

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

As discussed in Chapter 3, regulation 3 of the *Building Regulations 2012* defines a private swimming pool as follows:

**private swimming pool** means a swimming pool —

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

The Building Code of Australia defines the classes of buildings referred to in regulation 3 of the *Building Regulations 2012* as follows:

...

**Class 1a** – a single dwelling being-

- (i) a detached house; or
- (ii) one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit; or

...

**Class 2:** A building containing 2 or more sole-occupancy units each being a separate dwelling.

...

**Class 4:** a dwelling in a building that is Class 5 [an office building], 6 [a shop or other building for the sale of goods by retail or the supply of services direct to the public], 7 [a car park or for storage or display of goods or produce for sale by wholesale], 8 [a laboratory or a building involved in the production, repair or cleaning of goods], or 9 [public building] if it is the only dwelling in the building.<sup>151</sup>

In this report, the term **private swimming pool** is used to refer to a private swimming pool and a private spa. Where it is not known whether the swimming pool/spa is a private swimming pool/spa or is not a private swimming pool/spa, or this distinction is not relevant, the term **swimming pool** is used.

As also discussed in Chapter 3, 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

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<sup>151</sup> Australian Building Codes Board, National Construction Code 2016: *Volume One Building Code of Australia, Class 2 to Class 9 Buildings*, February 2016, pp. 37.

hospital following a non-fatal drowning incident, the incident occurred in either a private or public swimming pool.

Data regarding the location of the non-fatal drowning incident was not available for the children who attended an emergency department at a hospital. However, using the percentage of children who were admitted to a hospital (66 per cent), the Office estimated that, for 1,525 children of the 2,310 children who attended an emergency department at a hospital following a non-fatal drowning incident, the location of the incident may have been a private or public swimming pool.

The research literature suggests that supervision is a key element in the layers of protection against drowning, as follows:

The existing literature on child drowning often cites a lapse in, or lack of, supervision as a contributing factor. Our findings confirm that this is also the case in Australia, with supervision a contributor in almost three-quarters of unintentional child drownings (71.7%).<sup>152</sup>

Lapses in supervision were discussed in detail in Chapter 4. Where a lapse in supervision occurs, a barrier (such as a fence) to a swimming pool provides an additional layer of protection against drowning, as follows:

... evidence from other studies found that pool fencing that adequately prevents children reaching the pool unsupervised can prevent about three-quarters of all child drownings in pools.

...

Pool fencing is a passive environmental intervention, designed to reduce unintended access to swimming pools and thus prevent drowning in the preschool age group.<sup>153</sup>

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>154</sup> The regulatory framework in relation to barriers around private swimming pools<sup>155</sup> establishes requirements for both individuals and local governments, including that:

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<sup>152</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) p. 230.

<sup>153</sup> Thompson, D and Rivara, F, *Pool fencing for preventing drowning of children*, Cochrane Database of Systematic Reviews, 1998, Issue 1, pp. 1-2.

<sup>154</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>155</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>156</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>157</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>158</sup>

These requirements are discussed in detail below.

## 6.1 Each owner and occupier of premises on which there is a private swimming pool must ensure that a barrier is installed or provided

### 6.1.1 Legislative requirements

Regulation 50(1)<sup>159</sup> of the *Building Regulations 2012* requires owners and occupiers of premises on which there is a private swimming pool to ensure that a barrier is installed or provided around the private swimming pool (a **swimming pool barrier**), as follows:

#### 50. Barrier to private swimming pool

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

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

Regulation 50(1) was amended by the *Building Amendment Regulations (No 2) 2016*, which came into operation on 1 May 2016. At the time of the Investigation, regulation 50(1) provided:

#### 50. Enclosure of private swimming pool

- (1) Each owner and occupier of premises on which there is a private swimming pool containing water that is more than 300 mm deep must ensure that there is installed or provided around the pool an enclosure

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<sup>156</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). The application of this obligation is discussed in detail in section 9.4 of this report.

<sup>157</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>158</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). The application of this obligation is discussed in detail in section 9.4 of this report.

<sup>159</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). The application of this obligation is discussed in detail in section 9.4 of this report.

that restricts access by young children to the pool and its immediate surrounds.

Penalty: a fine of \$5 000.

That is, the effect of the amendment was to replace ‘an enclosure’ with ‘a barrier’ to a private swimming pool. To avoid confusion and for consistency, throughout this report, the term ‘barrier’ is used.

## 6.2 Swimming pool barriers must comply with the requirements specified in the *Building Regulations 2012*

### 6.2.1 Legislative requirements

Regulation 50 of the *Building Regulations 2012* goes on to set out the circumstances in which a swimming pool barrier is considered to be suitable for restricting access by young children to the pool and its immediate surrounds. This includes requirements to comply with an applicable Building Code pool barrier requirement (for private swimming pools constructed after May 2016) and to comply with the requirements of AS 1926.1-1993 (for private swimming pools constructed before May 2016), as follows:

#### 50. Barrier to private swimming pool

...

- (1A) A barrier to a private swimming pool is to be taken to be suitable for the purposes of subregulation (1) if —
  - (a) it complies with a Building Code pool barrier requirement that was in effect —
    - (i) if a building permit applies to the construction of the pool — at the time the application for a building permit to construct the pool was made; or
    - (ii) otherwise — at the time the construction of the pool commenced; or
  - (b) the swimming pool is a pre-May 2016 private swimming pool and the barrier satisfies the requirements in paragraph (a) or complies with subregulations (2) to (5).
- (1B) For the purposes of subregulation (1A)(a), a performance solution cannot be used to comply with a Building Code pool barrier requirement unless the performance solution is an approved barrier solution.
- (2) The immediate surrounds of a pre-May 2016 private swimming pool that is at the rear of premises may include any part of the rear portion of the premises.
- (3) If a building other than a Class 10 building is included within the barrier to a pre-May 2016 private swimming pool all external doors and windows in that building must satisfy the requirements of AS 1926.1.

- (4) A barrier to a pre-May 2016 private swimming pool —
  - (a) may consist of a fence, wall, gate or other component, or a combination of them; and
  - (b) any fence, wall, gate or other component that is included in the barrier must be in accordance with —
    - (i) the requirements of AS 1926.1; or
    - (ii) approved alternative requirements; and
  - (c) any wall comprising part of the barrier must have no means of access through a building other than —
    - (i) a window that is in accordance with the requirements of AS 1926.1; or
    - (ii) an approved door.
- (5) If a boundary fence of the premises is a part of the barrier to a pre-May 2016 private swimming pool, the boundary fence satisfies the requirements of clauses 2.3, 2.6 and 2.7 of AS 1926.1 if all those requirements are satisfied in relation to either side of the fence.

The different requirements for pre-May 2016 and post-May 2016 private swimming pools reflect the *Building Amendment Regulations (No 2) 2016*, which came into operation on 1 May 2016. These amendments resulted in the adoption of the swimming pool barrier requirements of the Building Code of Australia. The (then) Department of Commerce summarised the effect of the amendments as follows:

The Amendment Regulations will:

- adopt the safety barrier requirements of the Building Code of Australia (BCA), and thus the 2012 edition of AS 1926.1 (Safety barriers for swimming pools) and 2007 edition of AS 1926.2 (Location of safety barriers for swimming pools) incorporating amendments nos 1 & 2, for new private swimming pools from 1 May 2016;
- allow existing private swimming pools to continue to comply with their existing requirements;
- optionally, allow existing private swimming pools to comply with the new requirements; and
- maintain the requirement that alternative solutions to a private swimming pool safety barrier must be approved by the relevant permit authority.

Once the Amendment Regulations come into effect, Western Australia will no longer have any variations to the BCA [Building Code Australia].<sup>160</sup>

At the time that information was collected for the Investigation, which was prior to 1 May 2016, AS 1926.1-1993 applied rather than the Building Code pool barrier

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<sup>160</sup> Government of Western Australia, Department of Commerce, *Building Amendment Regulations (No. 2) 2016 (swimming pool barriers)*, Industry Bulletin 067/2016, viewed 1 November 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/ib\\_067\\_building\\_amendment\\_regulations\\_n\\_o\\_2\\_2016.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/ib_067_building_amendment_regulations_n_o_2_2016.pdf)>.

requirement set out immediately above. Accordingly, the Office has examined local governments' inspections of swimming pool barriers against the requirements of AS 1926.1-1993, except where this was not relevant.

## 6.3 Local governments are to be advised of the existence of a private swimming pool through applications for building permits and notices of completion

### 6.3.1 Legislative requirements

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>161</sup>

An application for a building permit for a private swimming pool is usually made to the relevant local government (as the permit authority) by the owner of the premises, the swimming pool builder or sometimes a building surveyor (as the applicant). As part of the application process, a registered building surveyor is required to sign a certificate of design compliance stating that the proposed private swimming pool and its barrier will, upon their completion, comply with applicable standards.<sup>162</sup>

This certificate of design compliance may also specify the inspections that should be conducted after the work is completed. Section 19(3) and (4) of the *Building Act 2011* relevantly provide:

#### 19. Certificate of design compliance

...

