths. The review does not set out to establish the cause of the child's death; this is properly the role of the Coroner.

1.2 *The Investigation into ways to prevent or reduce deaths of children by drowning*

Through the review of the circumstances in which, and why, child deaths occurred, the Ombudsman identified a pattern of cases in which children appeared to have died by drowning. In accordance with the Ombudsman's child death review function, children are defined as those under 18 years of age. The Ombudsman decided to undertake an investigation into these deaths with a view to determining whether it may be appropriate to make recommendations to any local government or state government department or authority about ways to prevent or reduce deaths of children by drowning (**the Investigation**).

The report of the findings and recommendations arising from the drownings investigation, titled *Investigation into ways to prevent or reduce deaths of children by drowning (the Report)*, was tabled in the Parliament on 23 November 2017. The Report is available at www.ombudsman.wa.gov.au/drowningsreport.

To assist the reading of this report, without further reference being required to the Report, the Office has reproduced the Executive Summary of the Report as [Appendix 1](#) to this report and the recommendations arising from the Report as [Appendix 2](#).

1.3 A report on giving effect to the recommendations arising from the Report

1.3.1 Objectives

The Report made 25 recommendations about ways to prevent or reduce deaths of children by drowning.

The objectives of this report were to consider (in accordance with the Act):

- the steps that have been taken to give effect to the recommendations;
- the steps that are proposed to be taken to give effect to the recommendations; or
- if no such steps have been, or are proposed to be taken, the reasons therefor.

This report also considered whether the steps taken, proposed to be taken or reasons for taking no steps:

- seem to be appropriate; and
- have been taken within a reasonable time of the making of the recommendations.

1.3.2 Methodology

1.3.2.1 Summary

- the Office sought from the Department of Mines, Industry Regulation and Safety (**the Department**) and the Building Commissioner a report on the steps taken to give effect to the recommendations arising from the Investigation;
- where further information, clarification or validation was required, the Office liaised with staff from the Department and the Building Commissioner;
- the Office reviewed and considered the information provided by the Department and the Building Commissioner and the information, clarification or validation provided to the Office;
- the Office developed a draft report;
- the Office provided the draft report to the Department and the Building Commissioner; and
- the Office developed a final report.

1.3.2.2 Methodology in detail

1.3.2.2.1 Reports from the Department of Mines, Industry Regulation and Safety and the Building Commissioner

The Office requested from the Department and the Building Commissioner, to which the Ombudsman had made recommendations in the Report, to provide a report to the

Ombudsman of the steps taken to give effect to the recommendations that had been directed to the Department and the Building Commissioner.

In providing the report to the Ombudsman, the Department and the Building Commissioner were also requested to provide evidence regarding the steps taken. This evidence could include, for example, revised policies and procedures, documents and meetings with relevant stakeholders. In addition, where further information, clarification or validation was required, the Office liaised with the Department and the Building Commissioner.

1.3.2.2.2 Review of information provided and collected

The Office reviewed the information contained in the reports provided by the Department and the Building Commissioner, supporting documentation that was included with the reports and information provided during liaison with the Department and the Building Commissioner.

1.3.2.2.3 Draft report

The Office provided the Department and the Building Commissioner with the draft report for their consideration and response.

1.3.2.2.4 Final report

Having considered the responses of the Department and the Building Commissioner, the Office prepared this final report to be tabled in Parliament.

1.4 Overall approach to implementation of recommendations arising from the Report

In its response to this work by the Ombudsman, the Building Commissioner relevantly informed the Office that in its response to the Ombudsman's report and its 25 recommendations:

The Building Commissioner has commenced a review of the regulatory requirements applicable to private swimming pools, and is working collaboratively with local governments through WALGA [Western Australia Local Government Association].

Stakeholders called for a holistic approach to progressing the recommendations, commencing with the development of a Consultation Plan [**the Consultation Plan**].

A copy of the Consultation Plan was provided to the Office by the Building Commissioner. The Consultation Plan is presented in stages and outlines work and activities undertaken and proposed to be undertaken as well as the relevant stakeholder involvement as follows:

CONSULTATION PLAN – OUTLINE

Stage 1

Minimum Standard Regulatory Framework

- Establish a small local government working group
- Defining a Minimum Standard Regulatory Framework – Compliance Model for the swimming pool and barrier approval and inspection process

Stage 2

Targeted Consultation

- Preliminary Targeted Consultation Paper
- Consultation with all local governments
- Canvass the draft Minimum Standard Regulatory Framework – Compliance Model
- Canvass those Report recommendations specific to local government processes

Stage 3

Working Groups

- Targeted Stakeholder Consultation – Working Groups
- Working Group 1 – WALGA and local government
- Working Group 2 – WALGA, local government, Swimming Pool and Spa Association Western Australia, Royal Life Saving Society Western Australia, building surveyors, other relevant stakeholders
- Working Group 3 – The Department of Mines, Industry Regulation and Safety, Building and Energy and Consumer Protection divisions

Stage 4

Public Consultation

- Public Consultation Paper
- Public consultation process and feedback

Stage 5

Regulatory Reform

- Proposals for regulatory reform
- Drafting instructions for amending the *Building Regulations 2012*

The Office notes that this approach by the Building Commissioner to the Ombudsman's report and its recommendations is an example of good practice by a public sector agency when responding to the findings and recommendations of an agency tasked by Parliament with overseeing the public sector.

2 Steps taken to give effect to the recommendations

Recommendation 1:

The Department of Mines, Industry Regulation and Safety continues to develop and implement strategies for educating parents and caregivers regarding the importance of maintaining active supervision of children who are placed in bath seats and of avoiding altogether the use of floor seats in the bath or shower.

Steps taken to give effect to the recommendation

The Office requested that the Department of Mines, Industry Regulation and Safety (**the Department**) inform the Office of the steps taken to give effect to the recommendation. In response, the Department provided a range of information in a report prepared by the Department.

In its report, the Department relevantly informed the Office that:

DMIRS has drafted a strategy to address this recommendation in which it was agreed to:

- Notify other state and territory Australian Consumer Law regulators of the Ombudsman's Report and its findings.
- Undertake a consumer education initiative to increase user awareness of the hazards associated with baby bath aids and reinforce the need for active supervision of children in/near water generally.
- Undertake an integrated product safety program encompassing supplier education, marketplace surveillance and appropriate enforcement. Supplier education will take place in July 2018 reminding suppliers of their obligations with respect to the legislative requirements. Marketplace surveillance will take place between July – September 2018. It is anticipated that subsequent enforcement action will be finalised by December 2018. A second tranche of surveillance will be undertaken in January – March 2019 to evaluate the overall impact of supplier education program and reinforce compliance with the *Consumer Goods (Baby Bath Aids) Safety Standard 2017* (the Safety Standard).
- The Safety Standard sets out new requirements for a warning label to meet the 'permanency' test and provides for a transitional period which allows suppliers to have to comply with either the requirements of the Regulations or the Safety Standard until 26 October 2018. However, as of 27 October 2018 all baby bath aids must comply with the requirements as set out in the Safety Standard.
- All other state and territory regulators have indicated in principle willingness to assist in surveillance activities.
- Any materials will be forwarded through existing distribution channels such as childcare centres and DMIRS is currently developing contacts with local libraries, child health nurses and other community organisations.

The Department also informed the Office that '[C]onsumer education actions undertaken during 2017/18 include the development of [the] 'Home Safety for Baby' video by [the Department] that includes safety tips in relation to baby bath aids and reminders that improvised products such as [bath seats] should never be used.' [The] video was developed with partners including Kidsafe WA, the Royal Lifesaving Society of WA and

Red Nose.'

Accordingly, steps have been taken to give effect to Recommendation 1.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 1.

Recommendation 2:

The Department of Mines, Industry Regulation and Safety continues to monitor data specifically regarding fatal and non-fatal drowning incidents that occur in the bath and, if warranted, pursue the development of further regulation applicable to the products associated with these incidents.

Steps taken to give effect to the recommendation

The Office requested that the Department of Mines, Industry Regulation and Safety (**the Department**) inform the Office of the steps taken to give effect to the recommendation. In response, the Department provided a range of information in a report prepared by the Department.

In its report, the Department relevantly informed the Office that:

- DMIRS contributes to, and reviews a report distributed by the Australian Competition and Consumer Commission monthly relating to deaths or severe injuries related to consumer goods;
 - The national reports are reviewed monthly by the Product Safety Operations Group, of which DMIRS is a member, and will be monitored specifically for any reports relating to baby bath aids or other items of this nature.
- Death and severe injuries are listed as an ongoing agenda item on the national Product Safety Operations Group meetings that are held monthly.
- The WA Consumer Products Advocacy Network is a network of public sector and non-government organisations with particular interests in product safety. Members include representatives from the Australian Competition and Consumer Commission, the Department of Health, the Emergency Department of Perth Children's Hospital and KidSafe WA. Meetings are held bi-monthly and emerging hazards and injuries/deaths are discussed.
- DMIRS undertakes a daily review of media to identify reports/articles that are relevant to Consumer Protection. This is collated into a monthly report available for review.
- DMIRS contributes to and reviews postings on Govdex (an information sharing platform) by all state and territory Australian Consumer Law regulators in regard to current and ongoing issues including those relating to product safety.
- DMIRS reports are reviewed on a weekly and monthly basis by product safety officers to identify relevant articles including those related to baby bath aids.

