

# 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**.<sup>1</sup>

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 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.

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<sup>1</sup> 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.

### 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.<sup>2</sup> 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.<sup>3</sup>

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.

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<sup>2</sup> 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'.

<sup>3</sup> 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.<sup>4</sup> 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'.<sup>5</sup>

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'.<sup>6</sup>

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.<sup>7</sup> 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

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<sup>4</sup> 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.

<sup>5</sup> 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](http://www.royallifesaving.com.au/__data/assets/pdf_file/0006/14559/RLS_NDR2015_Report_LR.pdf)>.

<sup>6</sup> 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.

<sup>7</sup> 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,<sup>8</sup> 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.

## 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*).<sup>9</sup> The regulatory framework in relation to barriers around private swimming pools<sup>10</sup> establishes requirements for both individuals and local governments, including that:

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<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> The legislative requirements for public swimming pools differ from private swimming pools and are not investigated in this report.

- each owner and occupier of premises on which there is a private swimming pool must ensure that a barrier is installed or provided;<sup>11</sup>
- 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;<sup>12</sup> and
- local governments must arrange for an authorised person to inspect the swimming pool barrier at intervals of no more than four years.<sup>13</sup>

### **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.'<sup>14</sup>

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.

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<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, p. 7.

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*<sup>15</sup> requires local governments to arrange for an authorised person to inspect the barrier<sup>16</sup> 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*<sup>17</sup> 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 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.

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<sup>15</sup> Amendments to the *Building Regulations 2012* took effect from 1 May 2016.

<sup>16</sup> 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.'

<sup>17</sup> 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.

### **1.5.3 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*<sup>18</sup> and the National Association of Testing Authorities' (Australia) *ISO/IEC 17020 Inspection Standard Application Document*.<sup>19</sup> The literature review identified the following key elements as fundamental to a quality inspection process:

- the person undertaking the inspection has the appropriate experience and/or qualifications;<sup>20</sup>
- inspections are undertaken against a sound framework;<sup>21</sup> and
- adequate records are kept of the inspections.<sup>22</sup>

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<sup>18</sup> 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>>.

<sup>19</sup> National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia.

<sup>20</sup> National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia, p. 9.

<sup>21</sup> 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.

<sup>22</sup> National Association of Testing Authorities, *The ISO/IEC 17020 Inspection Standard Application Document*, 2015, Australia, p. 17.

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.<sup>23</sup> Similarly, regulatory design should actively avoid any unintended undesirable consequences of the regulation.<sup>24</sup> The research literature identifies factors that are known to drive compliance with regulations. In particular, the 'Table of Eleven', published by the OECD, 'derives from academic literature in the areas of social psychology, sociology and criminology.'<sup>25</sup> 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
- Aspects of sanctions
  10. Chance of sanctions
  11. Severity of sanctions<sup>26</sup>

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.

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<sup>23</sup> Field, C, Recent Evolutions in Australian Ombudsmen, *AIAL Forum*, 2009, 63, pp. 4-12.

<sup>24</sup> Field, C, Recent Evolutions in Australian Ombudsmen, *AIAL Forum*, 63, 2009pp. 4-12.

<sup>25</sup> Organisation for Economic Cooperation and Development, *Better Regulation in Europe: Netherlands*, OECD, Paris, 2010, p. 109.

<sup>26</sup> Hampton, P, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, 2005, Norwich, p. 57.

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;<sup>27</sup> and
- eleven (eight per cent) local governments reported that they did not have any recorded swimming pools in their district.

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

**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.

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<sup>27</sup> This includes the City of Rockingham, which was not asked this question as it took part in a pilot of the survey.

### **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.