- (3) A certificate must contain a statement of the building surveyor signing the certificate to the effect that if the building or incidental structure that is the subject of the application is completed in accordance with the plans and specifications that are specified in the certificate, the building (including each incidental structure associated with the building) or incidental structure will comply with each applicable standard.
- (4) A building surveyor may, in a certificate, specify such of the inspections and tests listed in regulations mentioned in section 36(2)(b) that the building surveyor thinks should be conducted during or at the completion of the building work.

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<sup>161</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.

<sup>162</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.

The local government, as the permit authority, assesses the application for the building permit, including the certificate of design compliance and, if it approves the application, grants the building permit.

Section 25(3)(h) of the *Building Act 2011* requires that the building permit issued by the local government must set out each inspection and test that is to be conducted during or at the completion of the building work, as follows:

**25. Form and content of building or demolition permit**

...

(3) A building permit must set out —

...

(h) each inspection and test that is to be conducted during or at the completion of the building work —

(i) as specified under section 19(4) in the applicable certificate of design compliance; or

(ii) under regulations mentioned in section 36(2)(a);

Section 37(1) of the *Building Act 2011* provides that the person who is named as the builder on the building permit must ensure that, on completion, the building or incidental structure (including a private swimming pool) complies with each applicable building standard, as follows:

**37. All buildings to comply with applicable building standards**

(1) The person who is named as the builder on a building permit must ensure, on completion of the building or incidental structure to which the permit applies, that the building or incidental structure complies with each applicable building standard.

Penalty:

(a) for a first offence, a fine of \$50 000;

(b) for a second offence, a fine of \$75 000;

(c) for a third or subsequent offence, a fine of \$100 000 and imprisonment for 12 months.

Section 33 of the *Building Act 2011* requires the responsible person (in relation to the building permit) to provide the local government with a notice of completion, accompanied by a copy of a certificate for each inspection or test that applies to the permit (**an inspection certificate**), within seven days of the completion of the building work, as follows:

**33. Notice of completion**

...

(2) 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.

- (3) A notice of completion must —
- (a) be in an approved form; and
  - (b) state that the work, or the stage of the work, for which the permit was granted, is completed; and
  - (c) be accompanied by a copy of a certificate for each inspection or test mentioned in section 25(3)(h) or (4)(f) that applies to the permit.

In this way, local governments are informed 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.

### 6.3.2 Guidelines

The new Department of Mines, Industry Regulation and Safety administers the *Building Act 2011* and the *Building Regulations 2012*, primarily through the Building Commissioner and the Building Commission Division. The (then) Department Commerce described the key functions of its Building Commission Division as follows:

#### Building Commission

- registers or licenses builders, painters, building surveyors, plumbers and construction contracts adjudicators;
- audits and inspects registered building service providers, investigates breaches of legislation and provides a dispute resolution service;
- sets and monitors standards for building and plumbing services;
- develops and provides industry policy and legislation; and
- provides information and advice for industry and consumers.<sup>163</sup>

The Building Commission has developed *Inspector Guidelines: Private swimming and spa pool*<sup>164</sup> (**the Inspector Guidelines**) to provide guidance for all local governments on their inspections of private swimming pool barriers. The *Inspector Guidelines* provide advice to local governments regarding:

- requirements for approving and issuing a building permit;
- requirements regarding notices of completion and inspection certificates;
- requirements for undertaking inspections, including:
  - inspectors as authorised persons;
  - entry to properties, obtaining consent or using assistance and force; and
  - charges to be imposed on owners;
- enforcement measures, including building orders, infringement notices and prosecution; and
- technical details of the applicable standards.

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<sup>163</sup> Government of Western Australia, Department of Commerce, *Annual Report 2014–15*, 2015, viewed 17 August 2016, <[www.commerce.wa.gov.au/sites/default/files/atoms/files/ar2014-15\\_print\\_friendly.pdf](http://www.commerce.wa.gov.au/sites/default/files/atoms/files/ar2014-15_print_friendly.pdf)>, p.14.

<sup>164</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)>.

With respect to notices of completion, the *Inspector Guidelines* state that a notice of completion, accompanied by an inspection certificate, should be provided to the permit authority, as follows:

At the completion of the work, the person named as builder on the building permit must provide the permit authority with a notice of completion (Building Commission form BA7) (*Building Act 2011* section 33). If the building permit listed the required inspection under regulation 28, this notice must be accompanied by an inspection certificate that confirms whether the safety barriers comply with the Regulations (*Building Act 2011* section 33(2)(c), *Building Regulations 2012* regulations 28 and 29).<sup>165</sup>

On 9 November 2016, the Building Commission also published an Industry Bulletin entitled *Notice of completion – inspections and tests*<sup>166</sup> which states:

The responsible person (builder named on the building permit) must give a notice of completion (BA7) in accordance with section 33 of the Act to the permit authority within seven (7) days of completion of the work or stage of work for which the permit was granted. **This establishes the end date of the permit which serves to record relevant compliance matters.**

The notice of completion must be accompanied by a copy of an inspection certificate for each inspection and test that applies to the building permit. It is the responsibility of the builder to organise the inspection certificate.<sup>167</sup> [Emphasis added]

### **6.3.3 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**

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.

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<sup>165</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.

<sup>166</sup> Government of Western Australia, Department of Commerce, Building Commission, 'Notice of completion – inspections and tests', *Industry Bulletin IB 072/2016*, Department of Commerce, Perth, 2016.

<sup>167</sup> Government of Western Australia, Department of Commerce, Building Commission, 'Notice of completion – inspections and tests', *Industry Bulletin IB 072/2016*, Perth, 2016, p. 1.

#### **6.3.4 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**

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.

In relation to this second purpose, in the absence of a notice of completion, the five selected local governments reported at interview that they:

- proactively follow up on outstanding notices of completion by contacting the owners by email or telephone and/or conducting aerial surveying, including checking aerial maps. This can occur within six to 12 months from the granting of the building permit, depending on the local government; or
- rely on neighbours informing the local government that a swimming pool has been installed.

Alternatively, one selected local government reported that they record the swimming pool in the local government's building records at the time that the building permit is issued rather than waiting for the notice of completion.

Notwithstanding these measures, the non-compliance with section 33 of the *Building Act 2011* reported by the five selected local governments, if accurate, creates the risk that the barriers to private swimming pools will not be inspected by the local government on time or at all.

#### **6.3.5 The Building Commissioner has a role to monitor and review the operation of the *Building Act 2011* and to take other steps**

The Building Commissioner's functions are set out in section 86 of the *Building Services (Complaint Resolution and Administration) Act 2011* as follows:

##### **86. Functions**

The Building Commissioner has the following functions —

- (a) to monitor developments relevant to the regulation of building services in the State;
- (b) to monitor and review the operation of the building service Acts;
- (c) to administer the Building Services Board and the operation of registration and approval schemes under the *Building Services (Registration) Act 2011*;
- (d) to administer the collection of the building services levy under Part 7 Division 2;
- (e) to promote and conduct research and training into building industry policy, building services and other matters that relate to the functions of

- the Building Commissioner;
- (f) to advise the Minister on any matter to which a building service Act relates;
  - (g) to provide information on the registration of registered building service providers or the approval of approved owner-builders;
  - (h) to provide, or facilitate the provision of, advice, information, education and training in relation to —
    - (i) building standards and codes; and
    - (ii) consumer protection in relation to building services;
  - (i) to audit the work and conduct of registered building service providers;
  - (j) to deal with complaints under this Act;
  - (k) to review and identify the causes of complaints and to suggest ways of removing or minimising those causes;
  - (l) to provide advice generally on any matter relating to complaints, and in particular —
    - (i) advice to the public on the making of complaints;
    - (ii) advice to the public on other avenues available for dealing with grievances about building services, registered building service providers or approved owner-builders;
    - (iii) advice about removing or minimising the causes of complaints;
  - (m) to perform any other function conferred on the Building Commissioner by this Act or another written law.

Section 3 of the *Building Services (Complaint Resolution and Administration) Act 2011* provides as follows:

***building service Act*** means any of the following —

- (a) this Act;
- (b) the *Building Act 2011*;
- (c) the *Building Services (Registration) Act 2011*;
- (d) the *Construction Contracts Act 2004*;
- (e) the *Home Building Contracts Act 1991*;
- (f) the *Plumbers Licensing Act 1995* Part 5A;
- (g) the *Local Government (Miscellaneous Provisions) Act 1960* Parts VIII, IX and XV;
- (h) any other enactment prescribed for the purposes of this definition;

### **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*.

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

### **6.4.1 The Office's approach to examining local governments' swimming pool barrier inspections**

During the Investigation, the Office analysed key aspects of the application of the *Building Act 2011* and the *Building Regulations 2012*<sup>168</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. The Office then requested certain records relating to the inspection of these swimming pool barriers (**the inspection records**) including:

- the date of the two most recent inspections of each swimming pool barrier (**the inspection history**);
- the outcomes of the most recent inspection;
- if applicable, the reasons for the swimming pool barrier not complying with the *Building Regulations 2012*; and
- the completed inspection form for the most recent inspection of each swimming pool barrier (**the inspection forms**).

