

# Building Amendment (Swimming Pool and Spa) Regulations 2019

Regulatory Impact Statement



## Acknowledgment

We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it. We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

We are committed to genuinely partner, and meaningfully engage, with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader aspirations in the 21st century and beyond.



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# Acronyms and abbreviations

The Building Act	<i>Building Act 1993</i>
The Building Regulations	Building Regulations 2018
The proposed Regulations	Building Amendment (Swimming Pool and Spa) Regulations 2019
ABCB	Australian Building Codes Board
AIBS	Australian Institute of Building Surveyors
ANZCOR	Australian and New Zealand Committee on Resuscitation
BAB	Building Appeals Board
BCA	Building Code of Australia
CBA	Cost-benefit analysis
CPR	Cardiopulmonary resuscitation
DELWP	Department of Environment, Land, Water and Planning
LGA	Local Government Area
LSV	Life Saving Victoria
NCC	National Construction Code
NPV	Net Present Value
MAV	Municipal Association of Victoria
MBS	Municipal building surveyor
OCBR	Office of the Commissioner for Better Regulation
RIS	Regulatory Impact Statement
RTO	Registered Training Organisation
SPASA	Swimming Pool and Spa Association
VBA	Victorian Building Authority
VET	Vocational Education and Training
VGR	<i>Victorian Guide to Regulation</i>
VMBSG	Victorian Municipal Building Surveyors Group
VSL	Value of a statistical life

# Summary

## Background and the nature of the problem

Drowning is the most common cause of preventable death of young children (children aged under five years). This tragic fact is recognised in the Victorian Water Safety Strategy 2016 – 2020 where a reduction in drowning deaths of young children is one of the three areas noted as highest priority.

In Victoria, the most common location for fatal drownings of young children is home swimming pools. Between January 2000 and May 2019, there were 27 fatal drownings of young children in private swimming pools and spas in this state. The effects of such tragedies on family, and particularly parents and siblings, are significant and long-term. These incidents also affect the broader community, including neighbours, family friends and emergency services personnel who attended the scene.

It is an issue that affects all Victorian pool and spa owners, not just those with young children. According to the Department of Environment, Land, Water and Planning's (DELWP) analysis of the circumstances surrounding the 27 fatal drownings:

- At least 12 took place where child was not a resident of the property; and
- One took place at a neighbouring property that the child had gained access to without the knowledge of the pool owner.

Drowning incidents can also be non-fatal. On average, for every fatal drowning of a young child in a private swimming pool, there are approximately six non-fatal drowning incidents. The consequences of a non-fatal drowning vary; however, research has found that around 20 per cent of non-fatal drowning events result in some form of long-term behavioural and learning impairment. A severe neurological deficit manifests in 10 per cent of cases.

The evidence is clear that non-compliance with the current safety barrier laws is a significant contributing factor in fatal and non-fatal drowning incidents of young children in private swimming pools and spas. Of the 27 fatal drownings since 2000, coronial findings reported that in 20 cases it was found that the safety barrier was non-compliant with the relevant technical standard and that this non-compliance may have played a direct role in the fatal drowning.

Aside from an absence of adult supervision, the non-compliance of the safety barrier is the single biggest contributing cause to these tragedies. As a result, the Victorian Coroner has recommended strengthening pool safety laws in several findings relating to the fatal drownings of young children.

### ***Victoria's pool and spa safety barrier laws***

The requirement for mandatory safety barriers for swimming pools and spas was introduced into Victorian law in April 1991. The laws were strengthened in 1994 when the requirement was made retrospective, thus obliging owners of pools constructed prior to April 1991 to install a safety barrier around their swimming pool or spa regardless of the requirements that were in force at the time the pool or spa was constructed. Since this time the requirements have been progressively strengthened which has resulted in a significant drop in incidents of drownings amongst young children.

Under the requirements of the *Building Act 1993* ('the Building Act') and *Building Regulations 2018* ('the Building Regulations'), all swimming pools and spas that can contain a depth of water greater than 300mm must have a compliant safety barrier in place (with one exception, noted below under the discussion on relocatable swimming pools and spas).

In addition, owners of land containing a swimming pool or spa must ensure that the associated safety barrier is properly maintained, and an occupier of the land must take reasonable steps to ensure that barrier is operating effectively.

In September 2018, amendments to the Building Act were passed which included the introduction of a new mandatory requirement for local councils to establish and maintain a register of all private swimming pools and spas within their municipality. This requirement will come into effect on 1 December 2019. The amendments also include broad regulation-making powers relating to the form and use of the register and to the inspection and certification of safety barriers.

### ***Issues with the current pool and spa safety barrier laws***

Local councils are responsible for the administration and enforcement of certain parts of the Building Act as well as the Building Regulations within their municipal districts. This responsibility includes enforcing the current requirements in relation to swimming pool and spa safety barriers. However, council municipal building surveyors (MBSs) broadly report that resourcing constraints and competing priorities often limits their ability to take proactive compliance action in this space. A survey carried out by the Victorian Municipal Building Surveyors Group (VMBSG) in cooperation with DELWP in late 2018 found that:

- Owing to resource limitations, most councils only take a reactive approach to safety barrier compliance, generally only responding following a complaint or referral.
- There is a very high level of non-compliance on initial inspection—between approximately 80 per cent and 90 per cent.
- Owners of swimming pools and spas generally have a poor understanding of the requirements in relation to safety barriers and the need to ensure their barriers are maintained for them to remain effective.
- The existing enforcement powers available under the Building Act for dealing with non-compliant safety barriers are slow and resource-intensive.

The reports from councils regarding the high levels of non-compliance of safety barriers with the Building Act's requirements are supported by feedback from the private inspections sector. Non-compliance commonly arises due to a lack of maintenance on operable parts of the barrier (e.g. gate and door hinges and latches wearing out) but can also occur where alterations and additions are made to adjacent buildings, landscaping elements and boundary fences.

Even placing climbable objects such as BBQs, pot plants or allowing vegetation to grow immediately next to a barrier reduces the effectiveness of a barrier in preventing unintended access and is likely to result in them being non-compliant with the technical standard.

## **Objectives of the proposed Regulations**

The number of fatal and non-fatal drowning incidents, and reports from both councils and the private sector regarding non-compliance rates, indicate that the current regulatory requirements have significant weaknesses in ensuring the safety of private swimming pools and spas. DELWP has considered options that may achieve the underlying policy objective of reducing or preventing incidents of drowning amongst children aged under five years in private swimming pools and spas.

## **Options considered**

DELWP considered three broad options for addressing the problem described above. These options were required to fit within the constraints of the existing requirements under the Building Act as well as the amendments that will commence in December 2019.

### ***Option 1—New Regulations***

One option that has been made possible by the recent Building Act amendments is to use the newly inserted powers to make Regulations that build upon the Building Act's requirement for councils to establish and maintain a register of swimming pools and spas within their municipalities. These regulations could prescribe matters including:

- a mandatory requirement for pool and spa owners to register their pools and spas with council;
- the information councils need to include on their registers;



- requirements on pool and spa owners to have their safety barriers inspected;
- processes for the certification of the compliance of a safety barrier following inspection or alternatively dealing with non-compliance;
- fees that will be charged to pool and spa owners to fund the establishment and maintenance of the registers.

### **Option 2—Increased enforcement by local councils**

DELWP considered the option of increased enforcement action by councils utilising their existing powers in the Building Act. Under this option councils would prioritise their resources into identifying and acting against instances of non-compliant safety barriers within their municipality.

DELWP is aware that there would be no additional revenue stream to fund this and as a result concluded that this option would not be feasible owing to the resource constraints councils have reported in their efforts to monitor compliance with safety barrier laws. Moreover, councils have broader responsibility for monitoring compliance with the building requirements and it is unrealistic to expect that they could reprioritise resources to pool and spa safety barriers without a detrimental effect to other areas.

### **Option 3—Non-regulatory actions**

The third broad option considered by DELWP was to encourage the use of non-regulatory methods to increase compliance, e.g. information campaigns. The rationale behind this option is to improve swimming pool and spa owners' understanding of their obligations relating to safety barriers. The focus of these communications efforts would be on topics including:

- promoting voluntary registration with councils;
- the preparation, promotion and dissemination of technical guidance material designed to assist owners in assessing the compliance of their barriers; and
- general information to promote child safety around water.

DELWP would seek the assistance and cooperation of other government and non-government stakeholders such as the Victorian Building Authority (VBA), local councils and Life Saving Victoria (LSV) in the development and dissemination of this information. Although there would be no additional costs to swimming pool and spa owners under this option, DELWP and potentially other stakeholders would incur costs associated with the communications.

However, DELWP viewed this option as unlikely to achieve the rates of compliance necessary to achieve the policy goal of reducing drowning incidences of young children. The level of engagement with the voluntary registration scheme administered by the VBA as well as downloads of their self-assessment checklists has highlighted that additional enforceable requirements are necessary to achieve the policy objectives.

## **Preferred option**

DELWP's preferred option is the making of new regulations. This option is the most likely to achieve the policy objective of reducing drowning incidents of young children in private swimming pools and spas for the following reasons:

- The new regulations will create a framework which builds upon the councils' registers and implements enforceable requirements that will assist the identification and addressing of non-compliance.
- The creation of regulations will allow councils to recover the costs of establishing and maintaining their registers (action they would be required to take regardless) from the owners of swimming pools and spas rather than all ratepayers across the municipality.

Although councils will be required to establish and maintain registers from 1 December 2019 regardless of which option is selected, most councils consulted as part of this project suggested no substantial new compliance action to identify or locate pools would be undertaken in the absence of regulations prescribing the registration and inspection scheme.