The Department also informed the Office that it is 'undertaking a data sourcing project in 2018/19 aimed at consolidating and formalising the way in which data relating to injuries and fatalities is accessed and reviewed in WA' and '[the Department] is working with other Australian Consumer Law Regulators regarding the issue of national injury data collection and reporting regarding product related injuries including these products.'

Accordingly, steps have been taken to give effect to Recommendation 2.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 2.

Recommendation 3:

Taking into account the findings of the Investigation, and the findings and recommendations of the Coroner regarding private swimming pools at rental properties, the Department of Mines, Industry Regulation and Safety develops and implements further strategies designed to ensure that real estate agents, including property managers, and private landlords, respond appropriately to information regarding swimming pool barriers that do not comply with the *Building Act 2011* and the *Building Regulations 2012*.

Steps taken to give effect to the recommendation

The Office requested that the Department of Mines, Industry Regulation and Safety (**the Department**) inform the Office of the steps taken to give effect to the recommendation. In response the Department provided a range of information in a report prepared by the Department.

In its report, the Department relevantly informed the Office that:

- DMIRS has published educational bulletins to real estate agents, including property managers and private landlords, regarding swimming pool latches and the associated product recall.
- DMIRS will continue to publish educational bulletins on pool safety during the summer months.
- DMIRS is in the process of updating its online publications with additional information on pool safety; most importantly its comprehensive, and popular, guides for lessors and tenants.

The Department also informed the Office that:

The review of the *Residential Tenancies Act 1987* to commence in 2019 will look to identify and provide for measures that support actions being undertaken by all relevant parties in order to support the recommendation(s). In the meantime, property inspections by Property Managers mean the checks on pool barriers is part of mainstream property inspection processes. Most rental properties are inspected four times per annum.

Accordingly, steps have been taken and are proposed to be taken to give effect to Recommendation 3.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 3.

Recommendation 4:

The Department of Mines, Industry Regulation and Safety considers the introduction of requirements for property managers and private landlords to provide, in the most cost-effective way and resulting in the least regulatory burden, a copy of the most recent inspection form confirming that the swimming pool barrier was found to be compliant, to the potential tenant at the time of entering into a lease agreement.

Steps taken to give effect to the recommendation

The Office requested that the Department of Mines, Industry Regulation and Safety (**the Department**) inform the Office of the steps taken to give effect to the recommendation. In response, the Department provided a range of information in a report prepared by the Department.

In its report, the Department relevantly informed the Office that:

DMIRS will consider the issue of property managers providing the most recent compliance certificate to prospective tenants at the upcoming review of the *Residential Tenancies Act 1987* (the RT Act). DMIRS will consider all aspects of pool safety, including barriers and other legislative requirements, during its review of the RT Act. Public consultation for the review is expected to begin early in 2019. Recommendations are likely to be provided to the Minister in early 2020.

Accordingly, steps are proposed to be taken to give effect to Recommendation 4.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 4.

Recommendation 5:

The Building Commissioner reviews the operation of section 33 of the *Building Act 2011* in order to determine the level of compliance of permit holders (including owners, registered and unregistered builders and swimming pool barrier installers) with requirements to submit notices of completion for private swimming pools and their barriers in accordance with section 33.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

[A] dedicated Working Group will focus in detail on the issue of notices of completion.

A questionnaire will be prepared to gauge the level of compliance with requirements to submit notices of completion for private swimming pools.

Regarding the questionnaire the Building Commissioner also informed the Office that:

It is anticipated that the formation of the [questionnaire] will be in consultation with the Western Australian Local Government Association and the Swimming Pool and Spa Association of Western Australia. The questionnaire will be targeted at local governments, pool builders ... [and] registered builders.

The Building Commissioner has indicated Recommendation 5 will be addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups – Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 5.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 5.

Recommendation 6:

In undertaking the review of the operation of section 33 of the *Building Act 2011*, the Building Commissioner works cooperatively and collaboratively with local governments to increase compliance by permit holders (including owners, registered and unregistered builders and swimming pool barrier installers) with section 33 of the *Building Act 2011* through a series of the most complementary strategies utilising the expertise and experience of the Building Commissioner and ensuring that such strategies are the most cost-effective and result in the least regulatory burden. At a minimum, consideration should be given to:

- (i) the provision (by either local governments, the Building Commissioner or both) of advice, information, education and training for permit holders regarding the requirements and importance of section 33 of the *Building Act 2011*;
- (ii) the Building Commissioner undertaking risk-based compliance audits of the work and conduct of registered builders of swimming pools;
- (iii) measures which specifically target increased compliance by builders and installers of swimming pool barriers who are not registered builders; and
- (iv) where appropriate in all of the circumstances, use of sanctions by local governments, as provided for by the *Building Act 2011*.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

[A] dedicated Working Group will focus in detail on the issue of notices of completion. It will investigate strategies to increase compliance with section 33.

The Building Commissioner has indicated that Recommendation 6 will be addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups – Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 6 parts (i), (ii), (iii) and (iv).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 6.

Recommendation 7:

The Building Commissioner monitors local governments' compliance with regulation 53(1) of the *Building Regulations 2012*, including by requiring that local governments report on compliance with regulation 53(1) each year, and that the Building Commission reports this information to Parliament in its annual report.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has commenced monitoring local government's compliance with regulation 53 (1) and drafting a report to Parliament. A formal letter requesting compliance data was sent to all local governments.

The Building Commissioner is also considering amendments to the legislation to require data reporting from local government. This is being considered as part of a broader Building Permit Database project. Stage 3 of the Consultation Plan will consider further needs for reform.

The Office notes that the Building Commissioner has tabled in Parliament the report 'Progress Report – Local government's four yearly inspections of private swimming pool safety barriers 2017/2018'.

The Building Commissioner also informed the Office that it has met with Western Australia Local Government Association (**WALGA**) representatives and held a Pool Inspector Workshop in 2018. The recommendations from the Ombudsman's report *Investigation into ways to prevent or reduce deaths of children by drowning* were discussed at this workshop.

The Building Commissioner informed the Office that '[t]he workshops are voluntary and were initiated by the City of Rockingham approximately two years ago. Local governments shared hosting responsibilities and the meetings were typically held quarterly. The popularity of these meetings has grown with WALGA now facilitating the meetings. The Department of Mines, Industry Regulation and Safety, Building and Energy Division has attended many of these meetings as an invited attendee.'

The Building Commissioner has indicated that Recommendation 7 will be further addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups – Working group 1

Accordingly, steps have been taken and are proposed to be taken to give effect to Recommendation 7.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 7.

Recommendation 8:

The Building Commissioner provides guidance to local governments regarding the manner and form in which the information relating to swimming pools and their barriers should be kept including the key elements of any associated record management system, bearing in mind the need to avoid any inappropriate regulatory burden particularly for small local governments and local governments with few recorded swimming pools in their districts.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has commenced work on swimming pool data and records management. Work with Western Australian Local Government Association and the State Records Office is underway. Several meetings with different local governments to discuss their records management systems have also been undertaken. Stage 3 of the Consultation Plan will consider further needs for reform.

The Building Commissioner has indicated that Recommendation 8 will be further addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups – Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 8.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 8.

Recommendation 9:

Taking into account the findings of the Investigation, the Building Commissioner, subject to consultation, and in development with local governments and industry stakeholders, reviews the concessions for pre-November 2001 swimming pools provided for in regulation 52 of the *Building Regulations 2012*, with a view to considering whether an amendment to the *Building Regulations 2012* ought to be made to remove these concessions. If regulatory changes are made, any such regulatory change should consider an appropriate extended phase-in period to take into account regulatory (sovereign) risk and costs imposed upon existing property owners.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

The implications of removing concessions for pre-November 2001 swimming pools are being assessed. The Building Commissioner is also undertaking research into how other jurisdictions manage the issue.

Options for reform will be considered by a working group as part of Stage 3 of the Consultation Plan.

The Building Commissioner has indicated that Recommendation 9 will be addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups – Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 9.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 9.

Recommendation 10:

The Building Commissioner clarifies with local governments the charges that local governments are able to impose for inspections of swimming pool barriers, including whether these charges may be imposed only in the year of an inspection, or each year.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has commenced work on clarifying charges.