In addition, through the local government survey, the Office also requested the following information from all local governments:

- the number of swimming pool barriers inspected, and the number of inspections conducted, by the local government from 1 July 2014 to 30 June 2015;
- the number of inspections that were overdue as at 30 June 2015;

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<sup>168</sup> The requirements for swimming pool barriers are discussed in detail at section 6.2 of this report.

- the number of infringements issued and prosecutions commenced by the local government from 1 July 2014 to 30 June 2015; and
- charges made for inspections as at 30 June 2015.

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. The Office's findings are discussed in detail below.

## 6.5 Number and timeliness of swimming pool barrier inspections

### 6.5.1 Legislative requirements

The responsibility for installing or providing a swimming pool barrier that meets the legislative requirements rests with '[e]ach owner and occupier of premises on which there is a private swimming pool containing water that is more than 300 mm deep' (regulation 50(1) of the *Building Regulations 2012*).

Regulation 53(1) of the *Building Regulations 2012*<sup>169</sup> requires local governments to arrange for an authorised person to inspect the barrier<sup>170</sup> to a private swimming pool 'at intervals of no more than 4 years', to ensure compliance with regulation 50, as follows:

#### 53. Inspection of barrier to private swimming pool

- (1) The local government for the district in which a private swimming pool containing water that is more than 300 mm deep is located must arrange for an authorised person to inspect the barrier to the private swimming pool at intervals of no more than 4 years for the purpose of monitoring whether the provisions in regulations 50 and 52<sup>171</sup> are being complied with.

Local governments are required to arrange for the inspection of swimming pool barriers that are located in a local government district specified in Schedule 5 of the *Building Regulations 2012*, as follows:

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<sup>169</sup> Amendments to the *Building Regulations 2012* took effect from 1 May 2016.

<sup>170</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>171</sup> Regulation 52 sets out the concessions for pre-November 2001 private swimming pools.

## 49. Application of this Division

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

The application of this Division, such that some swimming pool barriers are exempt from inspection, is discussed in more detail at section 9.4.

### 6.5.2 Guidelines

The *Inspector Guidelines* state that local governments are required to conduct an inspection of all private swimming pools (and their barriers) at intervals not exceeding four years, as follows:

The Regulations require each local government to cause all private swimming pools in non-exempt areas (Building Regulations 2012 regulation 49) to be inspected at intervals not exceeding four years (Building Regulations 2012 regulation 53(1)). The purpose of this inspection is to monitor whether legislation, codes, and standards, are being complied with in regards to the pool safety barriers.

Swimming pools that are not located in a local government district specified in Building Regulations 2012 – column 1 of the Table in Schedule 5, in the area specified for that district in column 2 of that Table, do not require a four yearly inspection ...<sup>172</sup>

### 6.5.3 From 1 July 2014 to 30 June 2015, 51,736 inspections of swimming pool barriers were conducted for 41,692 private swimming pools 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;

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<sup>172</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.

- 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.

In the local government survey, the Office also requested information about the number of swimming pools for which local governments had inspected the barrier between 1 July 2014 and 30 June 2015. The 86 local governments that reported that they had undertaken inspections between 1 July 2014 and 30 June 2015 reported that there were 140,510 swimming pools located in their districts (representing 97 per cent of the 144,899 swimming pools recorded across Western Australia). These 86 local governments reported that they had inspected the barriers of 41,692<sup>173</sup> swimming pools. This represents 29 per cent of the 144,899 swimming pools recorded across Western Australia. This percentage of inspections undertaken in one year indicates that, if continued over four years and across local governments, the barriers for all recorded swimming pools in Western Australia would be inspected in accordance with regulation 53(1) of the *Building Regulations 2012*.

The Office found that 39 of the 127 (31 per cent) local governments with swimming pools recorded as being located within their district had not conducted any inspections from 1 July 2014 to 30 June 2015. The Office reviewed the comments provided by the 138 survey respondents regarding possible reasons for this. The Office found that local governments arranged and conducted inspections of swimming pools using two approaches:

- (i) local governments with large numbers of swimming pools arranged and conducted inspections throughout a four year period; and
- (ii) local governments with fewer swimming pools arranged and conducted inspections at a single point in time within a four year period.

The second approach identified above is a possible reason why some local governments did not undertake any inspections during the survey period. This was supported by the Office's further analysis of the survey data, which identified that, of the 39 local governments that reported that they had conducted no inspections of swimming pool barriers from 1 July 2014 to 30 June 2015, 35 (90 per cent) had less than 100 swimming pools recorded as being located in their district.

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<sup>173</sup> Swimming pool barriers may be inspected on more than one occasion, therefore this number is not the same as the total number of inspections undertaken. The re-inspection of swimming pool barriers is discussed in detail at section 6.7.

**6.5.4 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**

**A child's voice<sup>174</sup>**

A child was visiting an adult's house. The child was able to access the swimming pool because of a defective gate latch. The child was found face down in the swimming pool, unresponsive. Resuscitation was commenced, but the child could not be revived.

The swimming pool had been due for an inspection by the local government before the drowning occurred, however this inspection had not yet occurred. The barrier of the pool, including the gate latch, had been found to be compliant at previous inspections. However, after the drowning occurred, the local government undertook an inspection of the barrier and identified the gate latch was not compliant, along with other compliance issues.

The Office requested a list from the five selected local governments of all private swimming pools that were due for an inspection from 1 July 2014 to 30 June 2015.<sup>175</sup> From these lists, at each of the five selected local governments, the Office randomly identified 100 swimming pools. The Office collected the swimming pool inspection records of each of the 500 swimming pools including, where available:

- records of the most recent inspection and records of previous inspections; and
- associated inspection forms.

The Office then 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. As summarised in Figure 39, the Office found that:

- City of Canning - all 100 selected swimming pool barriers were inspected or visited at some time. Eight (eight per cent) were barriers to new swimming pools and the inspection form recorded their first inspection. Of the remaining 92 swimming pool barriers:
  - 11 (12 per cent) were inspected within four years of the previous inspection;

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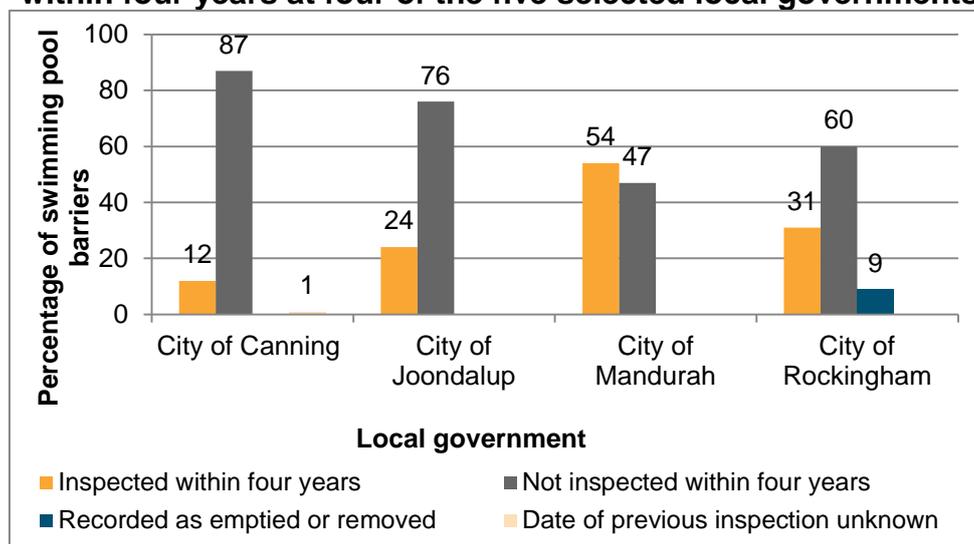
<sup>174</sup> This case study is drawn from deaths notified to the Ombudsman's office. Each child's death is tragic and the Office endeavours to ensure that every child can be given a voice in its investigations. In doing so, the Office wishes to show respect to the child that has died and the child's family, as well as represent the child's voice in a way that may assist in preventing other child deaths. As part of this respect it is critical that names and other identifying information have been removed or changed.

<sup>175</sup> The Office identified that the five selected local governments had a total of 43,406 (30 per cent) of the total swimming pools in Western Australia).