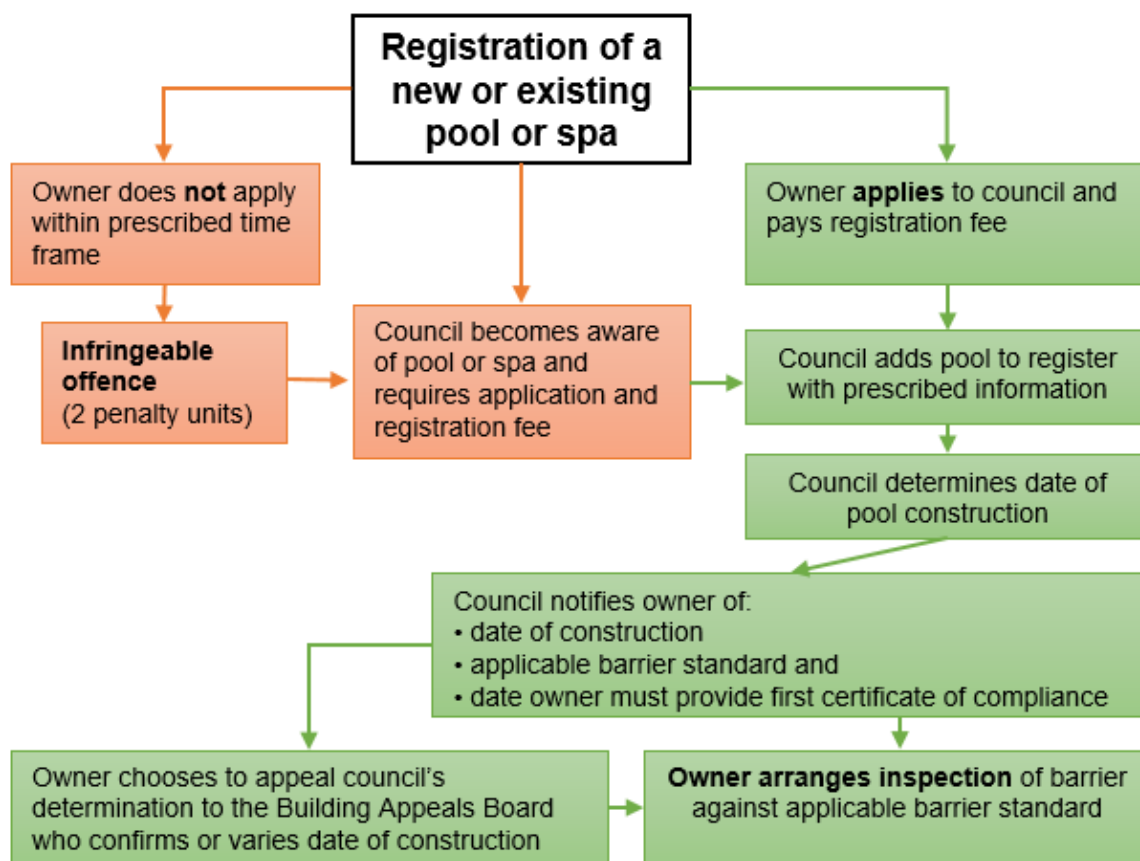
## Main features of the proposed Regulations

The proposed Regulations take the form of amendments to the Building Regulations, with most of the new requirements contained within a new Part 9A. A high-level overview of the broad features of the proposed new scheme is provided below.

### Mandatory registration of swimming pools and spas

The proposed Regulations will make it mandatory for all owners to apply to register their swimming pools and spas with their local council. The deadline for registration of existing swimming pools and spas is 14 April 2020. This date has been set four and a half months after the commencement of the Regulations to provide time for owners to inform themselves of the new requirements and for councils to prepare to receive registration applications.

New swimming pools and spas constructed after that date must be registered within 30 days of receipt of the relevant occupancy permit or certificate of final inspection. It is an offence not to register within the required timeframe, and contravention is subject to a penalty of 2 penalty units.<sup>1</sup> The complete registration process is set out in the flow chart below.



Flow chart: Swimming pool and spa registration process

The proposed Regulations prescribe the form that the registration application must take, the application fee that must be paid by the pool owner and the information that councils must keep on the register. Once on the register, swimming pools and spas remain registered until the owner applies to take them off the register.

<sup>1</sup> Equals \$330.44 for financial year 2019-20.

There is no requirement to renew registration. Removing a pool or spa from the register requires the owner to demonstrate to the satisfaction of the relevant council that it is no longer in use.

The date of construction of the swimming pool or spa will generally determine the applicable barrier standard which is the set of technical requirements that the barrier must comply with. However, the applicable barrier standard will also factor in alterations to the safety barrier that were made after the date of construction. DELWP considered a number of options as to how the date of construction should be determined, including whether it should be left to the pool owner, but determined that the power should reside with the relevant council.

Councils have broad discretion to consider all relevant material, including information provided by the owner, in determining the date of construction. The proposed Regulations also contain a requirement that owners notify their council of any building work carried out under a building permit which occurs post-registration that results in an alteration to the barrier in order that the council can determine if the applicable barrier standard has changed.

DELWP believes mandatory registration will ensure a much higher registration rate which is critical to ensure councils have a robust record of the pools and spas within their area so that the rest of the scheme can operate effectively. The voluntary registration scheme established by the VBA in mid-2018 has led to less than 120 out of Victoria's estimated 220,000 pool owners choosing to register voluntarily.

DELWP considered several design options in drafting the proposed regulatory requirements relating to the registration process. These are discussed in Chapter 3 and include options for the information that councils must keep on the register and the process for determining the date of construction of the pool or spa.

Broadly, the estimated cost of the proposed registration requirements is \$1.63 million for pool owners and \$4.16 million for councils over the 10-year costing period.<sup>2</sup> This does not include the cost of the registration fee payable by owners which is discussed under the Fees section later. The total cost of \$5.79 million is significantly higher than the \$1.60 million cost of the base case where no regulations are made (essentially leaving in place a voluntary registration system).

### ***Inspection and certification of safety barriers***

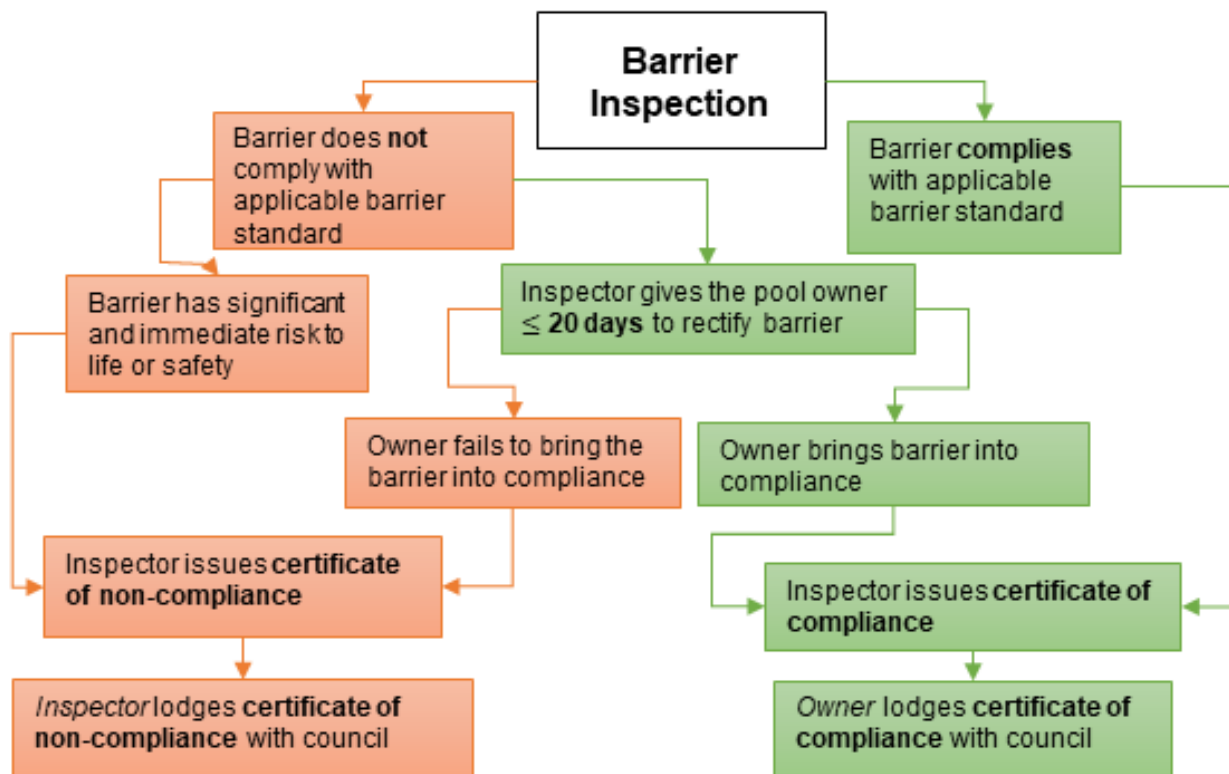
The proposed Regulations require owners of swimming pools and spas to arrange for an inspection and certification of their safety barriers every three years. The inspections can only be carried out by registered building practitioners in the categories of building surveyor or building inspector (hereafter collectively referred to as 'inspector').

Following an inspection, if the inspector determines that the safety barrier is compliant with the applicable barrier standard, they must issue a certificate of pool and spa barrier compliance to the owner. The owner must ensure that they lodge the certificate with the council by the date required. A lodgement fee is payable at the time the certificate is lodged.

It is an offence for an owner not to provide a certificate of pool and spa barrier compliance by the date required by the council. This will be a prescribed infringement offence subject to a fine of 2 penalty units. The proposed Regulations provide the power for councils to extend time required for lodgement of a certificate under certain circumstances, e.g. because ongoing building work on the property means that an inspection would not be appropriate.

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<sup>2</sup> Both figures are net present value (NPV).



Flow chart: Swimming pool and spa inspection and certification process

The approximate costs associated with the proposed inspection and certification requirements is \$186.50 million (NPV) over the 10-year period costed. The most significant design option considered in relation to these requirements was alternatives for the frequency of inspections, including every two years (22 per cent increase in overall cost of regulations), every four years (2 per cent decrease) and only upon the sale or lease of the property (50 per cent decrease). Requiring inspection and certification every three years was identified as the preferred option as feedback from MBSs is that most deterioration to safety barriers tends to emerge between three to four years.

### ***New class of Building Inspector (Pool Safety)***

The proposed Regulations introduce a new class of registered building practitioner: building inspector (pool safety). This new class will be limited to carrying out inspections and associated functions for the purposes of the new scheme. The proposed eligibility requirements for registration in this new class are:

- The successful completion of a course in swimming pool and spa safety barrier inspection approved by the VBA from a Registered Training Organisation (RTO); and
- At least six months of practical experience.

DELWP views the creation of this class as critical to ensure that there are enough registered building practitioners available to service the needs of the market.

### ***Transitional arrangements for inspection of existing pools and spas***

To ensure that the new requirements do not impose unnecessary burdens, the proposed Regulations adopt a staged implementation for the date by which owners of existing swimming pools and spas must lodge their first certificate by. This is intended to minimise the potential for councils to become overwhelmed by reports of non-compliance requiring their action at any one time. It also provides time for inspector numbers to grow to meet the market demand and minimise the cost to pool owners.

Three tranches of lodgements are proposed, with a different due date for the first certificate of compliance depending on the date of construction as determined by the relevant council. These are:

- 30 October 2020 for pools or spas built on or before 30 June 1994,
- 30 April 2021 for pools or spas built between 1 July 1994 and 1 May 2010; and,
- 29 October 2021 for pools or spas built on or after 1 May 2010.

Under this proposal, the oldest swimming pools and spas will be required to be inspected and have their certificates of pool and spa barrier compliance lodged first as they are viewed as being of higher risk on average. DELWP is asking stakeholders for their feedback in relation to these dates.

The regulations will require that a certificate for the barrier associated with newly constructed swimming pools and spas is issued following the relevant building surveyor's inspection of the final mandatory notification stage at the completion of construction. Certificates obtained in these circumstances must be provided along with the application to register the new swimming pool or spa.

### ***Responding to non-compliant safety barriers***

If the inspector determines that the safety barrier does not comply with the applicable barrier standard, the proposed Regulations set out two processes that may follow:

- Inspector provides the owner with a period (not longer than 20 business days) to bring the barrier into compliance; or
- Inspector issues a certificate of pool and spa barrier non-compliance and lodges it with council.

The proposed Regulations prescribe several circumstances under which an inspector must issue a certificate of pool and spa barrier non-compliance. These are if the inspector determines that:

- The barrier is non-compliant for one or more serious prescribed reasons; or
- The barrier is not capable of being made compliant with applicable barrier standard, or the owner is unlikely to bring the barrier into compliance, within 20 business days; or
- The non-compliance poses a significant and immediate risk to life or safety.