[The] Western Australian Local Government Association has been consulted on the issue and it has been agreed that the best approach is to clarify charges once the charges themselves have been reviewed to accommodate the new Minimum Standard Regulatory Compliance Model – Framework.

The Building Commissioner has indicated that Recommendation 10 will be addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups – Working group 1

The Office also notes that an amendment to the current maximum charge has been made since the tabling of the Ombudsman's report, *Investigation into ways to prevent or reduce deaths of children by drowning*.

The *Building Amendment Regulations (No. 3) 2017* (the Amendment Regulations) were published in the Government Gazette on 22 December 2017 amending the current maximum fee to \$58.45.¹

Accordingly, steps are proposed to be taken to give effect to Recommendation 10.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 10.

¹ Department of Mines, Industry Regulation and Safety, Western Australia, 22 December 2017, viewed 9 August 2018, <<https://www.commerce.wa.gov.au/publications/industry-bulletin-95-building-amendment-regulations-no-3-2017>>

Recommendation 11:

The Building Commissioner consults with local governments regarding the adequacy of charges to meet the cost of swimming pool barrier inspections, including:

- (i) establishing the actual cost of the efficient delivery of swimming pool barrier inspection practices;
- (ii) if appropriate, seeking an amendment to the *Building Regulations 2012* so that the allowed charge reflects this efficient cost; and
- (iii) informing local governments of the efficient cost so that such cost is transparent and borne by the users of the system (that is, ratepayers who have a swimming pool and not cross-subsidised by non-swimming pool owners).

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that:

Establishing the actual cost of, and determining an adequate charge for, delivering swimming pool barrier inspections that incorporate a user-pays principle (as per recommendation 18) and consideration of re-inspection charges (as per recommendation 20), hinge on the outcome [of] the Minimum Standard Regulatory Compliance Model – Framework Model. Once the Model has been established, work on the costing will begin.

The Building Commissioner has indicated that Recommendation 11 will be addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups - Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 11 parts (i), (ii) and (iii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 11.

Recommendation 12:

The Building Commissioner, in consultation with local governments and other stakeholders, considers whether it would be appropriate to co-ordinate the development and provision of a training program (including curriculum, scheduling arrangements, modes of delivery and assessment methods) specifically for inspectors of swimming pool barriers. In doing so, the Building Commissioner can take into account matters relevant to the expertise and experience of the Building Commissioner, but should at a minimum consider:

- (i) the cost of the program including developing and delivering the program at least cost to taxpayers. For example, the Building Commission could consider funding such training from the Department of Mines, Industry Regulation and Safety's internal training fund. Such funding would not require new funding and potentially represents a cost-beneficial way of contributing to enhanced inspection standards and enhanced protection for Western Australian children and ultimately the reduction of risk of child death by drowning;
- (ii) any unintended consequences of establishing the training program, including if establishing the program could act to restrict the supply of inspectors and thus exacerbate the difficulties in recruiting inspectors; and
- (iii) if the training program can and should be linked to the national training system.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and the Draft Private Swimming Pool Inspector Training Course.

In its report, the Building Commissioner relevantly informed the Office that:

Discussions have been held with the Swimming Pool and Spa Association Western Australia, Western Australian Local Government Association, and the Royal Life Saving Society Western Australia to determine appropriate training providers and course content.

The course will incorporate training on the template inspection checklist under recommendation 16, as per recommendation 17.

The Building Commissioner relevantly informed the Office that 'stakeholders have indicated they would prefer an online course instead of face-to-face courses.'

The Building Commissioner also informed the Office that:

The ongoing training to continue the required skills and knowledge of pool inspectors is still to be determined.

Some level of regulatory change may be required to mandate that local government train their pool inspectors and ensure they maintain their skills. Consultation with local government will occur as part of Stage 2.

The Building Commissioner has indicated that Recommendation 12 will be further addressed at stage 2 of the Consultation Plan:

- Stage 2 Targeted Consultation

Accordingly, steps have been taken and are proposed to be taken to give effect to Recommendation 12 parts (i), (ii) and (iii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 12.

Recommendation 13:

The Building Commissioner, in consultation with local governments and other stakeholders, considers improvements to training in compliance promotion and conflict resolution. This could be included as part of the training program developed specifically for inspectors of swimming pool barriers, discussed at Recommendation 12.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and the Draft Private Swimming Pool Inspector Training Course.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has informally emailed local governments seeking information and has also met with [the] Western Australian Local Government Association about this matter.

The Building Commissioner has also identified some documents, including the 'Ombudsman New South Wales Enforcement Guidelines for Councils Dec 2016', that make reference to compliance promotion. Further work will be undertaken to determine their adequacies to meet the intent of recommendation 14.

The Building Commissioner has indicated that Recommendation 13 will be further addressed at stage 2 of the Consultation Plan:

- Stage 2 Targeted Consultation

The Building Commissioner also indicated that Recommendation 13 is being addressed in consideration with Recommendations 12 and 14.

The Office notes that the Building Commissioner has also considered a conflict resolution module in the preliminary outline of the introductory training course document provided to the Office, the Draft Private Swimming Pool Inspector Training Course.

Accordingly, steps have been taken and are proposed to be taken to give effect to Recommendation 13.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 13.

Recommendation 14:

The Building Commissioner, in consultation with local governments and other stakeholders, considers the development and provision of a systematic program of cost-effective continuous professional development for inspectors of swimming pool barriers to support inspectors to remain up-to-date with changes in the legislation, regulations and standards.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and the Draft Private Swimming Pool Inspector Training Course.

In its report, the Building Commissioner relevantly informed the Office that:

Ongoing training to continue the required skills and knowledge of pool inspectors is to be determined. This will be considered as part of the review of the training requirements (Related to recommendation 12 and 13).

The Building Commissioner has indicated that Recommendation 14 will be addressed at stage 2 of the Consultation Plan:

- Stage 2 Targeted Consultation

The Building Commissioner also indicated that Recommendation 14 is being addressed in consideration with Recommendations 12 and 13.

Accordingly, steps are proposed to be taken to give effect to Recommendation 14.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 14.

Recommendation 15:

The Building Commissioner considers the promotion of a quality assurance process (for which there is currently a good practice example) for swimming pool barrier inspections to local governments. This quality assurance process could include reviewing a sample of inspections undertaken by each inspector at appropriate intervals throughout the inspection program, with additional information on this process included in the Inspector Guidelines.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan, a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group and the draft Minimum Standards/Best Practices as defined by Compliance Model For Pool Barrier Inspections Working Group.

In its report, the Building Commissioner relevantly informed the Office that:

Progression of this recommendation has commenced through the work underway in developing the Minimum Standard Regulatory Framework - Compliance Model.

Once the Model is determined, it will feed into developing strategies for advice, information, education and training, as well as data and record keeping, fees and charges, and quality assurance processes.

In its report and the copy of the draft Minimum Standards/Best Practices that the Building Commissioner provided to the Office it states:

Minimum requirements have been agreed to by the small local government working group, including:

- (i) Photographs are to be taken of compliant and non-compliant safety barriers;
- (ii) Every element is to be inspected; and
- (iii) Inspection reports are to be completed in full.

The minimum standard will assist with the auditing of records for quality assurance purposes. The quality assurance process will also include examination of a sample of the completed inspection checklists.

The Building Commissioner has indicated that Recommendation 15 will be further addressed at stage 3 of the Consultation Plan:

- Stage 3 Working Groups - Working group 1

Accordingly, steps have been taken to give effect to Recommendation 15.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 15.

Recommendation 16:

The Building Commissioner works with local governments and other stakeholders to develop a template swimming pool barrier inspection checklist template, which incorporates all of the required elements to meet the applicable standards, and is as efficient to complete as possible for inspectors, for use across local governments.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan, a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group and the Draft Private Swimming Pool Inspector Training Course.

In its report, the Building Commissioner relevantly informed the Office that:

The development of the inspection checklist is an essential component of Minimum Standard Regulatory Compliance Model – Framework.

The Building Commissioner is working with local governments to determine the essential elements which an inspection must cover, and to develop an agreed template or checklist to ensure all the essential elements are inspected consistently.

Existing forms and templates used by some local governments are also being considered, to assist with this process.

The Building Commissioner has indicated that Recommendation 16 will be further addressed at stage 1 and 3 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)
- Stage 3 Working Groups - Working group 1

The Office notes that all of the required elements to meet the applicable standards are included in the Draft Private Swimming Pool Inspector Training Course document provided to the Office.

Accordingly, steps have been taken and are proposed to be taken to give effect to Recommendation 16.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 16.