- 80 (87 per cent) had not been inspected within four years of the previous inspection; and
- one (one per cent) was inspected but the date of inspection was not available (as it had been overwritten by the date of a newly installed swimming pool).
- City of Joondalup - all 100 selected swimming pool barriers were inspected at some time. Seven (seven per cent) were barriers to new swimming pools and the inspection form recorded their first inspection. Of the remaining 93 swimming pool barriers:
  - 22 (24 per cent) were inspected within four years of the previous inspection; and
  - 71 (76 per cent) were not inspected within four years of the previous inspection.
- City of Mandurah - all 100 selected swimming pool barriers were inspected at some time. Twenty nine (29 per cent) were barriers to new swimming pools and the inspection form recorded their first inspection. Of the remaining 71 swimming pool barriers:
  - 38 (54 per cent) were inspected within four years of the previous inspection; and
  - 33 (46 per cent) were not inspected within four years of the previous inspection.
- City of Rockingham - 99 of the 100 selected swimming pools were inspected or visited at some time. Of these 99 swimming pool barriers:
  - 31 (31 per cent) were inspected within four years of the previous inspection;
  - nine (9 per cent) had been visited within four years of a previous inspection and the swimming pool was found to be emptied or removed, and accordingly the inspection did not proceed; and
  - 59 (60 per cent) were not inspected within four years of the previous inspection.
- City of Bayswater - could not provide a list of swimming pool barriers that were due for inspection between 1 July 2014 and 30 June 2015. At the time of the Investigation, the City of Bayswater maintained a list of swimming pools with a field to record the date of the 'last or due inspection'. That is, once an inspection was undertaken, the City of Bayswater recorded the date the inspection was undertaken over the top of the date that the inspection was due. The Office randomly selected 100 swimming pools that the City of Bayswater had recorded as having barriers that were 'last or due inspection' between 1 July 2014 and 30 June 2015. The Office found that, of these 100 swimming pools, 86 swimming pool barriers had been inspected. However, as the City of Bayswater had overwritten the date that the inspection was due (if the inspection had been undertaken), and the City did not separately record the date of the previous inspection, the Office could not determine whether these 86 inspections had been undertaken within four years of the previous inspection.

In summary, 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.

**Figure 39: Percentage of swimming pool barriers inspected within four years at four of the five selected local governments**



Source: Ombudsman Western Australia

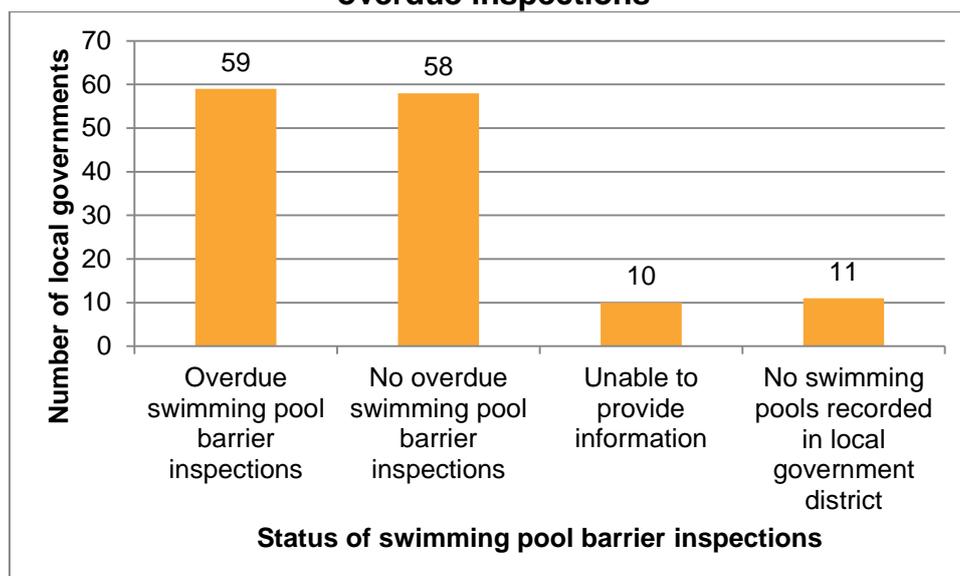
Note: Percentages do not add to 100 due to rounding.

Since the Investigation was concluded, all five selected local governments reported that they have taken steps to ensure that all swimming pool barriers that were due for inspection have been inspected.

### 6.5.5 Forty-three per cent of the 138 survey respondents self-reported having overdue inspections at 30 June 2015, with the percentage of overdue inspections ranging up to 100 per cent

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 local governments reported that there were a total of 8,639 swimming pools that were overdue for inspection at 30 June 2015. Of the 138 survey respondents:

- 59 (43 per cent) local governments reported having overdue inspections at 30 June 2015;
- 58 (42 per cent) local governments reported having no overdue inspections at 30 June 2015;
- 10 (7 per cent) local governments did not know the number of overdue inspections at 30 June 2015; and
- 11 (8 per cent) local governments reported having no swimming pools within their district (Figure 40).

**Figure 40: Number of local governments that self-reported having overdue inspections**

Source: Ombudsman Western Australia

The Office further analysed the local government survey responses to determine the regions in which local governments with overdue inspections were located and the percentage of overdue inspections within local governments. To undertake this analysis, the Office applied the categorisation of 'Metropolitan' and 'Other regions' defined in Schedules 3, 4 and 5 of the *Planning and Development Act 2005*. As identified in Chapter 5 of this report, those regions defined as 'Other regions' in Schedule 4 of the *Planning and Development Act 2005* are referred to as 'non-metropolitan' regions in this report.

The Office found that, of the 30 metropolitan local governments:

- 14 (47 per cent) local governments reported having overdue inspections at 30 June 2015;
- 13 (43 per cent) local governments reported having no overdue inspections at 30 June 2015; and
- three (10 per cent) local governments reported that they did not know the number of overdue inspections at 30 June 2015 (Figure 41).

In summary, and as shown in Figure 41 below, for the 15 metropolitan local governments with reported overdue inspections at 30 June 2015, the percentage of overdue inspections ranged from 0.1 per cent in the City of Melville to 70.6 per cent in the City of South Perth.

**Figure 41: Number and percentage of overdue inspections self-reported by metropolitan local governments**

Local government	Number of recorded swimming pools at 30 June 2015	Number of inspections self-reported as overdue at 30 June 2015	Percentage of inspections self-reported as overdue at 30 June 2015
City of Armadale	4,794	23	0.5
City of Canning	6,186	120	1.9
City of Cockburn	6,688	188	2.8
The (then) Shire of Kalamunda <sup>176</sup>	6,290	2,360	37.5
City of Kwinana	1,645	20	1.2
City of Melville	9,640	7	0.1
Town of Mosman Park	746	55	7.4
Shire of Serpentine-Jarrahdale	1,681	562	33.4
City of South Perth	2,157	1,522	70.6
City of Stirling	10,499	34	0.3
City of Subiaco	706	3	0.4
City of Swan	3,773	1,174	31.1
Town of Victoria Park	697	23	3.3
City of Vincent	559	110	19.7

Source: Ombudsman Western Australia

The Office found that, of the 108 non-metropolitan local governments:

- 45 (42 per cent) local governments reported having overdue inspections at 30 June 2015;
- 45 (42 per cent) local governments reported having no overdue inspections at 30 June 2015;
- seven (six per cent) local governments did not know the number of overdue inspections within their district at 30 June 2015; and
- 11 (10 per cent) local governments reported that they had no swimming pools within their district (Figure 42).

In summary, and as shown in Figure 42 below, for the 45 non-metropolitan local governments with reported overdue inspections at 30 June 2015, the percentage ranged from 1.3 per cent in the City of Karratha to 100 per cent in 11 non-metropolitan local governments.

<sup>176</sup> Kalamunda was designated as a City as of 1 July 2017.

**Figure 42: Number and percentage of overdue inspections self-reported by non-metropolitan local governments**

Local government	Number of recorded swimming pools at 30 June 2015	Number of inspections self-reported as overdue at 30 June 2015	Percentage of inspections self-reported as overdue at 30 June 2015
Shire of Ashburton	528	16	3
Shire of Boyup Brook	13	1	7.7
Shire of Bridgetown-Greenbushes	41	2	4.9
Shire of Broome	1,446	483	33.4
Shire of Broomehill-Tambellup	24	24	100
City of Bunbury	1,412	34	2.4
Shire of Chapman Valley	94	75	79.8
Shire of Cocos (Keeling) Islands	2	2	100
Shire of Collie	318	6	1.9
Shire of Cuballing	28	1	3.6
Shire of Dalwallinu	44	12	27.3
Shire of Denmark	25	6	24
Shire of Derby-West Kimberley	106	80	75.5
Shire of Donnybrook-Balingup	161	15	9.3
Shire of Dundas	6	6	100
Shire of East Pilbara	373	5	1.3
Shire of Gnowangerup	11	11	100
City of Greater Geraldton	1,747	312	17.9
City of Kalgoorlie-Boulder	2,341	437	18.7
City of Karratha	1,658	21	1.3
Shire of Katanning	116	58	50
Shire of Kellerberrin	23	23	100
Shire of Kojonup	86	46	53.5
Shire of Koorda	25	21	84
City of Mandurah	4,423	261	5.9
Shire of Merredin	104	41	39.4
Shire of Moora	104	20	19.2
Shire of Nannup	35	15	42.9
Shire of Narrogin	20	20	100
Shire of Northam	500	61	12.2
Shire of Northampton	124	7	5.6
Shire of Perenjori	6	6	100
Town of Port Hedland	866	48	5.5
Shire of Shark Bay	7	6	85.7
Shire of Three Springs	8	8	100
Shire of Toodyay	72	6	8.3
Shire of Trayning	2	2	100
Shire of Victoria Plains	15	12	80
Shire of Wagin	71	71	100
Shire of Wandering	16	10	62.5
Shire of Waroona	148	38	25.7
Shire of West Arthur	2	1	50
Shire of Williams	9	9	100
Shire of Wyndham-East Kimberley	260	74	28.5
Shire of Yilgarn	27	25	92.6

Source: Ombudsman Western Australia

In summary, the Office found that a significant number of local governments have, or self-reported to have, overdue inspections. Based on the findings of both the Office's analysis of the five selected local governments' inspection records and the local government survey, it is imperative that all local governments review their records to identify swimming pool barriers that are overdue for inspection and undertake these inspections as a matter of priority.<sup>177</sup>

As discussed at section 6.5.4, 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. Since the conclusion of the Investigation, all five selected local governments reported that they have taken steps to ensure that all swimming pool barriers that were due for inspection have been inspected. Having done this, it is also critical that all local governments ensure that future inspections of swimming pool barriers are undertaken on a four yearly basis, in compliance with regulation 53(1) of the *Building Regulations 2012*.