If the inspector believes one or more of the criteria above is present, the inspector must immediately issue a certificate of pool and spa barrier non-compliance and provide it to council for action. Although the inspector must lodge the certificate of pool and spa barrier non-compliance directly with the council on behalf of the owner, the proposed Regulations provide for the council to subsequently recover a lodgement fee from the owner.

If none of the circumstances requiring the immediate issue of a certificate of pool and spa barrier non-compliance are present, the inspector must issue a written notice to the owner providing them with a period of not more than 20 business days during which the non-compliance must be rectified. Following the expiration of the nominated period, the inspector will re-inspect the safety barrier to determine if compliance has been achieved. If it has, they will issue a certificate of pool and spa barrier compliance and provide it to the owner. If the barrier remains non-compliant, they must issue a certificate of pool and spa barrier non-compliance and lodge it directly with council for action.

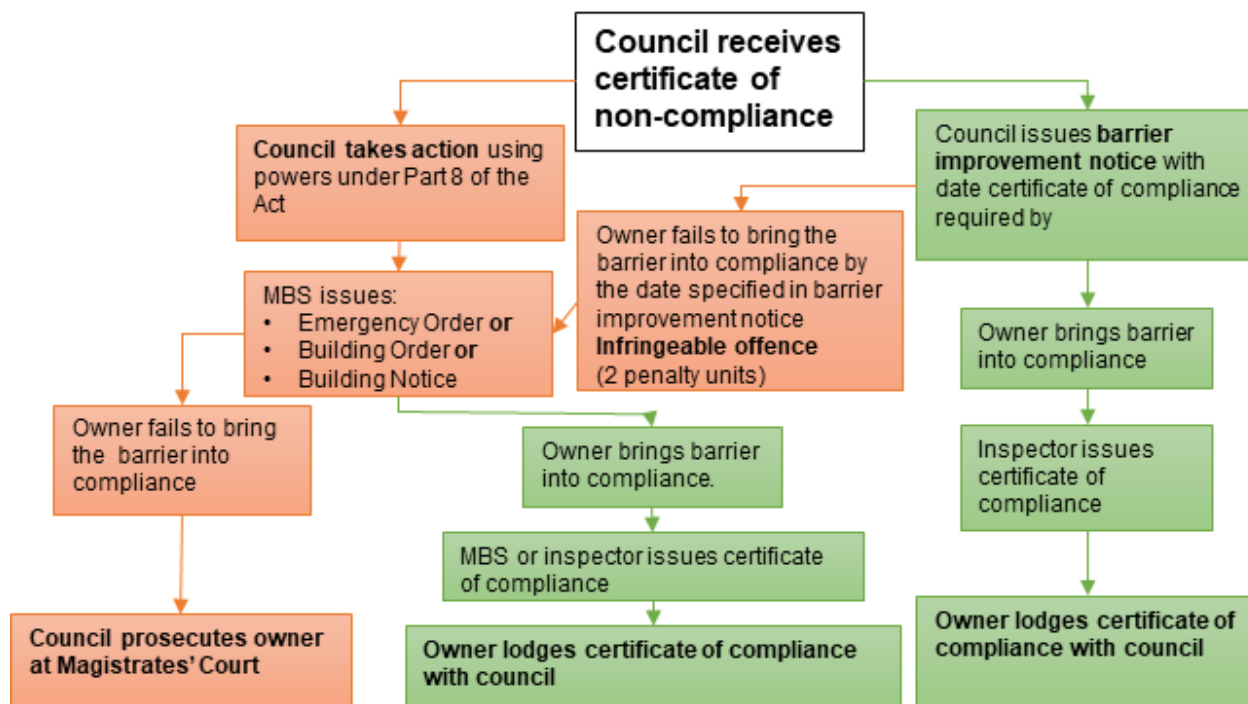
The proposed Regulations include an addition to the exemptions in Schedule 3 of the Building Regulations that would exempt building work involving the replacement of part of a barrier from the building permit requirements, subject to certain limitations. The application of the exemption is limited to building work occurring after a determination of non-compliance by an inspector meaning that any work that is carried out under this exemption will always be subject to an inspection following completion to obtain a certificate of pool and spa barrier compliance.

The insertion of this exemption allows owners to arrange for certain rectification work to be undertaken speedily on their barriers without the costs and time delays associated with applying for a building permit.

### ***Council receives a certificate of pool and spa barrier non-compliance***

Upon receipt of a certificate of pool and spa barrier non-compliance, councils have a few options to address the identified non-compliance. The MBS may choose to utilise their existing powers under the Building Act and issue a building notice, emergency order etc. The proposed Regulations also provide a new option,

which is the issuing of a barrier improvement notice. These notices require owners to provide a certificate of pool and spa barrier compliance within a time period (not less than 14 days) nominated by the council. A failure to provide a certificate by the date specified in the barrier improvement notice is an offence that is subject to an infringement penalty of 2 penalty units.



Flow chart: Processes when council receives a certificate of pool and spa barrier non-compliance

DELWP assessed another broad option for responding to non-compliance identified following an inspection: issuing certificates of pool and spa barrier non-compliance in every instance regardless of the nature of the non-compliance. This would effectively mean that councils would be responsible for taking action in regard to every instance of identified non-compliance. This was not selected as the preferred option as it would overburden councils with non-compliance cases beyond what they are resourced to respond to in an effective and timely manner.

The preferred option operates as a triage process, leaving more minor issues of non-compliance with surveyors and inspectors to oversee the compliance of subsequent rectification works. Only major non-compliance matters posing immediate and significant risks to young children are referred to councils in order that they may be dealt with using the broader suite of enforcement powers available to MBSs.

Other design options relating to the processes following determination of barrier non-compliance after an inspection are set out under Chapter 5. These include the types of matters to be prescribed as requiring immediate issue of a certificate of pool and spa barrier non-compliance, the introduction of a barrier improvement notice process and the maximum period permitted for a surveyor or inspector to oversee rectification works.

The total cost associated with these requirements relating to addressing non-compliance under the proposed Regulations is \$203.48 million (NPV) over the 10-year life of the Regulations. The largest component of this figure is the estimated \$155.42 million cost of rectifying non-compliance for owners. DELWP estimates that Councils are likely to also incur costs of \$48.06 million as a result of enforcement action taken in response to non-compliance matters referred to them.

### **Relocatable swimming pools and spas**

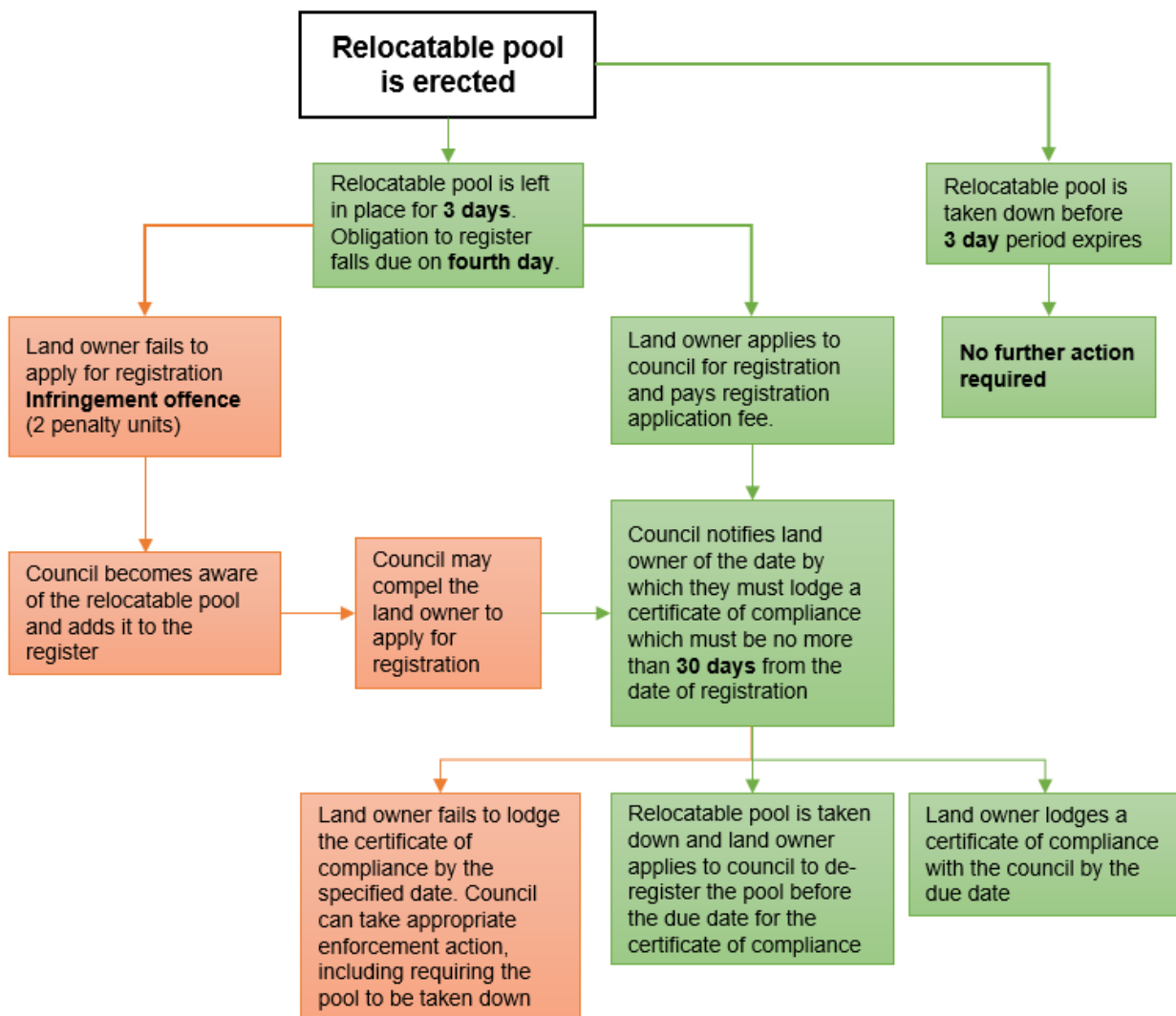
Broadly, the proposed registration, inspection and certification requirements described above apply to swimming pools and spas both of a permanent and relocatable nature. However, relocatable pools and spas present some unique policy and regulatory challenges that require a modified approach. By their very nature

and design relocatable pools and spas can be pulled down, moved and re-erected within a short period of time. Accordingly, they may only be in use for a short period of time before they are disassembled and packed away.

In the broadest sense a relocatable pool is any pool that is designed to be moved from one place to another. They sit on top of the ground and come in a range of sizes from small paddling pools to pools that can be up to 10 meters long and 1.4 meters deep. Industry has advised DELWP that in their estimation approximately 30,000 of these pools are sold in Victoria every year in a range of configurations from small paddling pools through to much larger solid-framed pools complete with filtration systems.

The requirement to install a safety barrier around any pool or spa with a depth of water greater than 300mm applies to relocatable pools in the same manner as it applies to permanent swimming pools and spas. However, some council MBSs have reported significant levels of non-compliance with this requirement.