Recommendation 17:

In implementing Recommendation 12, the Building Commissioner works with local governments to (at least cost to taxpayers and ratepayers):

- (i) ensure that the training program for inspectors of swimming pool barriers includes specific training on the template swimming pool barrier inspection form and the requirement to complete all elements of the form; and
- (ii) to develop a quality assurance process for ensuring that all elements of swimming pool barrier inspection forms are consistently completed.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan, a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group and a copy of the Draft Private Swimming Pool Inspector Training Course.

In its report, in relation to Recommendation 12, the Building Commissioner relevantly informed the Office that:

Discussions have been held with the Swimming Pool and Spa Association Western Australia, Western Australian Local Government Association, and the Royal Life Saving Society Western Australia to determine appropriate training providers and course content.

The course will incorporate training on the template inspection checklist under recommendation 16, as per recommendation 17.

The Building Commissioner also informed the Office in relation to Recommendation 15 that:

Progression of this recommendation has commenced through the work underway in developing the Minimum Standard Regulatory Compliance Model – Framework.

Once the Model is determined, it will feed into developing strategies for advice, information, education and training, as well as data and record keeping, fees and charges, and quality assurance processes.

The Building Commissioner also informed the Office in relation to Recommendation 16 that:

The development of the inspection checklist is an essential component of Minimum Standard Regulatory Compliance Model - Framework.

The Building Commissioner is working with local governments to determine the essential elements which an inspection must cover, and to develop an agreed template or checklist to ensure all the essential elements are inspected consistently. Existing forms and templates used by some local governments are also being considered, to assist with this process.

The Building Commissioner indicated that Recommendation 17 is being addressed in consideration with Recommendations 12, 15 and 16.

The Building Commissioner has indicated Recommendation 17 will be addressed at stage 1 and 3 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)
- Stage 3 Working Groups - Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 17 parts (i) and (ii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 17.

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.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan, a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group and a draft copy of a consultation paper - Preliminary Consultation: Swimming Pool And Safety Barrier Control.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has raised this recommendation with the small local government working group working on the Minimum Standard Regulatory Compliance Model – Framework.

Discussions thus far indicate a preference for local governments to reinspect non-compliant swimming pools until they are satisfied that compliance has been achieved.

A user-pays fee structure will be considered as part of delivering recommendation 11.

The Building Commissioner has indicated that Recommendation 18 has been addressed at stage 1 and will also be considered in detail at stage at 2 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)
- Stage 2 Targeted Consultation (Preliminary Targeted Consultation Paper)

The Building Commissioner also indicated that Recommendation 18 is being addressed in consideration with Recommendation 11.

Accordingly, steps are proposed to be taken to give effect to Recommendation 18 parts (i) and (ii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 18.

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.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group.

In its report, the Building Commissioner relevantly informed the Office that this recommendation has been raised during 'Stage 1 Minimum Standard Regulatory Framework - Compliance Model': 'the working group will consider the issue of re-inspection of non-compliant barriers.'

The Building Commissioner also informed the Office that:

Discussions thus far indicate a preference by the working group for local governments to reinspect non-compliant swimming pools until they are satisfied that compliance has been achieved.

Stage 2 of the Consultation Plan will consider the need for legislative amendments.

The Building Commissioner has indicated that Recommendation 19 has been raised during stage 1 and will also be considered in detail at stage 2 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)
- Stage 2 Targeted Consultation (Preliminary Targeted Consultation Paper)

Accordingly, steps have been taken to give effect to Recommendation 19 part (i) and are proposed to be taken to give effect to Recommendation 19 part (ii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 19.

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.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group.

In its report, the Building Commissioner relevantly informed the Office that:

Charges for re-inspection of non-compliant barriers will be considered as part of the work on recommendation 19, and also recommendation 11.

The Building Commissioner has indicated that Recommendation 20 has been raised during stage 1 and will also be considered in detail at stage 2 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)
- Stage 2 Targeted Consultation

The Building Commissioner also indicated that Recommendation 20 is being addressed in consideration with Recommendations 11 and 19.

Accordingly, steps are proposed to be taken to give effect to Recommendation 20 parts (i) and (ii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 20.

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).

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has begun researching requirements in place in other jurisdictions for temporary barriers.

Controls around temporary barriers, such as 3 monthly inspections, requirements for a gate, requirements for plank and mesh covers, are under consideration by the working group working on the Minimum Standard Regulatory Compliance Model – Framework.

The Building Commissioner has indicated that Recommendation 21 has been raised at stage 1 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)

Accordingly, steps are proposed to be taken to give effect to Recommendation 21 parts (i) and (ii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 21.

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.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan and a copy of a draft portable pool brochure – Rules for portable pools.

In its report, the Building Commissioner relevantly informed the Office that:

The Building Commissioner has been working closely with the Commissioner for Consumer Protection on the issue of portable pools. Work is underway to obtain data research and to conduct an education campaign.

The Building Commissioner is developing, in conjunction with Consumer Protection, a flyer on the safety barrier requirements for portable pools. This will target purchasers of portable pools and be made available at appropriate retail outlets.

The Building Commissioner has indicated that Recommendation 22 is being addressed at stage 2, 3 and 4 of the Consultation Plan:

- Stage 2 Targeted Consultation
- Stage 3 Working Groups - Working group 3
- Stage 4 Public Consultation

The Office notes that Recommendation 22 has been considered with Recommendation 23 which was directed to the Department of Mines, Industry Regulation and Safety. The Building Commissioner is working in collaboration with the Department of Mines, Industry Regulation and Safety, Building and Energy and Consumer Protection divisions.

Accordingly, steps have been taken and are proposed to be taken to give effect to Recommendation 22 (i) and (ii).

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 22.

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.

Steps taken to give effect to the recommendation

The Office requested that the Department of Mines, Industry Regulation and Safety (**the Department**) inform the Office of the steps taken to give effect to the recommendation. In response, the Department provided a range of information in a report prepared by the Department.

In its report, the Department relevantly informed the Office that:

DMIRS has commenced two national projects, an education project and a research project relating to portable swimming pools.

- The national education project is aimed at increasing consumer awareness of the hazards associated with portable swimming pools. The campaign is planned to commence for summer 2018 and includes point of sale materials and content.
- The national Education, Information and Advisory Committee² endorsed the national education project proposal in May 2018. Program development is underway and the education campaign will commence in the lead up to summer 2018. The project works in partnership with other stakeholders such as Royal Life Saving.
- The national research project will examine injury data, market and consumer behaviour to determine if further regulatory action is required in relation to portable swimming pools. The project is also seeking information regarding consumers' knowledge and understanding of the risks posed by portable pools, current swimming pool fencing regulation and their willingness to comply with fencing requirements. The research aims to explore reasons households do not comply with legislative requirements regarding fencing and how resistance might be addressed. It is anticipated that this research will also help formulate a further, more detailed education campaign during 2019/20.

² 'The Education and Information Advisory Committee (EIAC) is chaired by Victoria and seeks to ensure that cost-effective, coordinated, innovative and effective mechanisms are used to provide information, increase knowledge and change behaviour of both consumers and business in the interests of consumer protection', NSW Department of Fair Trading, Interagency and national committees, NSW Government, viewed 30 July 2018, <<https://www.fairtrading.nsw.gov.au/about-fair-trading/how-we-work/interagency-and-national-committees>>.

- The national Compliance and Dispute Resolution Advisory Committee³ endorsed the research project proposal in June 2018 and a national working group has been established to progress this.

The Department also informed the Office of further 'consumer education actions undertaken during 2017/18' including:

- Development of 'Home Safety for Baby' video by DMIRS that includes safety tips in relation to portable pools and the need to ensure barrier erection or removal of water.
- Development of 'Home Safety for Baby' FAQ sheet.
- Updates and revisions to Portable swimming pool safety page on DMIRS' website.
- Real estate bulletin issue 163 (November 2017) – Pool safety and the rental property.

Accordingly, steps have been taken to give effect to Recommendation 23.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 23.

³ 'The Compliance and Dispute Resolution Advisory Committee (CDRAC) is chaired by New South Wales and seeks to ensure that compliance and dispute resolution across Australia is coordinated, efficient, responsive and where appropriate, consistently applied', NSW Department of Fair Trading, Interagency and national committees, NSW Government, viewed 30 July 2018, <<https://www.fairtrading.nsw.gov.au/about-fair-trading/how-we-work/interagency-and-national-committees>>.

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*.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner, the Consultation Plan, a copy of minutes of meetings of the Minimum Standard Regulatory Framework - Compliance Model working group and a copy of Minimum Standards/Best Practices as defined by Compliance Model For Pool Barrier Inspections Working Group.

In its report, the Building Commissioner relevantly informed the Office that:

The minimum standard determined by the working group, at this stage, is that local governments are to keep empty swimming pools on their pool registers and continue to inspect as part of the four year programme. An additional charge to cover this cost is being considered.