Section 86(b) of the *Building Services (Complaint Resolution and Administration) Act 2011* set out at section 6.3.5 provides the Building Commissioner with the powers to 'to monitor and review the operation of the building service Acts', including the *Building Act 2011*. Additionally, section 132 of the *Building Act 2011* provides that:

**132. Provision of information to Building Commissioner**

- (1) A permit authority must give the Building Commissioner prescribed information for inclusion in the annual report submitted under *the Financial Management Act 2006* Part 5 by the accountable authority, as defined in section 3 of that Act, of the Department as defined in the *Building Services (Complaint Resolution and Administration) Act 2011* section 3.
- (2) The Building Commissioner may, for the purposes of performing the Commissioner's functions under the *Building Services (Complaint Resolution and Administration) Act 2011*, request a permit authority to provide to the Commissioner —
  - (a) a record kept by the permit authority under section 130; or
  - (b) other information of a prescribed kind that is relevant to the functions of the permit authority under this Act or the functions of the Commissioner.

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<sup>177</sup>For example, and very pleasingly, the City of Greater Geraldton informed the Office of the following: "Since 30 June 2015 the City has reduced the number of overdue pool inspections from 312 to zero by having a dedicated team to achieving this end.", City of Greater Geraldton, personal communication, 11 October 2017.

- (3) A permit authority that is a special permit authority or a local government must provide a record or information requested under subsection (2) to the Building Commissioner in the prescribed manner.
- (4) Information to be given under this section must be given in a format approved by the Building Commissioner.

Regulation 14 of the *Building Regulations* provides that:

**14. Provision of information to Building Commissioner (s. 132)**

- (1) For the purposes of section 132(1) a permit authority must give the Building Commissioner the following information, in respect of the period covered by an annual report —
  - (a) the number of building permits, demolition permits and occupancy permits granted by the permit authority;
  - (b) the number of building approval certificates granted by the permit authority;
  - (c) the total estimated value of building work for which building permits were granted by the permit authority;
  - (d) the number of building orders made by the permit authority;
  - (e) the number of prosecutions for an offence against the Act commenced by the permit authority;
  - (f) the number and outcome of prosecutions commenced by the permit authority that have been finalised in the period.
- (2) For the purposes of section 132(3) information requested under section 132(2) must be provided to the Building Commissioner electronically.

**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.

6.5.5.1 *Sound record keeping systems are necessary to ensure local governments compliance with the Building Regulations 2012*

In undertaking fieldwork with the five selected local governments, the Office observed their record keeping arrangements, which varied from an up to date electronic register of private swimming pools and the inspection history of their barriers, to orderly files of hard copies of inspection forms, to files of inspection forms stored by date, with no link to the owner or address of the swimming pool, impeding access to the inspection history. In addition, in the local government survey, respondents also expressed the view that errors can occur with swimming pools 'dropping off' the local government's records.

Given that regulation 53(1) requires local governments to arrange for inspections of swimming pool barriers 'at intervals of no more than 4 years', it is important that local governments maintain a records management system that will enable them to schedule and monitor these inspections.<sup>178</sup> In this regard, the Office notes that section 128(1) of the *Building Act 2011* provides that local governments must keep a register of all building permits (this includes building permits obtained for swimming pools but may be distinct from the local governments' swimming pool register). Section 128(2) further provides that the register of building permits must be kept in an approved manner and form:

**128. Register of permits, building approval certificates, building orders**

- (1) A permit authority must keep a register of all building permits, demolition permits, occupancy permits and building approval certificates granted by it, and all building orders made by it.
- (2) The register must be kept in an approved manner and form.

Regulation 4 of the *Building Regulations 2012* provides that the Building Commissioner is a person who may approve the manner and form in which a register is to be kept, pursuant to section 128(2) of the *Building Act 2011* as follows:

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<sup>178</sup> Record keeping is provided for, and also regulated by, the *State Records Act 2000*.

#### 4. Approval of manner or form of things (s. 3)

For the purposes of paragraph (a) of the definition of **approved** in section 3 the Building Commissioner is a person who may approve the things set out in the Table.

**Table**

Section	Description
s. 16(a)	The manner and form of an application for a building permit or a demolition permit
s. 19(2)	The form of a certificate of design compliance
s. 25(1)	The form of a building permit or a demolition permit
s. 33(2)(a)	The form of a notice of completion
s. 34(2)(a)	The form of a notice of cessation
s. 39(8)	The manner and form of an application for a declaration
s. 54(1)(a)	The manner and form of an application for an occupancy permit or a building approval certificate
s. 56(1)	The form of a certificate of construction compliance
s. 57(1)	The form of a certificate of building compliance
s. 61(1)	The form of an occupancy permit or modification or a building approval certificate
s. 65(2)(a)	The manner and form of an application to extend the period of duration of certain occupancy permits or building approval certificates
s. 85(1)(a)	The form of a notice about effect on other land
s. 85(1)(i)	The form of a response notice to accompany a notice about effect on other land
s. 110(2)	The form of a building order
s. 128(2)	The manner and form in which a register is to be kept

In summary, the Office observed variability in the effectiveness of local government record management systems. The key elements in any record management system relating to swimming pools and their barriers should include, but not be limited to:

- the name of the owner;
- the address of the swimming pool;
- the date the swimming pool was submitted for approval and was approved for construction;
- the associated building permit number;
- the date the notice of completion was provided, including the date of the inspection certificate;
- the dates and outcome of any previous inspections; and
- the date the next inspection is due.

A centrally located electronic register, maintained by the Building Commission, could be considered but such an option is likely to be more costly (without sufficient countervailing benefits) than the otherwise less costly option of guidance, instruction and information.

### **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.

## **6.6 Outcomes of initial inspections of swimming pool barriers**

### **6.6.1 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**

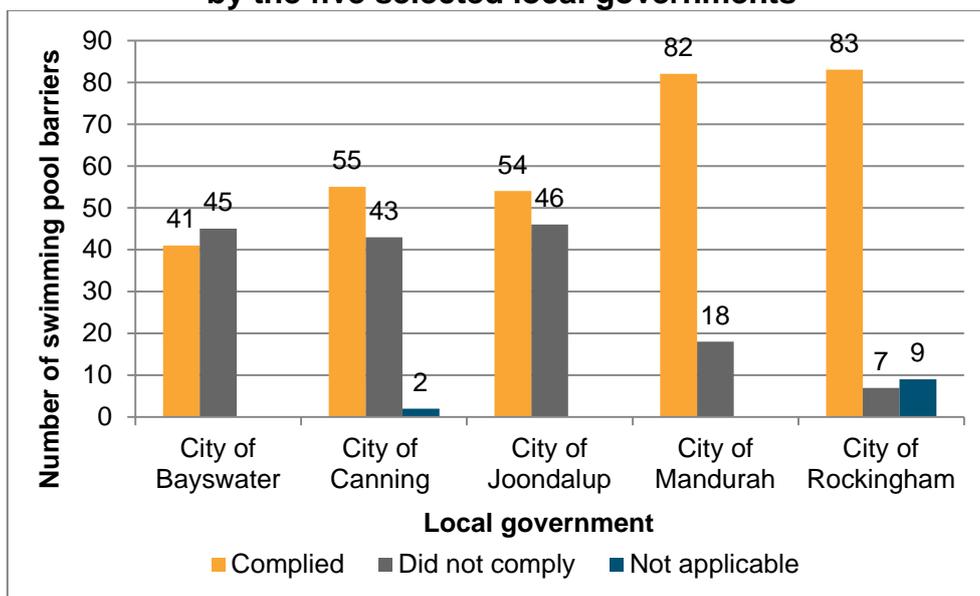
In each four yearly inspection, the local government is required to inspect the barrier to determine if the swimming pool complies with the *Building Regulations 2012* (**initial inspection**). The Office analysed the inspection records of the 500 randomly selected private swimming pools to determine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

On a local government by local government basis, as shown in (Figure 43), the Office found that, where the local government had undertaken an initial inspection or visit (a total of 485 private swimming pool barriers):

- City of Bayswater - of the 86 swimming pool barriers inspected, 41 (48 per cent) were found to comply;
- City of Canning - of the 100 swimming pool barriers inspected, two were barriers to private swimming pools that had been emptied or removed, so the inspection did not proceed further. Of the remaining 98 swimming pool barriers inspected, 55 (56 per cent) were found to comply;
- City of Joondalup - of the 100 swimming pool barriers inspected, 54 (54 per cent) were found to comply;
- City of Mandurah - of the 100 swimming pool barriers inspected, 82 (82 per cent) were found to comply; and
- City of Rockingham - of the 99 swimming pool barriers inspected, nine were barriers to private swimming pools that had been emptied or removed, so the inspection did not proceed further. Of the remaining 90 swimming pool barriers inspected, 83 (92 per cent) were found to comply.