The proposed Regulations will require owners of land with a relocatable swimming pool or spa to register their pool or spa with the council from 14 April 2020. However, the requirement to register a relocatable pool or spa only takes effect after it has been erected for three days. This means that if the pool is taken down before that period elapses, there is no requirement to register it.



Flow chart: Processes when relocatable pool is erected

DELWP believes that this modified approach is warranted considering that the available data indicates that a significant majority of fatal drownings have taken place in permanent pools and the ease with which

relocatable pools and spas can be erected and taken down. It is a proportionate approach and DELWP believes that only requiring registration if the pool or spa is to remain up for more than three days is more likely to encourage compliance with the registration requirements. Significantly, it avoids imposing unnecessary burden upon councils by requiring them to process registration applications for pools and spas that may only be erected for a day (e.g. for use at a party).

As with permanent facilities, a registered relocatable pool or relocatable spa remains registered until the owner applies to have it taken off the register. This applies irrespective of whether the relocatable pool or spa is taken down and re-erected after registration. The proposed Regulations impose the same inspection and certification requirements on relocatable pools and spas. Upon registering a relocatable swimming pool or spa, the council must nominate a date, that is no longer than 30 days after the registration date, by which the owner must provide the first certificate of pool and spa barrier compliance.

The proposed Regulations also expand upon the current exemption in Schedule 3 of the Building Regulations exempting relocatable pools from building permit requirements. The current exemption only applies to relocatable pools that are erected temporarily within an approved barrier. The proposed new exemption removes the limitation in the existing exemption that it only applies if the relocatable pool is up for a temporary period. It applies more broadly to any work assembling, erecting or installing a relocatable swimming pool regardless of how long the pool is intended to remain in place.

This will significantly reduce costs of, and delays associated with, compliance for erecting a relocatable pool and DELWP believes will lead to improved compliance with the safety barrier requirements.

It is important to note that the approach taken to relocatable pools in the proposed Regulations does not change the requirement that a relocatable swimming pool or relocatable spa must be enclosed within a compliant safety barrier at the time it is erected. This requirement remains irrespective of whether the intention is to keep the relocatable pool or spa in place for more than three days and thus apply for registration.

### ***Limitations in the application of the Building Act to certain relocatable pools and spas***

*A relocatable pool must fall within the definition of 'building'*

The language contained in the Building Act limits the application of both existing, and the proposed new requirements in relation to some relocatable pools. DELWP understands that relocatable swimming pools are more likely to fall within the definition of 'building' under the Building Act if they meet some or all of the following broad characteristics:

- It is comprised of multiple components requiring assembly.
- It is commonly attached to the land.
- It has a degree of permanence.

DELWP believes most relocatable swimming pools meet all or some of these characteristics and are therefore subject to regulatory requirements under the Building Act and Building Regulations including the obligation to install a safety barrier. However, a small range of relocatable pools do not appear to meet these characteristics; predominantly inflatable pools that are entirely self-contained and require no assembly of components.

DELWP understands that stakeholders are likely to be concerned by the absence of safety barrier requirements for these relocatable swimming pools. In addition, it is not possible for the requirements in the proposed Regulations to apply to such relocatable pools. A change to the Building Act is required to capture these types of relocatable swimming pools and legislative change falls outside the scope of this regulation-making project.

DELWP welcomes stakeholder views on the most effective and appropriate way to regulate relocatable pools that do not meet the current definition of 'building' under the Building Act.

*The new requirements can only apply to the 'owner of the land'*

The power to make regulations for the registration, inspection and certification of private swimming pools and spas is limited to the making of requirements that apply to the owner of land. Accordingly, the proposed



requirements relating to relocatable swimming pools and spas fall upon the owner of the land on which the pool or spa is erected. In practical terms this means that if a tenant erects a relocatable swimming pool or spa the obligations relating to registration and inspection/certification of that pool or spa fall upon the landlord as the owner of the land.

DELWP acknowledges that it would be preferable for the new requirements to fall upon the tenant as the owner of the pool. However, this would require an amendment to the Building Act which falls outside the scope of this project. DELWP is committed to working with Consumer Affairs Victoria (CAV) and other stakeholders to determine the fairest and most effective means of ensuring that the requirements for relocatable pools and spas erected on land occupied by tenants are appropriate.

## Costs and benefits associated with the proposed Regulations

The *Subordinate Legislation Act 1994* (SLA) requires “an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives”. To assist DELWP’s consideration of the available policy options as well as the preparation of this RIS, a consultant was engaged to prepare a cost-benefit analysis report. This report was prepared in accordance with the SLA, Guidelines for Statutory Rules and relevant parts of the *Victorian Guide to Regulation* (VGR).

DELWP believes that the benefits generated by the Regulations in terms of these avoided costs is likely to outweigh the costs of the new requirements. In addition, evidence from other jurisdictions (i.e. NSW, Queensland) suggests that similar schemes to register and inspect swimming pool and spa safety barriers have worked well and achieved their objective.

The estimated costs of the proposed Regulations are contained in Table 1 below. They have been set out to clearly distinguish between the respective costs to swimming pool and spa owners and to councils for each of the major facets of the proposed regulatory requirements.

**Table 1: Estimated costs of the proposed Regulations (\$ million)**

Activity	Cost to pool owners (\$ million)	Cost to councils (\$ million)
<b>Registration</b>		
Cost of establishing registers across all councils		1.13
Informing residents about need to register		0.46
Owners apply to register pools (includes locating information on date of construction) (does not include registration fee)	1.28	
Councils register pools		0.47
Councils determine date of construction		0.70
Councils send notices confirming registration details and date of next inspection		0.70
Some owners appeal council’s determination of date of construction	0.35	0.70
<b>Inspections</b>		
Cost of inspections (includes assumption that 50% of barriers will require a second inspection)	186.50	
Cost of rectification	155.42	
Cost of lodging certificates with council (time cost, not including lodgement fee)	1.18	

Activity	Cost to pool owners (\$ million)	Cost to councils (\$ million)
Councils update register for lodgement of certificates		1.24
Council actions in responses to non-compliance		48.06
<b>Sale/lease of property</b>		
Update register for change in ownership		0.18
Councils write to new owners confirming registration and inspection details		0.27
<b>TOTAL COSTS</b>	<b>344.72</b>	<b>53.91</b>

The total cost of the proposed Regulations is **\$398,637,279** (NPV over 10 years), which amounts to an annualised annual cost of \$39.9 million per annum. This does not include costs associated with the fees payable under the proposed scheme; these are discussed in the Fees section below.

The benefits of the proposed Regulations are reflected by lives saved and injuries prevented which may be considered as avoided costs. There is no sensitive way to place a monetary value on the loss of a loved one. However, for public policy purposes including the assessment of proposed regulations, it is accepted methodology to use the value of a 'statistical life' to establish the financial value society places on reducing the average number of deaths as a means of to help in assessing government policies.

In the context of this regulatory proposal, the lives intended to be saved are young children aged under five years. Hence, assuming life expectancy of 81, the number of additional years a young child might be expected to enjoy would be a further 77 years. Using a value per year of life of \$199,892 and a discount rate of 3 per cent, this results in a net present value of \$5.98 million per life. There are difficulties in establishing the avoided cost of non-fatal injuries owing to data limitations. However, a figure of \$690,000 was used which has been obtained from research conducted by Royal Life Saving Australia regarding the cost of each non-fatal drowning incident for the community.<sup>3</sup>

An additional benefit that needs to be considered in this analysis is the avoided trauma of parents and families of drowning victims. The monetary value of such trauma cannot be determined but is still very real and can manifest itself in some, or potentially all, of the ways listed in Table 2 below.

**Table 2: Potential impacts of grief and bereavement on parents and family members**

<b>Physical health</b>	<ul style="list-style-type: none"> <li>• Insomnia, aches and pains, loss of appetite, confusion, inability to concentrate.</li> </ul>
<b>Psychological health</b>	<ul style="list-style-type: none"> <li>• Guilt or self-blame, depression, anxiety, loneliness, helplessness, abandonment, chronic irritation or frustration.</li> <li>• Some parents may also experience intense jealousy of other families and intense rage at the unfairness of their situation. This can be directed either outwards or inwards.<sup>4</sup></li> <li>• In the first year after a child's death a parent is two to three times more likely to be hospitalised for mental health problems.<sup>5</sup></li> </ul>

<sup>3</sup> This figure is the total cost of the 6,158 cases of fatal drowning in Australia over 13 financial years from 2002-03 to 2014 was estimated at \$4.3 billion, or \$328 million annually. This means that the average cost per non-fatal incident is \$690,000. This is taken from:

[https://www.royallifesaving.com.au/data/assets/pdf\\_file/0013/22180/RLS\\_ResearchSummary\\_CostOfDrowning.pdf](https://www.royallifesaving.com.au/data/assets/pdf_file/0013/22180/RLS_ResearchSummary_CostOfDrowning.pdf)

<sup>4</sup> 'Appendix E – Bereavement experiences after the death of a child' in *When Children Die: Improving Palliative and End of Life Care for Children and Their Families*, M.J. Field and R.E (2003) *op.cit.*

<sup>5</sup> G. van den Berg, 'How to calculate the economic impact of grief', *The Conversation*, accessed at: <https://theconversation.com/how-to-calculate-the-economic-impact-of-grief-68936>

<b>Financial wellbeing</b>	<ul style="list-style-type: none"> <li>• Most parents suffer a decline in income in the immediate aftermath and recover it later. However, some parents never regain their original earning capacity and can earn up to 30% less going forward.<sup>6</sup></li> <li>• Some children who are revived at the scene may receive intensive medical care for days or months prior to passing away which can lead to significant out-of-pocket expenses.</li> <li>• The expense of funeral arrangements which can range from \$4,000 to \$15,000 or more.<sup>7</sup> Often parents and families choose to make additional special arrangements which can add to the cost.<sup>8</sup></li> <li>• Some bereaved parents may try to cope with their grief through spending on themselves or their surviving children.<sup>9</sup></li> </ul>
<b>Employment</b>	<ul style="list-style-type: none"> <li>• A parent who loses a child is 9% more likely to be unemployed than a parent who has not.</li> </ul>
<b>Social isolation</b>	<ul style="list-style-type: none"> <li>• Parents report that their social groups undergo a 'breakdown' leaving them feeling isolated and alone.</li> <li>• Because child mortality is comparatively rare many well-meaning friends and family can find it difficult to provide comfort.</li> <li>• This can lead to parents feeling responsible for 'making others feel better' and so choosing to avoid social situations.</li> <li>• Many parents avoid social circles they once shared with their children, such as school communities or mother's groups.</li> <li>• Some parents feel they should abstain from enjoyment out of respect.</li> <li>• Some parents have reported feeling self-conscious at being publicly known as the parent who lost a child and feeling pressure to conform with peoples' expectations of a grieving parent.<sup>10</sup></li> </ul>

<sup>6</sup> Ibid.