The Building Commissioner has indicated that Recommendation 24 has been raised during stage 1 and 3 of the Consultation Plan:

- Stage 1 Small Local Government Working Group (working on the Minimum Standard Regulatory Framework - Compliance Model)
- Stage 3 Working Groups - Working group 1

Accordingly, steps are proposed to be taken to give effect to Recommendation 24.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 24.

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.

Steps taken to give effect to the recommendation

The Office requested that the Building Commissioner inform the Office of the steps taken to give effect to the recommendation. In response, the Building Commissioner provided a range of information in a report prepared by the Building Commissioner and a copy of the Consultation Plan.

In its report, the Building Commissioner relevantly informed the Office that '[R]esearch is underway to examine the implications of different options for reform.'

The Building Commissioner has indicated that Recommendation 25 will be addressed at stage 3 and 4 of the Consultation Plan:

- Stage 3 Working Groups - Working group 1
- Stage 4 Public Consultation

The Office notes amendments to Part 8, Division 2 of the *Building Regulations 2012* occur on a regular basis. The most recent amendment was made in relation to the Shire of Gingin requiring all private swimming pools and spas within the Shire of Gingin to have compliant fencing.⁴

Accordingly, steps are proposed to be taken to give effect to Recommendation 25.

The Office will continue to monitor, and report on, the steps being taken to give effect to Recommendation 25.

⁴ Shire of Gingin, Western Australia, viewed 20 February 2018, <<https://www.gingin.wa.gov.au/services/building-services/swimming-pool-fencing-regulations.aspx>>.

Table 1: Summary of findings by recommendation

Recommendation		Recommendation	
1	Steps have been taken	14	Steps are proposed to be taken
2	Steps have been taken	15	Steps have been taken
3	Steps have been taken and are proposed to be taken	16	Steps have been taken and are proposed to be taken
4	Steps are proposed to be taken	17	Steps are proposed to be taken
5	Steps are proposed to be taken	18	Steps are proposed to be taken
6	Steps are proposed to be taken	19	Steps have been taken and are proposed to be taken
7	Steps have been taken and are proposed to be taken	20	Steps are proposed to be taken
8	Steps are proposed to be taken	21	Steps are proposed to be taken
9	Steps are proposed to be taken	22	Steps have been taken and are proposed to be taken
10	Steps are proposed to be taken	23	Steps have been taken
11	Steps are proposed to be taken	24	Steps are proposed to be taken
12	Steps have been taken and are proposed to be taken	25	Steps are proposed to be taken
13	Steps have been taken and are proposed to be taken		

Source: Ombudsman Western Australia

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Appendix 1: Executive Summary of the *Investigation into ways to prevent or reduce deaths of children by drowning*

To assist the reading of this report, without further reference being required to the **Drownings Report**, the Office has reproduced the Executive Summary of the **Drownings Report**.

1 Executive Summary

1.1 About the investigation

The Ombudsman commenced the review of certain child deaths on 30 June 2009 following the passage of the *Parliamentary Commissioner Amendment Act 2009*. The Department of Communities (**Communities**) receives information from the Coroner on reportable deaths of children and notifies the Ombudsman of these deaths. In accordance with the Ombudsman's child death review function, children are defined as those under 18 years of age.

Through the review of the circumstances in which, and why, child deaths occurred, the Ombudsman identified a pattern of cases in which children appeared to have died by drowning. The Ombudsman decided to undertake an investigation into these deaths with a view to determining whether it may be appropriate to make recommendations to any local government or state government department or authority about ways to prevent or reduce deaths of children by drowning (**the Investigation**).

1.1.1 Aims

The Investigation had two aims. First, the Investigation aimed to develop an understanding of the deaths of children who died by drowning and an understanding about the children who were admitted to a hospital or attended an emergency department at a hospital following a non-fatal drowning incident.

Second, informed by this understanding, the Investigation aimed to examine the actions of local governments and state government departments and authorities in administering the relevant laws of the Western Australian Parliament and relevant regulations and standards.

1.1.2 Engagement and consultation

The Office engaged with the following local governments and state government departments and authorities that were the subject of the Investigation:

- all local governments in Western Australia;
- the (then) Department of Commerce (functions relevant to the Investigation now undertaken by the Department of Mines, Industry Regulation and Safety);
- the Department of Health; and
- the (then) Department of Local Government and Communities (functions relevant to the Investigation now undertaken by the Department of Local Government, Sport and Cultural Industries).

The Office also consulted with non-government and not-for-profit organisations and the Coroner's Court of Western Australia.

1.1.3 Information collected

During a six-year period from 1 July 2009 to 30 June 2015 (**the six-year investigation period**), the (then) Department for Child Protection and Family Support (now Communities) notified the Ombudsman regarding children who died in the circumstance of drowning. For the Investigation, the Office examined the deaths of 34 children who had died by drowning. In this report, these children are referred to as **the 34 children who died by drowning**.

To more fully understand patterns and trends in drowning, the Office collected and analysed information regarding all children who were admitted to a hospital or who attended an emergency department at a hospital following a non-fatal drowning incident during the six-year investigation period.

During the six-year investigation period, 258 children were admitted to a hospital following a non-fatal drowning incident. In this report, these children are referred to as **the 258 children who were admitted to a hospital**.

In addition, during the six-year investigation period, 2,310 children attended an emergency department at a hospital following a non-fatal drowning incident. In this report, these children are referred to as **the 2,310 children who attended an emergency department at a hospital**.⁵

In order to further examine the responsibilities of local governments, the Office also collected information by:

- surveying all Western Australian local governments regarding the number of private swimming pools within their local government district and their inspection of these private swimming pools; and
- selecting five local governments (**the five selected local governments**) and obtaining from each of them records regarding the inspection of 100 randomly selected private swimming pools, including the inspection history and the most recent inspection form; and
- undertaking structured interviews with officers at the five selected local governments.

1.2 Deaths of children by drowning in Western Australia

1.2.1 Age

The Office found that the average age of the 34 children who died by drowning was four years and four months. Almost three quarters of the 34 children who died by drowning were aged under five years (24 children or 71 per cent). Seventy four per cent (or 191) of

⁵ Children may also have attended a non-hospital based health service such as a general practice or a nursing service following a non-fatal drowning incident.

the 258 children who were admitted to a hospital and 67 per cent (or 1,542) of the 2,310 children who attended an emergency department at a hospital following a non-fatal drowning incident were aged under five years.

1.2.2 Aboriginal and Torres Strait Islander children

The Office found that five (15 per cent) of the 34 children who died by drowning were recorded as being Aboriginal and no children were recorded as being Torres Strait Islander.⁶ For comparison, in 2011 Aboriginal and Torres Strait Islander children made up six per cent of children aged zero to 17 years in Western Australia.⁷

Of the 258 children who were admitted to a hospital, 19 children (7.4 per cent) were recorded as being Aboriginal and/or Torres Strait Islander.

Of the 2,310 children who attended an emergency department at a hospital, 102 children (4.4 per cent) were recorded as being Aboriginal and/or Torres Strait Islander.

Bearing in mind the relatively low numbers of deaths, Aboriginal children were twice as likely to die by drowning as non-Aboriginal children. Aboriginal children were as likely as non-Aboriginal children to be admitted to a hospital and less likely to attend an emergency department following a non-fatal drowning incident.

1.2.3 Location of drowning incident

The Office found that, for 16 (47 per cent) of the 34 children who died by drowning, the fatal drowning incident occurred in a private swimming pool. For 170 (66 per cent) of the 258 children who were admitted to a hospital following a non-fatal drowning incident, the incident occurred in a swimming pool. Data regarding the location of the incident was not available for the 2,310 children who attended an emergency department at a hospital following a non-fatal drowning incident.

The Office found that for children under one who died by drowning, the incident more frequently occurred in a bath or shower, for children aged from one to four years the incident more frequently occurred in a private swimming pool and for children aged from five to 17 years the incident more frequently occurred in a river, ocean, lake, dam or pond. Of the 24 children aged under five years who died by drowning, 13 (54 per cent) died following an incident in a private swimming pool.

⁶ The Department of Health provided the Office with information about Aboriginal origin of the 34 children who died by drowning. In this respect, the Department of Health records 'Aboriginal not Torres Strait Islander origin,' 'Torres Strait Islander not Aboriginal origin,' 'Not-Aboriginal or Torres Strait Islander origin,' 'Other' and 'Unknown'.

⁷ Developed using the Australian Bureau of Statistics, '2011 Census Counts – Aboriginal and Torres Strait Islander Peoples', *Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians, 2011*, cat. no. 2075.0, ABS, Canberra, June 2012.