**Figure 43: Number of swimming pool barriers found to comply with the *Building Regulations 2012* on initial inspection, by the five selected local governments**



Source: Ombudsman Western Australia

In summary, the Office found that, at initial inspection, the number of swimming pool barriers inspected by each of the five selected local governments that were found to comply with the *Building Regulations 2012* ranged from 41 to 83. 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 these 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 the 72 local governments was 55 per cent.

The Office's findings are consistent with research undertaken by RLSSWA, relating to swimming pools that were inspected between 2004 and 2007. RLSSWA identified that the percentage of Western Australian swimming pool barriers that were found to be compliant at initial inspection at five local governments across a broad cross-section of Western Australia, ranged from 53 per cent to 94 per cent of swimming pool barriers inspected.<sup>179</sup>

Strategies for addressing this non-compliance with the *Building Regulations 2012* on initial inspection are discussed in Chapter 8.

<sup>179</sup> Leaversuch, P, and Zic, M, *Home Swimming Pools Barrier Report 2004-2007*, Royal Life Saving Society Australia, Perth, Western Australia, 2008, p. 9.

### 6.6.2 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. Figure 44 lists the most common reasons for a barrier being found not to comply as including:

- 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).

**Figure 44: Reasons for swimming pool barriers being found not to comply with *Building Regulations 2012* during initial inspections**

Reason recorded by the local government	Number of instances this reason recorded
Gate not self-closing/self-latching	67
Window opens >100mm	44
Door not self-closing/self-latching	44
Fence climbable	28
Climbable objects	24
Gap underneath fence/gate >100mm	25
Door latch <1500mm above ground level	15
Gate height/gate latch height <1500mm above ground level	14
Fence height <1500mm above ground level	13
Gate climbable	10
Gate opens/closes incorrectly	8
Incomplete permanent barrier/missing fence panels	7
Skimmer box unsealed	2
Door not permitted	2
Other	12
<b>Total</b>	<b>315</b>

Source: Ombudsman Western Australia

The Office's findings are consistent with the findings of *An Independent Review of Swimming Pool Barrier Requirements for Backyard Swimming Pools in NSW, Discussion Paper, September 2015 (the Independent Review Discussion Paper)*, which identified similar reasons for non-compliance, as follows:

Common factors leading to pools being non-compliant with pool safety requirements include:

- Gates that do not latch or self-close
- Climbable objects within close proximity to the pool barrier
- Excess space under the fence
- Faults with the location or shielding of the gate latch ...<sup>180</sup>

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

#### **A child's voice<sup>181</sup>**

A child was found floating face up, submerged, in the swimming pool and although immediately pulled from the swimming pool, and cardiopulmonary resuscitation undertaken, the child died.

The swimming pool was installed prior to November 2001. At the time of completion, the swimming pool met Australian Standard AS 1926.1-1993 barrier requirements and a barrier between the house and the swimming pool was not required as the doors and windows from the home were self-closing and self-latching. At the last swimming pool inspection, the local government identified two issues of compliance that needed to be rectified. A re-inspection took place a month later and confirmed that the two issues had been resolved and that, at that time, the pool was found to be compliant.

The self-closing door, although compliant, had trapped an adult's fingers on multiple occasions and, concerned that this would happen to the child, had been disconnected by the adult a few months after the inspection took place to prevent any injury to the child's fingers.

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 not to comply with the *Building Regulations 2012* at initial inspection. The Office identified that 61 of the 315 reasons (19 per cent) for a barrier not to comply were associated with the barrier

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<sup>180</sup> Lambert, M, *Independent Review of NSW Swimming Pool Barrier Requirements: Discussion Paper*, 2015, viewed 10 August 2016, <<https://www.olg.nsw.gov.au/sites/default/files/Independent-Review-of-NSW-Swimming-Pool-Barrier-Requirements-Discussion-Paper-2015.pdf>>, p. 8.

<sup>181</sup> This case study is drawn from deaths notified to the Ombudsman's office. Each child's death is tragic and the Office endeavours to ensure that every child can be given a voice in its investigations. In doing so, the Office wishes to show respect to the child that has died and the child's family, as well as represent the child's voice in a way that may assist in preventing other child deaths. As part of this respect it is critical that names and other identifying information have been removed or changed.

being a 'three-sided barrier' (that is 'there is restricted access via a ... door from the house to the pool'),<sup>182</sup> as follows:

- door not self-closing/self-latching: 44 instances (14 per cent);
- door latch less than 1500mm above ground level: 15 instances (4.7 per cent); and
- door not permitted: two instances (0.6 per cent).

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 AS 1926.1-1993. That is, for these swimming pools, the swimming pool barrier may consist of a barrier or fence and the sides of the house, if any door satisfies the requirements of AS 1926.1-1993. A barrier constructed in this way is often referred to as a 'three sided barrier'.

This concession is established through regulation 52 of the *Building Regulations 2012*, which provides:

**52. Concessions for pre-November 2001 private swimming pools**

- (1) This regulation applies to a private swimming pool —
  - (a) installed before 5 November 2001; or
  - (b) installed on or after 5 November 2001 in accordance with plans, drawings and specifications submitted to the local government for approval before that day.
- (2) For the purposes of regulation 50(1), the immediate surrounds of a private swimming pool to which this regulation applies may include any part of the premises on which the pool is located.
- (3) The barrier required by regulation 50 may include a wall that contains a door permitting access through a building if that door satisfies the requirements of AS 1926.1.

This concession for swimming pools installed prior to 5 November 2001 also applied at the time of the Investigation.

As discussed in section 4.2.3, previous Coroner's findings suggest that four-sided barriers are more effective than three-sided barriers in preventing children drowning. Research in Queensland and New South Wales suggests that four-sided swimming pool barriers are more effective than three-sided swimming pool barriers in preventing children drowning as highlighted below.

Queensland research reviewed children aged between one and four years who died in swimming pools and found that the relative risk for children aged between one to four

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<sup>182</sup> Barker, R, Spinks, D, Hockey, R, and Pitt, R. *Pool Fencing Legislation in Australia in 2003: The Way Forward*, 2003, p. 2.

years (toddlers) who died by drowning, accessing a swimming pool through a house door than a pool gate was 2.99 times higher, as follows:

... for barriers that failed static compliance, the relative risk of fatal toddler access to the pool via a house door compared to a pool gate was 2.88. Considering compliant and non-compliant barriers together, the relative risk of fatal toddler access to a pool through a house door versus a pool gate was 2.99. This suggests that even when not fully functional, a barrier that separates the house from the pool is more effective at preventing toddler immersion death than a barrier that allows direct toddler access.<sup>183</sup>

The Independent Review Discussion Paper also examined the Queensland research and observed that there was a significantly higher risk of drowning and near drowning with three-sided barriers than four-sided pool barriers, as follows:

The review [2009 Review of the Swimming Pool Act] examined a range of studies that considered the effectiveness of four sided relative to three sided pool barriers. All studies found that there was a significantly higher risk of drownings and near drownings with three sided barriers relative to four sided barriers.<sup>184</sup>

However, the Independent Review Discussion Paper suggested that property owners who chose to install a four-sided barrier may also be highly conscientious and therefore undertake the most effective supervision, decreasing the risk of children drowning in swimming pools with four-sided barriers, as follows:

Of course this need not reflect the relative merits of the barriers but could correlate with another factor such as the conscientiousness of the property owner with respect to pool safety. A highly conscientious owner could both select the highest standard pool barriers and undertake the most effective supervision.<sup>185</sup>

The Queensland Government conducted a review 'focusing on reducing the number of drownings and serious immersion injuries in swimming pools involving children less than five years of age'<sup>186</sup> in 2008. As a result of this review, in 2010 the Queensland Government implemented a pool safety strategy including amendments to the swimming pool safety laws mostly affecting existing swimming pools, including:

a five-year phase out of child-resistant doors used as pool barriers for existing outdoor pools, or earlier if the property is sold or a lease or other accommodation agreement is entered into prior to 30 November 2015.<sup>187</sup>

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<sup>183</sup> Barker, R, Heiring, C, Spinks, D, Pitt, R, 'Domestic Pool Immersions in Queensland Children under 5 years of age'. *Queensland Injury Surveillance Unit Injury Bulletin*, No 104, December 2008, viewed 2 December 2016, <[http://www.qisu.org.au/ModCoreFilesUploaded/Bulletin\\_10486.pdf](http://www.qisu.org.au/ModCoreFilesUploaded/Bulletin_10486.pdf)>, p. 5.