<sup>7</sup> <https://www.moneysmart.gov.au/life-events-and-you/over-55s/paying-for-your-funeral>

<sup>8</sup> *Choices in Arranging a Child's Funeral*, Red Nose Foundation, accessed at: <https://rednosegriefandloss.org.au/downloads/05092016-Choices-in-Arranging-a-Childs-Funeral.pdf>

<sup>9</sup> Liz Crowe, *When a Child Dies*, Queensland Health, 2006, page 23.

<sup>10</sup> Joanna Moorhead, 'Can a parent get over the death of a child?', in *The Guardian*, 5 July 2014 accessed at <https://www.theguardian.com/lifeandstyle/2014/jul/05/can-parent-get-over-death-of-a-child>

<b>Family relationships</b>	<ul style="list-style-type: none"> <li>• The death of a child can often lead to friction and sometimes to the breakdown of the relationship between the parents, although this varies significantly depending on factors such as the circumstances surrounding the death.<sup>11</sup></li> <li>• Studies suggest that children in the family experience grief as deeply, profoundly and long-term as adults.<sup>12</sup> International studies also suggest that children who lose a sibling are at higher risk of mortality themselves from a range of causes.<sup>13</sup></li> <li>• In addition, they also lose the home environment they are familiar with and, at least temporarily, the attention of their grieving parents.</li> <li>• Grandparents can have a double burden, the first from losing their grandchild, and the second from witnessing the grief of their own child. Grandparents also feel a sense of injustice when a grandchild pre-deceases them.<sup>14</sup></li> </ul>
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Similarly, the families of children who have been left with injuries because of non-fatal drownings can be impacted in a range of different ways. Some of these impacts are outlined in Table 3 below.

**Table 3: Potential impacts on families resulting from non-fatal drownings**

<b>Physical health</b>	<ul style="list-style-type: none"> <li>• 31.7% of male carers and 28.5% of female carers were suffering from poor physical health, compared to 15.9% of males and 18.3% of females in the general population.<sup>15</sup></li> </ul>
<b>Psychological health</b>	<ul style="list-style-type: none"> <li>• Carers are more likely to suffer mental health issues than the general population.</li> </ul>
<b>Financial Health</b>	<ul style="list-style-type: none"> <li>• Families who care for a person were significantly more likely to suffer financial hardship than families who did not. For example, over 30% of carer families could not pay utility bills on time compared to less than 15% of the general population.</li> </ul>
<b>Social isolation</b>	<ul style="list-style-type: none"> <li>• 18% of carer families report having contact with people outside their immediate household once or twice every three months.</li> <li>• The higher levels of financial hardship amongst such families also limits the potential for social interaction.</li> </ul>

## New fees under the proposed Regulations

The proposed Regulations set maximum fees that councils can charge for registration and lodgement of certificates of pool and spa barrier compliance and non-compliance. The intention of setting fees for these activities is that councils can recover the additional costs associated with their activities relating to registration and inspection and enforcement under the regime.

The Government's *Cost Recovery Guidelines* do not apply to local councils. However, it is expected that councils would only charge fees that reflect their actual costs to avoid fees being perceived as a form of

<sup>11</sup> Because the circumstances of the death and the condition of the relationship is so variable DELWP is not aware of any definitive estimate of the percentage of relationship breakdown.

<sup>12</sup> Z. Krupka, 'Gone but never forgotten: how to comfort a child whose sibling has died', *The Conversation*, accessed at: <https://theconversation.com/gone-but-never-forgotten-how-to-comfort-a-child-whose-sibling-has-died-101847>

<sup>13</sup> M. Rostila, L. Berg, J. Saarela, I. Kawachi and A. Hjern, 'Experience of Sibling Death in Childhood and Risk of Death in Adulthood: A National Cohort Study From Sweden', in *American Journal of Epidemiology*, June 2017, accessed at: <https://academic.oup.com/aje/article/185/12/1247/3793083>

<sup>14</sup> *Grandparents' Grief is Unique*, Red Nose Foundation, accessed at: <https://rednosegriefandloss.org.au/support/article/grandparents-grief>

<sup>15</sup> Dr. B. Edwards, 'Caring for families caring for a person with a disability', *Family Relationships Quarterly No. 11*, March 2009, accessed at: <https://aifs.gov.au/cfca/publications/family-relationships-quarterly-no-11#caring>

taxation, and due to scrutiny from residents. Accordingly, the proposed fees were assessed in accordance with the Guidelines.

**Table 4: Proposed Fees**

Fee	Amount in 2018-19 dollars	Rationale
Fee for registration	Maximum fee of \$37	Double the estimated average cost, to allow some councils to recover higher actual costs
Fee for lodgement of certificate of pool and spa barrier compliance	Maximum fee of \$20	Double the estimated average cost, of costs related to compliant barriers
Fee for lodgement of certificate of pool and spa barrier non-compliance	Maximum fee of \$385	Based on the estimated average cost of non-compliance to councils. <sup>16</sup>

Councils have the ability to charge fees under the *Local Government Act 1989* for any services they perform related to functions and powers carried out under any legislation. DELWP considers it unlikely that all councils would charge the same fees as they are likely to have different cost structures or varying capacities to manage the costs of a new registration system (e.g., recovering fixed costs where there may be a smaller proportion of houses with pools). However, imposing a maximum fee that may be charged places an upper limit on the fees levied to ensure that they are not set higher than they need to be. Prescribing the fee in the proposed Regulations also means that it is transparent and subject to public consultation through the RIS process.

The fees set out in the proposed Regulations are expressed in the form of fee units. This means that they will be subject to the automatic indexation under the Victorian Treasurer's annual fixing of the value of a fee unit.

### Implementation, evaluation and forward work plan

The Regulations will commence on 1 December 2019 to coincide with the commencement of the new provisions of the Building Act. DELWP recognises that the proposed Regulations in their preferred form will introduce significant changes for stakeholders, in particular:

- Owners of land with private swimming pools and spas;
- Councils; and
- Registered building practitioners carrying out functions as a swimming pool and spa inspector.

To ensure that the requirements of the new scheme are introduced in a timely manner and achieve the desired policy outcome DELWP will actively seek to assist each of these groups. This assistance will be tailored to meet the different requirements of the stakeholder group but will consist primarily of:

- the preparation and dissemination of information and education material regarding the new requirements;
- ongoing cooperation and assistance to impacted stakeholders, with a focus on councils, to ensure that they can fulfil their role under the new Regulations; and
- working with the VBA to ensure that the necessary arrangements for the new class of building inspector (pool safety) are in place.

DELWP is proposing to conduct a formal midterm evaluation of the operation of the new requirements by the end of 2024 which is five years after the commencement of the Regulations. The purpose of the evaluation will be to determine how the new regulatory scheme is operating in practice and whether any changes are needed to better achieve the policy objectives.

<sup>16</sup> The basis of this estimate is discussed in detail in Chapter 9 of the RIS.

DELWP has also committed to a forward work program to examine issues that arose during the preparation of the RIS and the proposed Regulations that were not within the scope of the review to address. These issues include:

- the applicability of the regulations to certain relocatable pools not currently captured under the Act,
- the applicability of the Regulations in relation to owners of relocatable pools who are not also owners of the land on which the relocatable pools are erected; and,
- options to better integrate pool safety with the requirements governing residential tenancies and the sale of land.

DELWP proposes to continue work on these issues once the proposed Regulations have commenced and will engage with relevant stakeholders as required.

## Submissions

DELWP welcomes public comment on this RIS document and the requirements contained within the proposed Regulations.

Anyone wishing to make a submission can submit a formal response or complete the form on the Engage Victoria website at <https://engage.vic.gov.au/new-safety-standards-private-swimming-pools-and-spas>.

Alternatively, responses can be emailed to [building.policy@delwp.vic.gov.au](mailto:building.policy@delwp.vic.gov.au), or mailed to:

Director, Building Policy  
Department of Environment, Land, Water and Planning  
PO Box 500  
East Melbourne, VIC 8002

All submissions will be treated as public documents and may be referenced in further policy development or public documents such as the RIS, unless the submitter has requested that their submission remain confidential or be deidentified.

## Questions for Stakeholders

Below is a collated list of questions that are contained in this RIS. Stakeholders are invited to provide responses to any questions that they have a view on.

### Chapter 2—Proposed regulatory approach

1. Do you agree that there should be no prescribed fee for the carrying out of an inspection and certification of a safety barrier? Please explain your response.
2. Do you agree that there should be no prescribed fee for councils to carry out information searches in relation to determining the date of construction of pools and spas? Please explain your response.
3. If you believe that a separate fee for council information searches should be charged, do you believe that the fee should be prescribed via regulations or set by individual councils? Please explain your response.
4. Do you agree that there should be no requirement for renewal of registration? Please explain your response.

### Chapter 3—Registration

5. Do you support mandatory registration of all swimming pools and spas? Please explain your response.
6. Is the proposed deadline of 14 April 2020 for owners of existing swimming pools and spas to apply to register an appropriate timeframe? Please explain your response.
7. Is the requirement for a registration application for new swimming pools and spas to be submitted within 30 days of the owner's receipt of a certificate of final inspection/occupancy permit appropriate? Please explain your response.
8. Do you support no fee being required for an application to remove a swimming pool or spa from the register? Please explain your response.
9. Do you agree with the information proposed to be prescribed as required to be kept on the register? Please explain your response.
10. Is there any other information that should be required to be included on the register? Please explain your response.
11. What, if any, additional obligations should be placed on councils to keep the register up to date? For example, if after inspecting a safety barrier, an inspector believes that the applicable barrier standard recorded on the register is not accurate, should council be required to update the register? Or can this be left to the discretion of councils?
12. Do you have any information or data supporting an amendment to the requirements in relation to windows in walls used as barriers for pools constructed prior to 8 April 1991? If so, what amendments should be introduced to address these issues?
13. Do you have any information or data regarding how many swimming pool and spa barriers are likely to have multiple applicable barrier standards, i.e. because of alterations to part of a barrier?
14. To what extent do you believe a system of mandatory self-assessment by owners of the compliance of their safety barriers would increase the safety of swimming pools and spas across Victoria? Please explain your response.
15. Do you agree that councils should be responsible for determining the date of construction? Please explain your response.

## Chapter 4—Inspection and Certification

16. Do you agree that the average period for operable components of a barrier to fail in the absence of appropriate maintenance is approximately three years? Please explain your response.
17. Do you agree with the proposed timeframes for when owners of swimming pools and spas constructed or under construction prior to 14 April 2020 must provide their first certificate of pool and spa barrier compliance? Please explain your response.
18. How long does it usually take councils to resolve matters of swimming pool and spa safety barrier non-compliance? Which factors influence the time taken (e.g. age of barrier)?
19. Do you believe that 30 days is an appropriate maximum 'currency' period for the lodging of a certificate of pool and spa barrier compliance? If you believe an alternative period is more appropriate, please indicate the period in your response.
20. If periodic inspection and certification of barriers is required under the new scheme, what is the most appropriate interval for requiring owners to provide a new certificate of barrier compliance? Please explain your response.
21. Do you consider the size of the existing cohort of registered building surveyors and building inspectors to be enough to support the efficient and effective operation of the proposed scheme? Please explain your response.
22. If the new building inspector (pool safety) class is to proceed, are the proposed qualification and experience requirements suitable for the proposed scope of work? Please explain your response.
23. Do you foresee any issues with applicants for the new building inspector (pool safety) class successfully meeting the proposed experience requirements? Please explain your response.