1.3 Preventing and reducing deaths of children by drowning

1.3.1 Supervision

In the research literature, child deaths by drowning have been associated with a lack of or lapse in supervision.⁸ The research literature further suggests that children aged under five years of age who are known to be 'in, on, or around the water' (such as a bath, shower or swimming pool) require 'active adult supervision'. 'Active supervision means that a child is being constantly watched by an adult who is within arms' reach at all times'.⁹

The Office found that, of the 34 children who died by drowning:

- none of the six children aged under five years who died by drowning, and who were known to be in, on, or around water, were under active supervision;
- none of the 18 children aged under five years who died by drowning, and who were not known to be in, on, or around water, were under active supervision; and
- of the 10 children aged five years and over who died by drowning, eight children were known to be in, on, or around water, and for six of these children the location of the fatal drowning incident was a river, ocean, lake, dam or pond.

1.3.2 **Thirteen children aged under five years who died by drowning in a private swimming pool were not known to be in, on, or around water; a suitable swimming pool barrier may have restricted their access to the swimming pool**

The Office found that, of the 24 children aged under five years who died by drowning, 18 children (75 per cent) were not known to be in, on, or around water. For 13 of these 18 children, the location of the fatal drowning incident was a private swimming pool. The Office also found that while none of these 13 children were under active supervision 'not all drowning deaths are reasonably foreseeable or the result of a breakdown in the elements of supervision occurring for the child. Sometimes a child is not known to be in, on or around water and is being appropriately supervised'.¹⁰

Swimming pool barriers act as a second line of defence for when a child is not known to be in, on, or around water. The research literature identifies that most fatal drowning incidents in private swimming pools occur where there is no barrier or a faulty barrier between the residence and the swimming pool area.¹¹ The Office found that, all of the 13 children aged under five years, not known to be in and around water, who died by drowning in a private swimming pool, died in a private swimming pool with either no barrier, a defective barrier, or a climbable object near the permanent barrier. This highlights the importance of private

⁸ Petrass, L, Blitvich, J, Finch, C. Lack of caregiver supervision: a contributing factor in Australian unintentional child drowning deaths, 2000-2009, *The Medical Journal of Australia*, 2011, 194 (5) pp. 228-231.

⁹ Royal Life Saving Society Australia, *National Drowning Report 2015*, 2015, viewed 15 February 2016, p. 18, <http://www.royallifesaving.com.au/__data/assets/pdf_file/0006/14559/RLS_NDR2015_Report_LR.pdf>.

¹⁰ Queensland Family and Child Commission, *Annual Report: Deaths of children and young people 2013-14*, 2014, viewed 11 April 2016, <<http://www.qfcc.qld.gov.au/knowledge-and-resource-hub/annual-report-deaths-children-and-young-people-queensland-2013-14>>, p. 45.

¹¹ Peden, A, and Mahony, A, *Drowning Deaths of Children Under Five in Private Swimming Pools in NSW: A 13 Year Review*, Royal Life Saving Society – Australia, Sydney, 2016, p. 5.

swimming pools being enclosed by a barrier, which effectively restricts access by young children to the swimming pool.

1.4 Private swimming pools in Western Australia

Where location was known, private swimming pools were the most common location of fatal and non-fatal drowning incidents during the six-year investigation period. The Office found that, for 16 (47 per cent) of the 34 children who died by drowning, the fatal drowning incident occurred in a private swimming pool. Similarly, for 170 (66 per cent) of the 258 children who were admitted to a hospital following a non-fatal drowning incident, the incident occurred in a swimming pool. Accordingly, the Ombudsman determined to examine private swimming pools in Western Australia in more detail.

The Office was unable to identify any source with recent information about the total number and location of private swimming pools in Western Australia, therefore, as part of the Investigation, the Office collected and analysed this information.

The Office surveyed local governments regarding the number of private swimming pools in their local government district as at 30 June 2015 (**the local government survey**). Of the 140 local governments that were surveyed,¹² 138 (99 per cent) local governments responded to the survey (**the 138 survey respondents**) and two (one per cent) local governments did not respond to the survey. The two local governments that did not respond were small local governments located outside the metropolitan region of Western Australia.

As at 30 June 2015, the 138 survey respondents reported that they had recorded a total of 144,899 private swimming pools. The number of private swimming pools recorded (**recorded private swimming pools**) by each local government is provided at Appendix 1.

¹² At the time of the investigation, there were 138 local governments in Western Australia and two local governments located in the Commonwealth territories of Christmas Island and Cocos (Keeling) Islands that were also included in the survey. The Shire of Narrogin and the Town of Narrogin have merged to form a new and expanded Shire of Narrogin which took effect as of 1 July 2016.

1.5 Inspection of private swimming pool barriers by local governments in Western Australia

Recognising the importance of swimming pool barriers in the prevention of drowning, the Western Australian Parliament enacted the relevant provisions of the *Building Act 2011* (which includes provisions for the *Building Regulations 2012*).¹³ The regulatory framework in relation to barriers around private swimming pools¹⁴ establishes requirements for both individuals and local governments, including that:

- each owner and occupier of premises on which there is a private swimming pool must ensure that a barrier is installed or provided;¹⁵
- swimming pool barriers must comply with the requirements specified in the *Building Regulations 2012*;
- local governments are informed of the existence of a private swimming pool through applications for building permits to construct it and through the submission of notices of completion;¹⁶ and
- local governments must arrange for an authorised person to inspect the swimming pool barrier at intervals of no more than four years.¹⁷

1.5.1 The five selected local governments reported at interview that they estimate that only 30 to 50 per cent of notices of completion for private swimming pools are submitted by builders

Section 9 of the *Building Act 2011* provides that building work must not be done without a building permit, including building work for the construction of private swimming pools. Before a private swimming pool can be built '[s]wimming pools and pool safety barriers require a building permit to be issued by the permit authority ... unless otherwise exempt.'¹⁸

¹³ The *Building Act 2011* provided for the amendment of the *Local Government (Miscellaneous Provisions) Act 1960* and various other Acts of relevance to swimming pools and their barriers. The legislative requirements for public swimming pools differ from private swimming pools and are not investigated in this report.

¹⁴ The legislative requirements for public swimming pools differ from private swimming pools and are not investigated in this report.

¹⁵ This obligation only applies to owners and occupiers in certain local government districts and areas, as listed in the Table in Schedule 5 of the *Building Regulations 2012* (regulation 49).

¹⁶ This obligation only applies to certain areas and to certain kinds of building work as set out in Schedule 4 of the *Building Regulations 2012* (regulation 41).

¹⁷ This obligation only applies in certain local government districts and areas as listed in the Table in Schedule 5 of the *Building Regulations 2012* (regulation 49).

¹⁸ 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. 7.

Section 33(1) of the *Building Act 2011* provides that:

33. Notice of completion

- (1) The responsible person in relation to a permit must, within 7 days of completion of the work, or the stage of the work, for which the permit was granted, give notice of completion to a relevant permit authority.

Penalty: a fine of \$10 000.

In this way, local governments are advised that a private swimming pool has been constructed and that the requirements of the *Building Regulations 2012* regarding its barrier and the inspection of its barrier apply.

During the Investigation, the five selected local governments and other stakeholders reported at interview that, in accordance with the legislative requirements discussed above, local governments require that builders or owners submit a notice of completion accompanied by an inspection certificate certifying that the barrier complies with the *Building Regulations 2012*. However, the five selected local governments estimated that only 30 to 50 per cent of notices of completion and the accompanying inspection certificates are submitted by builders or owners, and that, when they are submitted, this rarely happens within the prescribed seven day timeframe.

Aside from the obvious need for compliance with legislative requirements and regulations, a submission of a notice of completion, and the accompanying inspection certificate, is important for at least two practical reasons. First, it ensures that local governments are provided with evidence that the swimming pool barrier complies with the *Building Regulations 2012* upon installation. Second, it informs the local government that the installation of the swimming pool has been completed and this triggers the commencement of the four yearly inspection period for the barrier. The widespread non-compliance reported by the five selected local governments, if accurate, creates the risk that the barriers to private swimming pools will not be inspected on time or at all.

1.5.2 Local governments must arrange for an authorised person to inspect swimming pool barriers at intervals of no more than four years

Regulation 53(1) of the *Building Regulations 2012*¹⁹ requires local governments to arrange for an authorised person to inspect the barrier²⁰ to a private swimming pool at intervals of no more than four years, to ensure compliance.

During the Investigation, the Office analysed key aspects of the application of the *Building Act 2011* and the *Building Regulations 2012*²¹ by local governments. To do so, for each of the five selected local governments, the Office randomly identified 100 private swimming pools from all private swimming pools whose barriers were due for inspection from

¹⁹ Amendments to the *Building Regulations 2012* took effect from 1 May 2016.

²⁰ Regulation 53(1) was amended by the *Building Amendment Regulations (No 2) 2016*, which came into operation on 1 May 2016. The effect of the amendment was to replace 'pool enclosure' with 'barrier to a private swimming pool'. To avoid confusion, and for consistency, throughout this report, the Office has used the term 'barrier.'