<sup>184</sup> Lambert, M, *Independent Review of NSW Swimming Pool Barrier Requirements: Discussion Paper*, 2015, viewed 10 August 2016, <<https://www.olg.nsw.gov.au/sites/default/files/Independent-Review-of-NSW-Swimming-Pool-Barrier-Requirements-Discussion-Paper-2015.pdf>>, p. 8, based on research by Barker et al, Pool fencing legislation in Australia in 2003: *The way forward*, Queensland Injury Surveillance Unit, p. 5.

<sup>185</sup> Lambert, M, *Independent Review of NSW Swimming Pool Barrier Requirements: Discussion Paper*, 2015, viewed 10 August 2016, <<https://www.olg.nsw.gov.au/sites/default/files/Independent-Review-of-NSW-Swimming-Pool-Barrier-Requirements-Discussion-Paper-2015.pdf>>, p. 8.

<sup>186</sup> Queensland Government, *Building Industry and Policy, Guidelines for pool owners and property agents*, October 2015, p6.

<sup>187</sup> Queensland Government, *Building Industry and Policy, Guidelines for pool owners and property agents*, October 2015, p6.

In summary, the findings of the Investigation set out in this report, the Coroner's findings, and the research literature all identify that four-sided swimming pool barriers are more effective than three-sided swimming pool barriers in preventing children from drowning. In addition, the Queensland Government has acted to phase out child resistant doors used as swimming pool barriers.

### **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.

## **6.7 Re-inspections of swimming pool barriers**

### **6.7.1 Legislative requirements**

As previously identified, regulation 53(1) of the *Building Regulations 2012* requires local governments to arrange for an authorised person to inspect the barrier to a private swimming pool at intervals of no more than four years, as follows:

#### **53. Inspection of barrier to private swimming pool**

- (1) The local government for the district in which a private swimming pool containing water that is more than 300 mm deep is located must arrange for an authorised person to inspect the barrier to the private swimming pool at intervals of no more than 4 years for the purpose of monitoring whether the provisions in regulations 50<sup>188</sup> and 52<sup>189</sup> are being complied with.

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.

### **6.7.2 Guidelines**

The *Inspector Guidelines* recognise that there is no legislative requirement to undertake re-inspections of swimming pool barriers, stating however that '[i]t is commonplace for the pool inspector to re-inspect a non-compliant safety barrier to ensure compliance has been achieved.'<sup>190</sup>

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<sup>188</sup> Regulation 50 prescribes the requirement for the installation or provision of a barrier around a private swimming pool.

<sup>189</sup> Regulation 52 sets out the concessions for pre-November 2001 private swimming pools.

<sup>190</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, p. 8.

### **6.7.3 The five selected local governments re-inspected 81 per cent of the swimming pool barriers that did not comply with the *Building Regulations 2012* on initial inspection and this proved to be an effective tool for increasing compliance**

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, 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), as follows:

- City of Bayswater - 24 of the 45 (53 per cent) swimming pool barriers that did not comply on initial inspection were re-inspected at least once;
- City of Canning - all of the 43 (100 per cent) swimming pool barriers that did not comply on initial inspection were re-inspected at least once;
- City of Joondalup - all of the 46 (100 per cent) swimming pool barriers that did not comply on initial inspection were re-inspected at least once;
- City of Mandurah - nine of the 18 (50 per cent) swimming pool barriers that did not comply on initial inspection were re-inspected at least once; and
- City of Rockingham - six of the seven (86 per cent) swimming pool barriers that did not comply on initial inspection were re-inspected at least once.

The Office undertook further analysis to determine whether the re-inspections resulted in compliance with the *Building Regulations 2012*. As shown in Figure 45 below, the City of Canning re-inspected all barriers that did not comply on initial inspection, and compliance was ultimately achieved for all swimming pools that were found not to comply at initial inspection. The other four selected local governments did not achieve compliance for all swimming pool barriers that did not comply at initial inspection, through the re-inspection process. For example, the City of Mandurah re-inspected half of the swimming pools that did not comply on initial inspection, and compliance was achieved for 44 per cent of swimming pools that were found not to comply on initial inspection. Overall, the Office found that the re-inspection process increased the percentage of private swimming pools that ultimately complied with the *Building Regulations 2012*.

**Figure 45: Swimming pool barriers inspected and re-inspected, and the outcome of those inspections, by the five selected local governments**

<b>City of Bayswater</b>				
	<b>Number of swimming pool barriers inspected or re-inspected</b>	<b>Number of swimming pool barriers that complied at this inspection/re-inspection</b>	<b>Number of swimming pool barriers that did not comply at this inspection/re-inspection</b>	<b>Percentage of swimming pool barriers that were non-compliant at this inspection that were re-inspected</b>
Initial inspection	86	41	45	52%
First re-inspection	24	20	4	53%
Second re-inspection	3	3	0	75%
<b>Outcome: 51 per cent of swimming pools found not to comply at initial inspection were found to comply after the second re-inspection</b>				

<b>City of Canning</b>				
	<b>Number of swimming pool barriers inspected or re-inspected</b>	<b>Number of swimming pool barriers that complied at this inspection/re-inspection</b>	<b>Number of swimming pool barriers that did not comply at this inspection/re-inspection</b>	<b>Percentage of swimming pool barriers that were non-compliant at this inspection that were re-inspected</b>
Initial inspection	98	55	43	44%
First re-inspection	43	32	11	100%
Second re-inspection	11	11	0	100%
<b>Outcome: 100 per cent of swimming pools found not to comply at initial inspection were found to comply after the second re-inspection</b>				

<b>City of Joondalup</b>				
	<b>Number of swimming pool barriers inspected or re-inspected</b>	<b>Number of swimming pool barriers that complied at this inspection/ re-inspection</b>	<b>Number of swimming pool barriers that did not comply at this inspection/ re-inspection</b>	<b>Percentage of swimming pool barriers that were non-compliant at this inspection that were re-inspected</b>
Initial inspection	100	54	46	46%
First re-inspection	46	30	16	100%
Second re-inspection	16	9	7	100%
<b>Outcome: 85 per cent of swimming pools found not to comply at initial inspection were found to comply after the second re-inspection</b>				

<b>City of Mandurah</b>				
	<b>Number of swimming pool barriers inspected or re-inspected</b>	<b>Number of swimming pool barriers that complied at this inspection/ re-inspection</b>	<b>Number of swimming pool barriers that did not comply at this inspection/ re-inspection</b>	<b>Percentage of swimming pool barriers that were non-compliant at this inspection that were re-inspected</b>
Initial inspection	100	82	18	18%
First re-inspection	9	8	1	50%
Second re-inspection	1	0	0	100%
<b>Outcome: 44 per cent of swimming pools found not to comply at initial inspection were found to comply after the second re-inspection</b>				

<b>City of Rockingham</b>				
	<b>Number of swimming pool barriers inspected or re-inspected</b>	<b>Number of swimming pool barriers that complied at this inspection/ re-inspection</b>	<b>Number of swimming pool barriers that did not comply at this inspection/ re-inspection</b>	<b>Percentage of swimming pool barriers that were non-compliant at this inspection that were re-inspected</b>
Initial inspection	90	83	7	8%
First re-inspection	6	6	0	86%
Second re-inspection	0	0	0	N/A
<b>Outcome: 86 per cent of swimming pools found not to comply at initial inspection were found to comply after the second re-inspection</b>				

Source: Ombudsman Western Australia

#### **6.7.4 Seventy-three per cent of the 138 survey respondents that reported the number of initial inspections they had undertaken, reported that they had also undertaken re-inspections**

As discussed at section 6.6.1, 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 these 75 local governments, 72 local governments were able to report on how many swimming pool barriers were found to be compliant with the *Building Regulations 2012* at initial inspection. These 72 local governments reported that they had undertaken 26,405 initial inspections and that 13,358 (51 per cent) of these swimming pool barriers were found to comply at the initial inspection, and 13,047 swimming pool barriers were found not to comply.

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

Chapter 8 of this report explores this issue further in the context of enforcement of regulation 50(1) of the *Building Regulations 2012*.

## 6.8 Inspection fees

### 6.8.1 Legislative requirements

Regulation 53(2) of the *Building Regulations 2012* enables a local government to fix a charge for the inspection of a private swimming pool barrier, as follows:

#### 53. Inspection of barrier to private swimming pool

...

- (2) A local government may, for a financial year, fix the charge to be imposed on each owner or occupier of land on which there is a private swimming pool containing water that is more than 300 mm deep, to meet the estimated cost in that financial year of carrying out the inspections mentioned in subregulation (1), but the charge fixed —
- (a) must not exceed the estimated average cost to the local government of carrying out inspections in that year; and
  - (b) must not exceed \$57.45.

The inspection charge is discretionary. That is, a local government may choose to impose the charge or not. However, where the local government decides to exercise its discretion and impose the charge, it must be imposed in accordance with regulation 53(2) of the *Building Regulations 2012*.