## Chapter 5—Procedures for dealing with non-compliant barriers

24. How effective do you believe the current enforcement powers available to MBSs under the Building Act are at addressing non-compliance of swimming pool barriers? Please explain your response.
25. Do you agree with the proposal to provide swimming pool and spa inspectors with discretion to oversee the rectification of minor instances of non-compliance? Please explain your response.
26. Is it likely that there will be many instances of non-compliance identified where the inspector forms a belief that there is no significant and immediate risk to life or safety? Please explain your response.
27. Is the proposed maximum period of 20 business days the appropriate limit for the period that inspectors can provide owners to address non-compliance? Please explain your response.
28. Are there any other criteria, apart from the immediacy of risk of young children gaining unsupervised access to the swimming pool or spa, that should be considered in prescribing matters for this purpose? Please explain your response.
29. Are the non-compliance matters proposed to be prescribed as always requiring the immediate lodgement of a certificate of pool and spa barrier non-compliance with council appropriate? Please explain your response.
30. Are there any matters that are not listed that should be prescribed in the proposed Regulations? Please explain your response.
31. Is there an approach other than the proposed barrier improvement notice process, that would better assist councils to effectively and efficiently respond to non-compliance raised through lodgement of certificates of pool and spa barrier non-compliance? Please explain your response.
32. Do you agree that 14 days is a reasonable minimum period of time for owners to be required to comply with a barrier improvement notice issued by a council? Please explain your response.
33. Do you believe the existing exemptions in items 3 and 4 of Schedule 3 to the Building Regulations cover repair, renewal, maintenance, or alterations work on a swimming pool or spa barrier? Please explain your response.



34. Do you agree with the proposal to insert a new item into Schedule 3 that would exempt certain work involving replacement of parts of a swimming pool or spa barrier from the building permit requirements? Please explain your response.
35. Are the limitations on the proposed exemption relating to the replacement of safety barrier parts appropriate? Is it necessary to broaden or lessen the application of the proposed exemption in some manner? Please explain your response.
36. How much is it likely to cost owners to appoint a building surveyor to oversee building work to rectify a non-compliant safety barrier? Please explain your response.

## **Chapter 6—Relocatable pools**

37. Do you have any data or information regarding the number of relocatable pools sold that have a depth of at least 300mm, but which do not constitute a 'structure' as discussed in section 6.6?
38. Do you have a view as to whether an amendment to Building Act should be made to ensure that its requirements apply to all relocatable pools with a depth of at least 300mm? Please explain your response.
39. Are there alternative means for ensuring that landlords are not unfairly burdened by the actions of their tenants in relation to the erection of a relocatable pool? Please explain your response.
40. What is the current rate of compliance amongst relocatable pool owners applying for building permits to erect their pools?
41. Do you support exempting the erection of all relocatable pools from the requirement to apply for a building permit? Please explain your response.
42. Do you agree that it is reasonable to only require the registration of a relocatable pool or spa once it has remained erected for three consecutive days? Please explain your response.
43. Do you believe that the registration requirement for relocatable pools and spas can be effectively enforced? Please explain your response.
44. Do you have any information regarding how many relocatable pools are likely to be left in place for longer than three days?
45. Do you think that the fee for the registration of a relocatable pool should be the same as for a permanent pool? If not, please indicate an appropriate fee and the reasons why the registration fees should be different.
46. Do you agree with the proposed requirement that councils will nominate when the first certificate of pool and spa barrier compliance is required to be provided for a relocatable pool or spa, not being more than 30 days after it was registered? Please explain your response.

## **Chapter 7—Additional regulatory options considered**

47. To what extent do you believe mandatory CPR signage would contribute to a reduction in fatal drownings and lessen the impacts of non-fatal drownings of young children in private swimming pools and spas across Victoria? Please explain your response.
48. To what extent do you believe a mandatory warning notice like that required in NSW would promote the safe use of private swimming pools and spas across Victoria? Please explain your response.
49. Do you believe the Building Regulations should allow for lockable spa lids to be used as an alternative means of complying with the requirement for spas to be enclosed by a compliant safety barrier in Victoria? Please explain your response.
50. If you agree that lockable spa lids are an acceptable alternative to a safety barrier, are there any limitations on the types of lids that should be accepted? Please explain your response.
51. If lockable spa lids are accepted as an alternative to a safety barrier, what is an appropriate method of ensuring that they are effective in preventing access to the spa by young children? For example,

is it necessary that they be inspected by an independent third party; or, should owners be required to use a self-assessment checklist; or is there another mechanism?

## **Chapter 10—Implementation, evaluation and forward work program**

52. Do you believe including information regarding certificates of pool and spa barrier compliance in the due diligence checklist under sale of land obligations would promote the safety of swimming pools and spas across Victoria? Please explain your response.
53. Do you think amending regulation 51(1) of the Building Regulations so potential purchasers can request information regarding the existence of a certificate of pool and spa barrier compliance from the relevant council is sufficient to allow them to fully inform themselves regarding the status of a pool or spa? Please explain your response.
54. Have you ever purchased a property with a swimming pool or spa? If so, what was the condition of the safety barrier?
55. Do you think including a compliance certificate as part of the prescribed information under the Residential Tenancies Act 1997 would promote the safety of swimming pools and spas across Victoria? Please explain your response.
56. Do you think including a certificate of compliance on the condition report for residential rental properties would promote the safety of swimming pools and spas across Victoria? Please explain your response.
57. Do you have any information regarding how many residential rental properties have swimming pools or spas?
58. Have you ever rented a property with a swimming pool or spa? What was the condition of the barrier? If the barrier was in a poor condition, did the owner repair the barrier?

# 1. Introduction

## 1.1 Background

An opportunity to escape the heat and enjoy a private swimming pool or relax in a spa is a highlight of the summer for many households in Victoria. However, for too many families this pastime has been marred by tragedy. The Australian Drowning Report 2018 reported that “Children under five recorded the largest number of drowning deaths in swimming pools, accounting for 36 per cent of all swimming pool drowning deaths in 2017-18.”<sup>17</sup> This is not unique to Australia. The World Health Organisation (WHO) reports that drowning is among the 10 leading causes of death for children and young people in every region of the world.<sup>18</sup>

The idea/concept of swimming pools in private houses dates back to ancient Rome but until relatively recently private pools have been a luxury item largely beyond the means of most home owners.<sup>19</sup> However, since the 1950s a combination of rising living standards and new technologies—such as the widespread availability of prefabricated pools—have given more households than ever the option of having their own private pool.

Unfortunately, swimming pools and spas can also pose a deadly danger. The potential risk, particularly to young children, has been recognised for decades. Historically it was argued that managing this risk was the responsibility of parents and caregivers. As recently as 1983 the responsible Minister informed Parliament that the Government would not require pools to be fenced, but rather that pool owners should “exercise care where swimming pools are erected.”<sup>20</sup>

It was not until the 1990s that state and territory governments around Australia began to introduce compulsory safety barrier requirements. In Victoria this came into law on 8 April 1991 when the Building Regulations were amended to require all new pools to install barriers that complied with the Australian Standard: AS 1926-1986 Safety Barrier for swimming pools.

This was further strengthened in 1994 when new Building Regulations were introduced that required all pools constructed prior to 8 April 1991 to install safety barriers regardless of the date of construction or the requirements that may have been in place at that time. Since 1994 the requirements have been progressively strengthened. In 2001 the Building Regulations were further amended in response to the deaths of seven young children in just four months between October 1999 and January 2000. This amendment required the occupier of land which contained a pool—whether they were a tenant or the owner of the property—to ensure the safety barrier and gate was kept closed and otherwise operating effectively.

Since these amendments were introduced there has been no repetition of tragedy on such a scale, however, young children have continued to drown in private pools even 25 years after pools were required to be fenced. In 2017, a Regulatory Impact Statement (RIS) for the proposed Building Regulations 2017 was released for public consultation. That document discussed a proposal that all pools, regardless of their date of construction, would be required to upgrade and completely enclose their pools within a four-sided isolation barrier.

After extensive public consultation and further detailed review in cooperation with the Coroner’s Court into the circumstances surrounding the drowning deaths of young children in private swimming pools and spas since 2000, the Victorian Government determined that this proposal was not the most effective as it would not address the underlying problem. The data indicated that it was the condition of the barrier rather than the specific configuration that was critical. A modern barrier that is poorly maintained or has been deliberately interfered with—such as a self-closing gate being propped open—represents a greater danger than an older barrier that is compliant with an older standard.

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<sup>17</sup> *Royal Life Saving National Drowning Report 2018*, Royal Life Saving Australia, page 20, accessed at [https://www.royallifesaving.com.au/data/assets/pdf\\_file/0004/23197/RLS\\_NDR2018\\_ReportLR.pdf](https://www.royallifesaving.com.au/data/assets/pdf_file/0004/23197/RLS_NDR2018_ReportLR.pdf).

<sup>18</sup> This includes all causes of drowning as well as in swimming pools see:

[https://www.who.int/violence\\_injury\\_prevention/other\\_injury/drowning/en/](https://www.who.int/violence_injury_prevention/other_injury/drowning/en/)

<sup>19</sup> <https://royallifesavingwa.com.au/news/community/history-of-the-swimming-pool>

<sup>20</sup> Question without Notice, Hon. Mr Pat McNamara MLA to Hon. Frank Wilkes MLA, Minister for Local Government, Hansard, 16 August 1983.

In September 2018 the Victorian Government amended the Building Act and included the establishment of a new regulatory scheme placing stronger obligations on pool and spa owners to maintain their barriers in a compliant state. Amendments to the Act include a requirement for councils to establish and maintain a register of swimming pools and spas in their municipal area. They also set out powers to make regulations regarding various aspects of the scheme including:

- requirements on pool and spa owners to have their pool and spa barriers inspected;
- the issuing of certificates of pool and spa barrier compliance or non-compliance following an inspection; and
- requirements for the lodgement of these certificates with council.

The relevant amendments to the Building Act will commence on 1 December 2019. Amendments to the Building Regulations will need to commence simultaneously for these amendments to the Building Act to be given full effect.

## 1.2 Overview of existing current regulatory requirements

The existing requirements in relation to pool barriers are divided into two categories:

### *Construction*

During the construction phase, swimming pools and spas must generally comply with the same requirements that apply to any new building. These include applying for a building permit from a building surveyor, offering the building work for inspection by the surveyor at critical stages of the build, and the issuing of either a certificate of final inspection or an occupancy permit at the completion of the building work.

In addition, the building work must comply with the requirements of the National Construction Code (NCC), specifically Performance Requirements in relation to the construction of swimming pools and spas. The NCC is a uniform set of technical requirements prepared by the Australian Building Codes Board (ABCB) and is adopted into law by all the Australian states and territories.<sup>21</sup> A pool can meet the Performance Requirements either by complying with the Australian Standard 1926.1, or by developing an alternative Performance Solution. AS 1926.1 is prepared and published by Standards Australia, Australia's peak non-government standards-setting body.<sup>22</sup>

This construction phase is overseen by the VBA.