²¹ The requirements for swimming pool barriers, which were most recently amended in May 2016, are discussed in detail at section 6.2 of this report.

1 July 2014 to 30 June 2015, and requested certain records relating to the inspection of these swimming pool barriers (**the inspection records**).

Using the inspection records and information collected through the local government survey, the Office analysed the number and timeliness of inspections undertaken by local governments, the outcomes of inspections, the re-inspection of swimming pool barriers, local governments' enforcement of the *Building Regulations 2012* and charges made for inspections.

1.5.3 From 1 July 2014 to 30 June 2015, 51,736 inspections of swimming pool barriers were conducted by 77 local governments

In the local government survey, the Office requested information about the number of inspections conducted from 1 July 2014 to 30 June 2015. The Office found that, of the 138 survey respondents:

- 86 (62 per cent) local governments reported that they undertook inspections from 1 July 2014 to 30 June 2015;
 - 77 (56 per cent) local governments reported that they had conducted a total of 51,736 inspections from 1 July 2014 to 30 June 2015; and
 - nine local governments reported that they had undertaken inspections of an identified number of swimming pools but did not know the total number of inspections conducted in the period;
- 39 (28 per cent) local governments reported that they had conducted no inspections from 1 July 2014 to 30 June 2015;
- 11 (8 per cent) local governments reported that they did not have any swimming pools within their district; and
- two (1 per cent) local governments were unable to provide information about whether they had undertaken any inspections from 1 July 2014 to 30 June 2015.

1.5.4 Four of the five selected local governments had inspected between 12 per cent and 54 per cent of swimming pool barriers due for inspection; records at one local government were not sufficient to allow for this to be determined

The Office analysed the available inspection records to determine if the local government had undertaken an inspection of the swimming pool, and whether the most recent inspection was undertaken within four years of the previous inspection.

The Office found that none of the five selected local governments recorded that they had inspected all swimming pool barriers at intervals of no more than four years, in accordance with regulation 53(1) of the *Building Regulations 2012*. Where records were available, four of the five selected local governments had inspected between 12 per cent and 54 per cent of swimming pool barriers due for inspection at intervals of no more than four years.

1.5.5 Forty-three per cent of the 138 survey respondents self-reported having overdue inspections at 30 June 2015

In the local government survey, the Office requested information about the total number of swimming pool barriers that were overdue for inspection (that is, more than four years had elapsed since the previous inspection). The Office found that 59 (43 per cent) local

governments reported that there were a total of 8,639 swimming pools that were overdue for inspection at 30 June 2015.

1.5.6 Between eight and 52 per cent of swimming pool barriers inspected by the five selected local governments did not comply with the *Building Regulations 2012* on initial inspection

In each four yearly inspection, the local government is required to inspect the barrier to determine if the swimming pool complies with the *Building Regulations 2012* (**initial inspection**). The Office analysed the inspection records of the 500 randomly selected private swimming pools to determine if, on initial inspection, the swimming pool barriers that had been inspected were found to comply with the *Building Regulations 2012*.

The Office found that two of the five selected local governments had not attempted to inspect all 100 swimming pools in the sample. A total of 485 swimming pools had been inspected (or an attempt had been made to inspect the pool - this occurred for eleven swimming pools that were found to be emptied or removed when visited for inspection). Of the total number of 485 swimming pool barrier inspections and visits conducted, a total of 315 (65 per cent) swimming pool barriers were found by local governments to comply with the *Building Regulations 2012*. 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 the *Building Regulations 2012* on initial inspection.

The Office also analysed the responses to the local government survey to identify whether this variation in the rate of compliance by swimming pool barriers with the *Building Regulations 2012* among the five selected local governments was consistently reported across Western Australia. Of the 138 survey respondents, 75 survey respondents reported that they had undertaken 37,363 initial inspections between 1 July 2014 and 30 June 2015. Of those 75 local governments, 72 were able to report on how many inspected barriers were found to be compliant 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 this inspection. The median percentage of swimming pools that were found to be compliant at initial inspection across these 72 local governments was 55 per cent.

1.5.7 Problems with gate latches were the most common reason that swimming pool barriers did not comply with the *Building Regulations 2012* on initial inspection

The Office reviewed the 485 inspection records provided by the five selected local governments to determine the reasons why swimming pool barriers were found not to comply with the *Building Regulations 2012* on initial inspection. Of the 485 swimming pool barriers that were inspected and visited for inspection (including where the inspections did not proceed as the swimming pools were found to be emptied or removed):

- 315 (65 per cent) swimming pool barriers were found to comply with the *Building Regulations 2012* on initial inspection;
- 159 (33 per cent) were found to not comply on initial inspection; and
- 11 swimming pools were found to be emptied or removed so the inspection did not proceed further.

As there can be multiple reasons for a barrier not to comply, a total of 315 reasons were recorded by the five selected local governments in relation to the 159 swimming pool barriers that were found not to comply at initial inspection. The most common reasons for a barrier being found not to comply included:

- gates not self-closing or self-latching (67 of 315 instances or 21 per cent);
- windows in houses (where the house wall forms part of a perimeter fence) opening more than 100mm (44 of 315 instances or 14 per cent); and
- doors in houses (where the house wall forms part of a fence) not self-closing or self-latching (44 of 315 instances or 14 per cent).

1.5.8 One fifth of the reasons that swimming pool barriers did not comply with the *Building Regulations 2012* on initial inspection related to three-sided barriers

For swimming pools installed before 5 November 2001, compliance with the requirements of regulation 50 of the *Building Regulations 2012* may include a wall that contains a door permitting access through a building, if that door satisfies the requirements of the applicable Australian Standard. A barrier constructed in this way is often referred to as a 'three sided barrier'.

As identified above, a total of 315 reasons were recorded by the five selected local governments in relation to 159 swimming pool barriers that were found to not comply with the *Building Regulations 2012* at initial inspection. The Office identified that 61 of the 315 reasons (19 per cent) for a barrier to not comply were associated with the barrier being a 'three-sided barrier'.

1.6 Quality of inspections

Through its literature review of best practice for regulatory inspections, the Office developed an approach to examining the quality of local governments' inspections of swimming pool barriers. In particular, the Office considered the Organisation for Economic Cooperation and Development's (OECD's) *Regulatory Enforcement and Inspections: OECD Best Practice Principles for Regulatory Policy*²² and the National Association of Testing Authorities' (Australia) *ISO/IEC 17020 Inspection Standard Application Document*.²³ The literature review identified the following key elements as fundamental to a quality inspection process:

²² Organisation for Economic Cooperation and Development, *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, 2014, viewed 2 August 2015, <<http://www.oecd.org/gov/regulatory-enforcement-and-inspections-9789264208117-en.htm>>.

²³ National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia.

- the person undertaking the inspection has the appropriate experience and/or qualifications;²⁴
- inspections are undertaken against a sound framework;²⁵ and
- adequate records are kept of the inspections.²⁶

The Office's findings included that:

- there is no specified level of experience or specific qualification for inspectors;
- there is no formal training for new inspectors;
- there is limited continuous professional development for swimming pool barrier inspectors;
- only one of the five selected local governments had a quality assurance process for ensuring consistency of swimming pool barrier inspections across inspectors; and
- none of the five selected local governments identified all elements of the relevant standard on their inspection forms.

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

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.²⁷ Similarly, regulatory design should actively avoid any unintended undesirable consequences of the regulation.²⁸ 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.'²⁹ The Table of Eleven identifies factors that increase the likelihood of compliance, as follows:

- 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

²⁴ National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia, p. 9.

²⁵ Organisation for Economic Cooperation and Development, *Regulatory Enforcement and Inspections, Best Practice Principles for Regulatory Policy*, OECD Publishing, 2014, viewed 2 August 2015, <<http://www.oecd.org/gov/regulatory-enforcement-and-inspections-9789264208117-en.htm>>, p. 12. National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia, p. 9.

²⁶ National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia, p. 17.

²⁷ Field, C, Recent Evolutions in Australian Ombudsmen, *AIAL Forum*, 2009, 63, pp. 4-12.

²⁸ Field, C, Recent Evolutions in Australian Ombudsmen, *AIAL Forum*, 63, 2009pp. 4-12.

²⁹ Organisation for Economic Cooperation and Development, *Better Regulation in Europe: Netherlands*, OECD, Paris, 2010, p. 109.

- Aspects of sanctions
 10. Chance of sanctions
 11. Severity of sanctions³⁰

With respect to compliance with regulation 50(1) of the *Building Regulations 2012*, legislation and regulations specifically 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.

1.7.1 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;³¹ 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.

³⁰ Hampton, P, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, 2005, Norwich, p. 57.

³¹ This includes the City of Rockingham, which was not asked this question as it took part in a pilot of the survey.

1.7.2 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

The Office found that, of the 138 survey respondents:

- six (four per cent) local governments 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.