### 6.8.2 Guidelines

The *Inspector Guidelines* state that local governments may charge swimming pool owners annually for inspections as follows:

Local governments are permitted, for a financial year, to fix the charge to be imposed on each owner or occupier of land on which there is a swimming or spa pool, to meet the estimated costs for that financial year of carrying out inspections. The fee charged must not exceed the estimated average cost to the local government of carrying out inspections in that year. The maximum fee that can be charged is \$57.45 (Building Regulations 2012 regulation 53(2)).<sup>191</sup>

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<sup>191</sup> Government of Western Australia, Department of Commerce, Building Commission, *Inspector Guidelines: Private swimming and spa pool*, August 2016, viewed 31 August 2016, <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private\\_swimming\\_and\\_spa\\_pool\\_inspector\\_guidelines\\_-\\_august\\_2016\\_web.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_swimming_and_spa_pool_inspector_guidelines_-_august_2016_web.pdf)>, p. 8.

### 6.8.3 The Investigation observed uncertainty among some local governments about the charges that they make for swimming pool barrier inspections

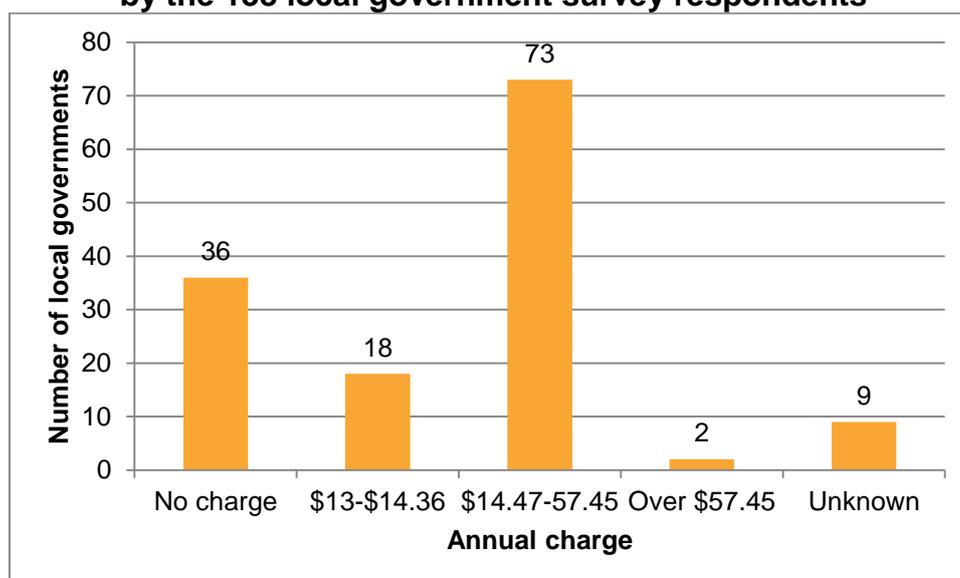
The five selected local governments charged between \$14 and \$33 per annum and described at interview how their different charges reflected the different interpretation by local governments of regulation 53(2) of the *Building Regulations 2012*.

In the local government survey, the Office requested that local governments identify their charges for conducting swimming pool barrier inspections. One hundred and twenty nine local governments provided the Office with an estimate of their charges. The Office found that, of the 138 survey respondents:

- 36 (26 per cent) local governments reported that they did not charge for swimming pool barrier inspections (including 11 local governments that responded in the survey that they did not have any swimming pools within their district);
- 18 (13 per cent) local governments reported that they charged between \$13.00 and \$14.36 per year (that is, a total of up to \$57.44 over a four year period);
- 73 (54 per cent) local governments reported that they charged between \$14.37 and \$57.45 per year;
- two (1 per cent) local governments reported that they charged slightly more than \$57.45 per year;<sup>192</sup> and
- nine (7 per cent) local governments reported that they did not know how much they charged for inspections (Figure 46).

Two of the 138 survey respondents specifically stated that the capped fee does not cover the actual costs of the administration of the inspections process and the on-the-ground inspections, particularly within the smaller local governments.

**Figure 46: Charges for swimming pool barrier inspections, by the 138 local government survey respondents**



Source: Ombudsman Western Australia

<sup>192</sup> As a result of the Ombudsman's investigation, the local governments that were charging in excess of \$57.45 per year contrary to regulation 53(2) of the *Building Regulations 2012* have now ceased doing so.

Thirty-three of the 36 (92 per cent) local governments that reported that they did not charge for swimming pool barrier inspections either had no swimming pools (11 local governments) or fewer than 100 swimming pools in their district (22 local governments). However, one local government reported that it had over 700 swimming pools within its district but was not charging for swimming pool barrier inspections (of course, the inspection services are not provided for 'free' despite this lack of direct charging and are paid for by all ratepayers through general rates).

This variation in charges may reflect:

- uncertainty with respect to regulation 53(2), particularly whether charges may be imposed only in the year of an inspection, or each year; and/or
- that local governments that are charging significantly less than others are operating on a partial, rather than full cost-recovery basis; and/or
- that certain local governments choose to ensure a 'user pays' system that charges costs by those who cause those costs to be incurred (that is pool owners) while other local governments spread these costs across all ratepayers (regardless of whether they own a pool) through general rates; and/or
- that there are significant differences in the efficiency of swimming pool barrier inspections between local governments and therefore the charges associated with these inspections.

#### **6.8.4 The maximum charge that may be made for a swimming pool barrier inspection has increased by \$7.45 since 1992; local governments reported that the current maximum is insufficient to fund an effective inspection program**

The (now repealed) section 245A of the *Local Government (Miscellaneous Provisions) Act 1960*<sup>193</sup> provided that:

##### **245A. Private swimming pools**

...

- (8) A local government may, for a financial year, fix the charge to be imposed on each owner or occupier of land on which there is a swimming pool, to meet the estimated cost in that financial year of carrying out the inspections required by subsection (5)(aa), but the charge fixed —
  - (a) shall not exceed the estimated average cost of carrying out inspections in that year; and
  - (b) shall not exceed the maximum charge, if any, prescribed by regulation.

In 1992, the *Building Amendment Regulation 1992* inserted new regulation 38F<sup>194</sup>, which set the maximum inspection charge for the purposes of section 245A(8)(b) of the *Local Government (Miscellaneous Provisions) Act 1960*, as follows:

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<sup>193</sup> Repealed by the *Building Act 2011*, and now incorporated in the *Building Regulations 2012* as regulation 53(2).

### 38F. Maximum inspection charge

For the purposes of section 245A(8)(b) of the Act, the maximum charge is \$50.

Regulation 38F of the (now repealed) *Building Regulations 1989* was amended by Gazette No. 148 on 28 July 2000 to set the maximum inspection charge as \$55.<sup>195</sup> That is, in 2000, local governments could charge the owner or occupier \$55 annually, if the charge did not exceed the estimated average cost of carrying out inspections in that year.

Regulation 53(2)(b) of the *Building Regulations 2012* currently provides that the charge to be imposed must not exceed \$57.45, as follows:

### 53. Inspection of barrier to private swimming pool

...

(2) A local government may, for a financial year, fix the charge to be imposed on each owner or occupier of land on which there is a private swimming pool containing water that is more than 300 mm deep, to meet the estimated cost in that financial year of carrying out the inspections mentioned in subregulation (1), but the charge fixed —

(a) must not exceed the estimated average cost to the local government of carrying out inspections in that year; and

(b) must not exceed \$57.45.

In summary, the maximum that local governments may charge annually for a swimming pool barrier inspection has increased by \$7.45 from \$50 in 1992 to \$57.45 in 2016. The Office notes that, if this fee had increased in line with the Consumer Price Index (CPI), the fee would have risen to \$92.70 in 2016.<sup>196</sup> Furthermore, as discussed at section 6.8.3, the Investigation observed uncertainty for some local governments about when charges can be imposed for swimming pool barrier inspections.

### 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.

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<sup>194</sup> Western Australian Government Gazette No. 88, Perth, 26 June 1992, p. 2760, <[https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/7F6AAF9455642D5DC82572FF001AD80C/\\$file/Gg088.pdf](https://www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/7F6AAF9455642D5DC82572FF001AD80C/$file/Gg088.pdf)>, accessed 10 July 2017.

<sup>195</sup> Western Australian Government Gazette No. 148, Perth, 28 July 2000, p. 4014 <[https://www.slp.wa.gov.au/gazette/gazette.nsf/gazlist/3CCB72B776848EF648256929001437D8/\\$file/gg148.pdf](https://www.slp.wa.gov.au/gazette/gazette.nsf/gazlist/3CCB72B776848EF648256929001437D8/$file/gg148.pdf)>, accessed 9 May 2017.

<sup>196</sup> Calculated using data from the Australian Bureau of Statistics, *Cat No. 6401.0 Consumer Price Index*, Australia, December 2016.

**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).

Chapter 8 of this report further discusses the enforcement of regulation 50(1) of the *Building Regulations 2012*.

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