### *Use and maintenance*

Once the pool is constructed the pool owner must take all reasonable steps to ensure that the safety barrier is properly maintained.<sup>23</sup> An occupier, such as tenant, also has the responsibility to take all reasonable steps to ensure that the barrier is operating effectively and that the gate remains closed except when people are either entering or leaving the pool area.<sup>24</sup> Any person, including visitors to the property, have a responsibility to close the gate after entering or leaving the pool area.

The use and maintenance of swimming pools and spas is overseen and enforced by the relevant council.

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<sup>21</sup> For further information about the NCC and the ABCB see: <https://ncc.abcb.gov.au/ncc-online/About>

<sup>22</sup> For further information regarding the functions of Standards Australia and the process of standards development see: <https://www.standards.org.au/>.

<sup>23</sup> Building Regulations 2018, regulation 141.

<sup>24</sup> Building Regulations 2018, regulations 142 and 143.

**Table 5: Overview of the different entities with regulatory involvement in this area**

<b>Victorian Building Authority</b>	Victoria’s building and construction regulator that oversees the registration and discipline of building practitioners.
<b>Local councils</b>	Responsible for enforcing the building legislation post-construction.
<b>Australian Building Codes Board</b>	Responsible for developing the NCC that requires all pools and spas to be fenced.
<b>Standards Australia</b>	Responsible for publishing and overseeing amendments to Australian Standard AS 1926.1 which sets out the technical specifications that pool barriers must meet
<b>Relevant Building Surveyor</b>	The RBS issues the building permit that allows the work to commence and is also responsible for inspecting the progress of the work during construction and issuing either the certificate or the permit once the build is complete.

### 1.3 The nature and extent of the problem

#### *The impact of fatal drownings on parents and families*

The purpose of these proposed Regulations is to reduce or prevent incidents of drowning amongst children aged from zero to four years of age (young children). A drowning is defined by the World Health Organisation as the process of experiencing respiratory impairment from submersion or immersion in liquid<sup>25</sup> which causes a reduction in the oxygen available to the brain and other critical organs. A drowning can be fatal or non-fatal depending on how quickly the oxygen supply is restored to the vital organs, particularly the brain. The effects of both outcomes are considered below. Young children are particularly at risk of drowning because once they get into difficulty, they are often unable to save themselves without assistance.

Before introducing new regulation that may impose an additional burden on the community DELWP is required under the SLA to carry out an assessment of the costs of the new measures and other options versus their potential benefits. In the context of the proposed Regulations the cost is a burden resulting from the additional obligations on pool owners to have their swimming pools and spas registered and the associated safety barriers checked. There is also a cost on councils to administer various aspects of the scheme. The benefit is the reduction or prevention of accidental drownings amongst young children.

The purpose of quantifying the benefits is not to try to place a dollar value on each life saved or lost, but to emphasise the significant impact that the drowning of a young child has on their parents, siblings and extended families.

Bereavement and grief are experienced in different ways depending on the individual and the circumstances.<sup>26</sup> However, parental grief after the death of a child is generally considered one of the most severe, enduring and debilitating forms of bereavement.<sup>27</sup> Not only do many parents feel instinctively that it is a reversal of the assumed order, but in many cases being a parent is an integral part of a person’s identity and hopes for the future.<sup>28</sup>

The pain of losing a child can be felt even more keenly where the death occurs suddenly and with no opportunity to prepare, to be proactive in easing their child’s suffering through a palliative care process, or to say goodbye. In addition, a sudden and unexpected death, such as a pool drowning, will automatically trigger an investigation requiring the gathering of evidence, the taking of witness statements and a medical

<sup>25</sup> [https://www.who.int/violence\\_injury\\_prevention/other\\_injury/drowning/en/](https://www.who.int/violence_injury_prevention/other_injury/drowning/en/).

<sup>26</sup> Liz Crowe, *When a Child Dies*, Queensland Health, 2006, Page 16.

<sup>27</sup> *Ibid*, page 14.

<sup>28</sup> G. H. Christ, G. Bonanno, R. Malkinson, S. Rubin, ‘Appendix E—Bereavement experiences after the death of a child’, in *When Children Die: Improving Palliative and End-of-Life Care for Children and Their Families*, 2003 accessed at: <https://www.ncbi.nlm.nih.gov/books/NBK220798/>

examination of the deceased by the police and the Coroner. Even when handled sensitively, this process inevitably compounds the distress felt by parents and family members.<sup>29</sup>

The effects of such an experience are impossible to quantify or generalise, except to acknowledge that they are often significant and long term. Parents assert that their grief continues throughout their lives, often saying, 'it gets different, it doesn't get better'.<sup>30</sup> The grief is likely to manifest itself in different ways at different times, but may include some, or all, or potentially none, of the following:

**Table 6: Potential impacts of grief and bereavement on parents and family members**

Physical health	<ul style="list-style-type: none"> <li>• Insomnia, aches and pains, loss of appetite, confusion, inability to concentrate</li> </ul>
Psychological health	<ul style="list-style-type: none"> <li>• Guilt or self-blame, depression, anxiety, loneliness, helplessness, abandonment, chronic irritation or frustration.</li> <li>• Some parents may also experience intense jealousy of other families and intense rage at the unfairness of their situation. This can be directed either outwards or inwards.<sup>31</sup></li> <li>• In the first year after a child's death a parent is two to three times more likely to be hospitalised for mental health problems.<sup>32</sup></li> </ul>
Financial wellbeing	<ul style="list-style-type: none"> <li>• Most parents suffer a decline in income in the immediate aftermath and recover it later. However, some parents never regain their original earning capacity and can earn up to 30% less going forward<sup>33</sup>.</li> <li>• Some children who are revived at the scene may receive intensive medical care for days or months prior to passing away which can lead to significant out-of-pocket expenses.</li> <li>• The expense of funeral arrangements which can range from \$4,000 to \$15,000 or more.<sup>34</sup> Often parents and families choose to make additional special arrangements which can add to the cost.<sup>35</sup></li> <li>• Some bereaved parents may try to cope with their grief through spending on themselves or their surviving children.<sup>36</sup></li> </ul>
Employment	<ul style="list-style-type: none"> <li>• A parent who loses a child is 9% more likely to be unemployed than a parent who has not.</li> </ul>

<sup>29</sup> *Sudden Unexpected Death in Childhood*, <https://rednosegriefandloss.org.au/downloads/05092016-Sudden-Unexpected-Death-in-Childhood.pdf>

<sup>30</sup> *Ibid.*

<sup>31</sup> 'Appendix E—Bereavement experiences after the death of a child', *op.cit.*

<sup>32</sup> G. van den Berg, 'How to calculate the economic impact of grief', *The Conversation*, accessed at: <https://theconversation.com/how-to-calculate-the-economic-impact-of-grief-68936>.

<sup>33</sup> *Ibid.*

<sup>34</sup> <https://www.moneysmart.gov.au/life-events-and-you/over-55s/paying-for-your-funeral>.

<sup>35</sup> *Choices in Arranging a Child's Funeral*, Red Nose Foundation, accessed at:

<https://rednosegriefandloss.org.au/downloads/05092016-Choices-in-Arranging-a-Childs-Funeral.pdf>.

<sup>36</sup> *When a Child Dies*, *op.cit.*, page 23.

Social isolation	<ul style="list-style-type: none"> <li>• Parents report that their social groups undergo a 'breakdown' leaving them feeling isolated and alone.</li> <li>• Because child mortality is comparatively rare, many well-meaning friends and family can find it difficult to provide comfort.</li> <li>• This can lead to parents feeling responsible for 'making others feel better' and so choosing to avoid social situations.</li> <li>• Many parents avoid social circles they once shared with their children, such as school communities or mother's groups.</li> <li>• Some parents feel they should abstain from enjoyment out of respect.</li> <li>• Some parents have reported feeling self-conscious at being publicly known as the parent who lost a child and feeling pressure to conform with peoples' expectations of a grieving parent.<sup>37</sup></li> </ul>
Family relationships	<ul style="list-style-type: none"> <li>• The death of a child can often lead to friction and sometimes to the breakdown of the relationship between the parents, although this varies significantly depending on factors such as the circumstances surrounding the death.<sup>38</sup></li> <li>• Studies suggest that children in the family experience grief as deeply, profoundly and long-term as adults.<sup>39</sup> International studies also suggest that children who lose a sibling are at higher risk of mortality themselves from a range of causes.<sup>40</sup></li> <li>• In addition, they also lose the home environment they are familiar with and, at least temporarily, the attention of their grieving parents.</li> <li>• Grandparents can have a double burden, the first from losing their grandchild, and the second from witnessing the grief of their own child. Grandparents also feel a sense of injustice when a grandchild pre-deceases them.<sup>41</sup></li> </ul>

### *The impact of non-fatal drownings*

A drowning may not always be fatal. Amongst young children there are far more non-fatal drownings than there are fatal drownings. A non-fatal drowning is a drowning that does not result in death but may result in temporary or permanent injury. Historically, data concerning non-fatal drownings has been difficult to acquire. However, in June 2017 Royal Life Saving Australia released a major report into non-fatal drownings in Australia.<sup>42</sup> Data compiled as part of the report revealed that between 2002-03 and 2014-15 there were 279 non-fatal drownings in swimming pools in Victoria. In addition, it showed that nationally:

- for every fatal drowning in a swimming pool there are 4.34 non-fatal drownings;
- young children make up 64.6 per cent of non-fatal drownings in swimming pools; and
- the average cost per non-fatal drowning incident is \$690,000 (obtained from research conducted by Royal Life Saving Australia regarding the cost of each non-fatal drowning incident for the community) but may vary significantly depending on the nature and severity of the injuries sustained.

The ratios are illustrated in this graph comparing fatal (dark blue) to non-fatal (light blue) drownings across the different age groups:

<sup>37</sup> Joanna Moorhead, 'Can a parent get over the death of a child?', in *The Guardian*, 5 July 2014, <https://www.theguardian.com/lifeandstyle/2014/jul/05/can-parent-get-over-death-of-a-child>.

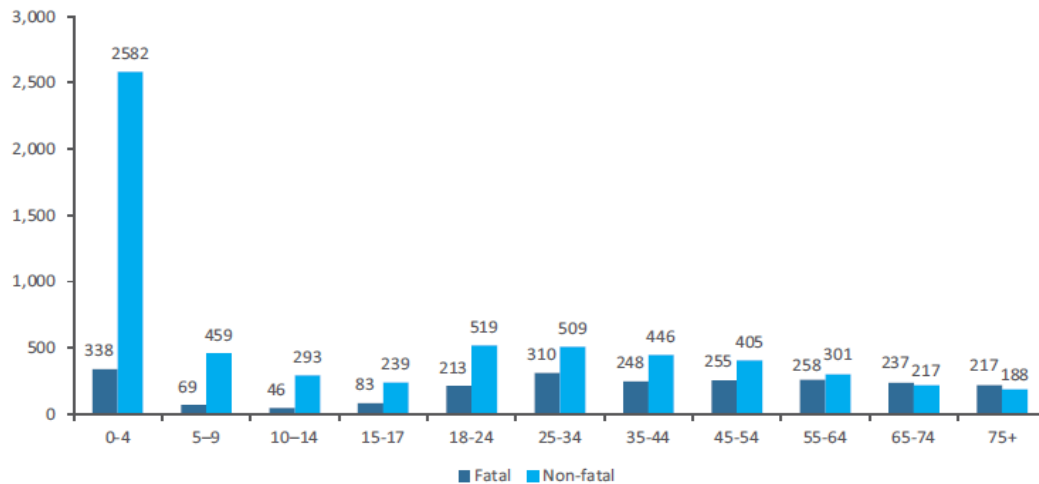
<sup>38</sup> Because the circumstances of the death and the condition of the relationship is so variable DELWP is not aware of any definitive estimate of the percentage of relationship breakdown.