1.7.3 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*

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.

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.

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

The *Building Regulations 2012* do not require local governments to undertake a re-inspection if a swimming pool barrier does not comply with the *Building Regulations 2012* on initial inspection.

The Office found that, if a swimming pool barrier does not comply with the *Building Regulations 2012* at the time of the initial inspection, the local government may re-inspect the barrier at a later date to determine if the barrier complies (**the first re-inspection**). If the barrier does not comply on the first re-inspection, the local government may undertake a second re-inspection (**the second re-inspection**) and so on, until compliance is achieved or the local government ceases to re-inspect.

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 inspected, 159 swimming pool barriers were found not to comply on initial inspection. The Office analysed the inspection records of these 159 swimming pool barriers to determine whether a re-inspection was undertaken. 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*. 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*.

1.7.5 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

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.

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.

1.8 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. 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.

Appendix 2: Recommendations arising from the *Investigation into ways to prevent or reduce deaths of children by drowning*

To assist the reading of this report, without further reference being required to the Drowning Report, the Office has reproduced the recommendations from the Drowning Report.

- **Recommendation 1:** The Department of Mines, Industry Regulation and Safety continues to develop and implement strategies for educating parents and caregivers regarding the importance of maintaining active supervision of children who are placed in bath seats and of avoiding altogether the use of floor seats in the bath or shower.
- **Recommendation 2:** The Department of Mines, Industry Regulation and Safety continues to monitor data specifically regarding fatal and non-fatal drowning incidents that occur in the bath and, if warranted, pursue the development of further regulation applicable to the products associated with these incidents.
- **Recommendation 3:** Taking into account the findings of the Investigation, and the findings and recommendations of the Coroner regarding private swimming pools at rental properties, the Department of Mines, Industry Regulation and Safety develops and implements further strategies designed to ensure that real estate agents, including property managers, and private landlords, respond appropriately to information regarding swimming pool barriers that do not comply with the *Building Act 2011* and the *Building Regulations 2012*.
- **Recommendation 4:** The Department of Mines, Industry Regulation and Safety considers the introduction of requirements for property managers and private landlords to provide, in the most cost-effective way and resulting in the least regulatory burden, a copy of the most recent inspection form confirming that the swimming pool barrier was found to be compliant, to the potential tenant at the time of entering into a lease agreement.
- **Recommendation 5:** The Building Commissioner reviews the operation of section 33 of the *Building Act 2011* in order to determine the level of compliance of permit holders (including owners, registered and unregistered builders and swimming pool barrier installers) with requirements to submit notices of completion for private swimming pools and their barriers in accordance with section 33.
- **Recommendation 6:** In undertaking the review of the operation of section 33 of the *Building Act 2011*, the Building Commissioner works cooperatively and collaboratively with local governments to increase compliance by permit holders (including owners, registered and unregistered builders and swimming pool barrier installers) with section 33 of the *Building Act 2011* through a series of the most complementary strategies utilising the expertise and experience of the Building Commissioner and ensuring that such strategies are the most cost-effective and result in the least regulatory burden. At a minimum, consideration should be given to:

- (i) the provision (by either local governments, the Building Commissioner or both) of advice, information, education and training for permit holders regarding the requirements and importance of section 33 of the *Building Act 2011*;
 - (ii) the Building Commissioner undertaking risk-based compliance audits of the work and conduct of registered builders of swimming pools;
 - (iii) measures which specifically target increased compliance by builders and installers of swimming pool barriers who are not registered builders; and
 - (iv) where appropriate in all of the circumstances, use of sanctions by local governments, as provided for by the *Building Act 2011*.
- **Recommendation 7:** The Building Commissioner monitors local governments' compliance with regulation 53(1) of the *Building Regulations 2012*, including by requiring that local governments report on compliance with regulation 53(1) each year, and that the Building Commission reports this information to Parliament in its annual report.
 - **Recommendation 8:** The Building Commissioner provides guidance to local governments regarding the manner and form in which the information relating to swimming pools and their barriers should be kept including the key elements of any associated record management system, bearing in mind the need to avoid any inappropriate regulatory burden particularly for small local governments and local governments with few recorded swimming pools in their districts.
 - **Recommendation 9:** Taking into account the findings of the Investigation, the Building Commissioner, subject to consultation, and in development with local governments and industry stakeholders, reviews the concessions for pre-November 2001 swimming pools provided for in regulation 52 of the *Building Regulations 2012*, with a view to considering whether an amendment to the *Building Regulations 2012* ought to be made to remove these concessions. If regulatory changes are made, any such regulatory change should consider an appropriate extended phase-in period to take into account regulatory (sovereign) risk and costs imposed upon existing property owners.
 - **Recommendation 10:** The Building Commissioner clarifies with local governments the charges that local governments are able to impose for inspections of swimming pool barriers, including whether these charges may be imposed only in the year of an inspection, or each year.
 - **Recommendation 11:** The Building Commissioner consults with local governments regarding the adequacy of charges to meet the cost of swimming pool barrier inspections, including:
 - (i) establishing the actual cost of the efficient delivery of swimming pool barrier inspection practices;
 - (ii) if appropriate, seeking an amendment to the *Building Regulations 2012* so that the allowed charge reflects this efficient cost; and
 - (iii) informing local governments of the efficient cost so that such cost is transparent and borne by the users of the system (that is, ratepayers who have a swimming pool and not cross-subsidised by non-swimming pool owners).

- **Recommendation 12:** The Building Commissioner, in consultation with local governments and other stakeholders, considers whether it would be appropriate to co-ordinate the development and provision of a training program (including curriculum, scheduling arrangements, modes of delivery and assessment methods) specifically for inspectors of swimming pool barriers. In doing so, the Building Commissioner can take into account matters relevant to the expertise and experience of the Building Commissioner, but should at a minimum consider:
 - (i) the cost of the program including developing and delivering the program at least cost to taxpayers. For example, the Building Commission could consider funding such training from the Department of Mines, Industry Regulation and Safety's internal training fund. Such funding would not require new funding and potentially represents a cost-beneficial way of contributing to enhanced inspection standards and enhanced protection for Western Australian children and ultimately the reduction of risk of child death by drowning;
 - (ii) any unintended consequences of establishing the training program, including if establishing the program could act to restrict the supply of inspectors and thus exacerbate the difficulties in recruiting inspectors; and
 - (iii) if the training program can and should be linked to the national training system.
- **Recommendation 13:** The Building Commissioner, in consultation with local governments and other stakeholders, considers improvements to training in compliance promotion and conflict resolution. This could be included as part of the training program developed specifically for inspectors of swimming pool barriers, discussed at Recommendation 12.
- **Recommendation 14:** The Building Commissioner, in consultation with local governments and other stakeholders, considers the development and provision of a systematic program of cost-effective continuous professional development for inspectors of swimming pool barriers to support inspectors to remain up-to-date with changes in the legislation, regulations and standards.
- **Recommendation 15:** The Building Commissioner considers the promotion of a quality assurance process (for which there is currently a good practice example) for swimming pool barrier inspections to local governments. This quality assurance process could include reviewing a sample of inspections undertaken by each inspector at appropriate intervals throughout the inspection program, with additional information on this process included in the *Inspector Guidelines*.
- **Recommendation 16:** The Building Commissioner works with local governments and other stakeholders to develop a template swimming pool barrier inspection checklist template, which incorporates all of the required elements to meet the applicable standards, and is as efficient to complete as possible for inspectors, for use across local governments.

- **Recommendation 17:** In implementing Recommendation 12, the Building Commissioner works with local governments to (at least cost to taxpayers and ratepayers):
 - (i) ensure that the training program for inspectors of swimming pool barriers includes specific training on the template swimming pool barrier inspection form and the requirement to complete all elements of the form; and
 - (ii) to develop a quality assurance process for ensuring that all elements of swimming pool barrier inspection forms are consistently completed.
- **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.
- **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.
- **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).
- **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.
- **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.
- **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*.
- **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.

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Major Investigations and Reports

Title	Date
<u>Investigation into ways to prevent or reduce deaths of children by drowning</u>	November 2017
<u>A report on giving effect to the recommendations arising from the Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities</u>	November 2016
<u>Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities</u>	November 2015
<u>Investigation into ways that State Government departments and authorities can prevent or reduce suicide by young people</u>	April 2014
<u>Investigation into ways that State Government departments can prevent or reduce sleep-related infants deaths</u>	November 2012
<u>Planning for children in care: An Ombudsman's own motion investigation into the administration of the care planning provisions of the Children and Community Services Act 2004</u>	November 2011
<u>The Management of Personal Information - good practice and opportunities for improvement</u>	March 2011
<u>2009-10 Survey of Complaint Handling Practices in the Western Australian State and Local Government Sectors</u>	June 2010

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