<sup>39</sup> Z. Krupka, 'Gone but never forgotten: how to comfort a child whose sibling has died', *The Conversation*, accessed at: <https://theconversation.com/gone-but-never-forgotten-how-to-comfort-a-child-whose-sibling-has-died-101847>

<sup>40</sup> M. Rostila, L. Berg, J. Saarela, I. Kawachi and A. Hjern, 'Experience of Sibling Death in Childhood and Risk of Death in Adulthood: A National Cohort Study From Sweden', in *American Journal of Epidemiology*, June 2017, accessed at: <https://academic.oup.com/aje/article/185/12/1247/3793083>.

<sup>41</sup> *Grandparents' Grief is Unique*, Red Nose Foundation, accessed at: <https://rednosegriefandloss.org.au/support/article/grandparents-grief>.

<sup>42</sup> *A 13 Year National Study of Non-Fatal Drowning in Australia*, Royal Life Saving Australia, June 2017, accessed at: [https://www.royallifesaving.com.au/data/assets/pdf\\_file/0003/19938/3985\\_v4\\_RLS\\_NonFatalSymposium\\_ReportHR\\_PROOF\\_LR.pdf](https://www.royallifesaving.com.au/data/assets/pdf_file/0003/19938/3985_v4_RLS_NonFatalSymposium_ReportHR_PROOF_LR.pdf).



### National Study of Non-Fatal Drowning in Australia

Source: Royal Life Saving Australia, 'A 13 Year National Study of Non-Fatal Drowning in Australia', June 2017, page 20.

The available data suggests that for every bereaved family, there is between one and two families left to deal with the long-term consequences of caring for a child with an impairment. Because brain cells begin to die five to six minutes after they have been deprived of oxygen the seriousness of the injury depends on the length of time the child was submerged.

An ongoing, long-term study at the Children's Hospital at Westmead by the Centre for Trauma Care, Prevention, Education and Research found in about 20 per cent of drowning events there was some form of long-term behavioural and learning impairment and in 10 per cent of cases there was severe neurological deficit, which means that 30 per cent of children who are involved in a near-drowning incident had some form of ongoing impairment. The nature of this impairment can range from mild to severe. Because the parts of the brain that control coordination, movement and memory are more vulnerable to oxygen deprivation than others, mild impairment can result in:

- inattentiveness
- poor judgment
- memory loss
- a decrease in motor coordination

Longer submersion can have more severe and longer lasting impacts such as:

- the child being left in a vegetative state
- significant developmental delay
- severe memory problems
- incontinence
- changes in personality
- disorientation in place, person and time
- difficulty walking<sup>43</sup>

The consequences for families are often profound. In addition to experiencing many of the same impacts felt by bereaved parents discussed above in Table 6 their ongoing caring responsibilities can also exert a

<sup>43</sup> P. K. Suominen & R. Vahatalo, 'Neurologic long-term outcome after drowning in children', *Scandinavian Journal of Trauma, Resuscitation and Emergency Medicine*, August 2012, accessed at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3493332/#B5>.



significant ongoing toll. Table 7 sets out some of the impact that carers of all kinds, including those caring for children, may experience:

**Table 7: Potential impacts on families resulting from non-fatal drownings**

<b>Physical health</b>	31.7% of male carers and 28.5% of female carers were suffering from poor physical health, compared to 15.9% of males and 18.3% of females in the general population. <sup>44</sup>
<b>Psychological health</b>	Carers are more likely to suffer mental health issues than the general population.
<b>Financial Health</b>	Families who care for a person were significantly more likely to suffer financial hardship than families who did not. For example, over 30% of carer families could not pay utility bills on time compared to less than 15% of the general population.
<b>Social isolation</b>	18% of carer families report having contact with people outside their immediate household once or twice every three months.  The higher levels of financial hardship amongst such families also limits the potential for social interaction.

The impacts listed in Table 6 and Table 7 are not intended to be exhaustive and DELWP acknowledges that parents and family members may experience these impacts to different degrees, or not at all. However, based on DELWP’s review of the available literature these impacts appear to be common responses among most families impacted by drowning.

For this reason, although DELWP acknowledges that the impact of losing a child is difficult if not impossible to quantify, these impacts are very real and often very long term. For that reason, they must be considered when assessing the costs and benefits of the proposed Regulations.

*The impact of responding to the death of a child*

When a family experiences the drowning of a child their first call is nearly always to the emergency services. When the emergency services receive such a call an ambulance will be dispatched as a Code 1 priority (lights and sirens) while the operator remains on the line to assist the caller—usually a parent or close family member—with the administration of cardiopulmonary resuscitation (CPR) until the ambulance arrives and the paramedics can take over. Police will also attend the scene. Once on scene medical personnel will attempt to revive the drowning victim while others deal with the frequently distraught family and friends of the young child.

Although their involvement in these tragedies is usually fleeting, there is a growing public awareness of the cumulative toll such experiences have on emergency services personnel. A Commonwealth Senate Inquiry into the mental health of first responders found that the nature of the work performed by first responders is often psychologically challenging and situations that involve the death or injury of children, whether it be through drowning, car accidents, abuse or some other means, are often reported as being the most harrowing. Trauma may be caused by either:

- A case which impacts a first responder profoundly, for example a paramedic or police officer may be a mother or father; or
- The cumulative effect of repeat exposure to confronting situations.<sup>45</sup>

DELWP acknowledges that responding to child drownings makes up only a small part of the essential work done by emergency services personnel. However, if properly implemented the proposed Regulations are

<sup>44</sup> Dr. B. Edwards, ‘Caring for families caring for a person with a disability’, *Family Relationships Quarterly* No. 11, March 2009, accessed at: <https://aifs.gov.au/cfca/publications/family-relationships-quarterly-no-11#caring>.

<sup>45</sup> Education and Employment References Committee, *The people behind 000: mental of our first responders*, the Australian Senate, February 2019, accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/Mentalhealth/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Mentalhealth/Report).

anticipated to reduce the number of drownings and therefore the number of traumatic incidents that first responders are required to attend.

#### *Deaths and injuries in private swimming pools and spas*

Since 1 January 2000, 27 children aged four years or younger have died in private pools or spas in Victoria. Although this represents a significant reduction compared to previous decades, the toll in terms of both death and injury is still substantial and to a certain extent avoidable. In addition, the data indicates that incidents of non-fatal drowning in swimming pools has remained largely static.<sup>46</sup>

To ensure that the proposed Regulations will effectively reduce the risk drowning, DELWP has worked closely with the Victorian Coroner's Court to gain an understanding of the circumstances surrounding the deaths of young children in private pools since 2000. To ensure the privacy of the individuals involved the following are general observations:

- In all cases the child was temporarily unsupervised at the time of death.<sup>47</sup>
- In 20 of the 27 cases not only was the barrier non-compliant with the applicable standard, but the non-compliance played a direct role in the death.
- At least 12 took place where the child was not a resident.
- One took place at a neighbouring property that the child had gained access to without the knowledge of the pool owner.
- The single most common non-compliant aspect of safety barriers was the gate and/or door that allowed access to the pool area. Non-compliance in this respect included gates that were propped open, absence of child locks on doors or because a pool gate was no longer functioning properly.
- In more than one case a section of barrier was either missing or had been replaced by an inadequate temporary fence.
- A significant majority of fatal drownings took place in permanent pools. Only one death occurred in a relocatable pool.

This document will highlight how the proposed Regulations can assist in reducing or eliminating the causes of such deaths in the future.

#### *Survey carried out by the VMBSG*

As part of the preparation of the proposed Regulations DELWP coordinated with the VMBSG to carry out a survey of municipal building surveyors (MBSs) to understand the strengths and weaknesses of the existing regulatory framework and how it is practically enforced by councils. The results of the survey suggested that:

- Most councils are largely reactive in their approach to pool barrier compliance, usually responding only after receiving a complaint from a member of the public or internal referral. Where proactive inspections are undertaken they often only capture a fraction of the pools in the local area.
- This is predominantly because of resourcing and time constraints.
- There is a very high level of non-compliance on initial inspection—approximately between 80 per cent and 90 per cent.<sup>48</sup>
- The most common causes of non-compliance were additional building work or landscaping which compromised the effectiveness of the barrier and the barrier components wearing out.

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<sup>46</sup> In 2002/03 there were 156 non-fatal drownings. In 2014/15 it was 170 with the worst year being 2003/04 when there were 221, *Non-Fatal Drowning in Australia, op.cit.*

<sup>47</sup> Because of this the Coroner was not always able to definitively determine how or when a child entered the pool area.

<sup>48</sup> DELWP acknowledges that it is possible this figure is influenced by the fact that councils are almost always responding to complaints and therefore a high rate of non-compliance can be expected. However, DELWP has not received any information from any stakeholder thus far to suggest that the figure is likely to be significantly lower.

- In general terms pool owners have a very low understanding of the requirements in relation to pool barriers and the need to ensure their barriers are maintained to remain effective.
- Nearly 70 per cent of MBSs indicated that their council already has some form of register or database in relation to swimming pools in their municipal area, although many also acknowledged that it was not complete.
- Nonetheless, all respondents also indicated that council would need to upgrade their existing database to meet the requirements of the Building Act and the proposed Regulations and maintaining the new register would require ongoing resources.
- To encourage pool owners to bring their pool into compliance the majority of MBSs rely on their power to issue a Minor Works Order under section 113 of the Building Act. This allows the MBS to compel a pool owner to carry out minor building works.

## 1.4 Objectives and scope of the project

The primary objective of the proposed Regulations is to reduce the number of drownings of young children, both fatal and non-fatal, that occur in private swimming pools and spas by improving the general standard of maintenance and the structural soundness of safety barriers. The proposed Regulations will do this by giving effect to the scheme that was provided for in the 2018 amendments to the Building Act. Those amendments were the first step in strengthening the requirements in relation to pool barrier maintenance. Because they have already been passed into law by the Victorian Parliament they are outside the scope of this paper.

This review analyses options for amending the Building Regulations to provide the requirements of the new scheme and ensure it operates effectively. Specifically, critical details that have been analysed include:

- the registration process and the barrier standards that pool and spa owners will be required to comply with;
- processes for the inspection of pools and spas and certification of their barriers;
- the procedures for addressing barriers determined to be non-compliant;
- the approach to regulating relocatable pools and spas; and
- the fees that will be charged to owners to fund the establishment and maintenance of the registers.

Although each of the individual measures proposed below would contribute to the reduction of drownings, the intent in this RIS is to consider their cumulative effect as a package of measures. Therefore, the analysis will not seek to apportion an individual value to each measure, but to consider their effectiveness as a whole.

Although DELWP's analysis of the Coronial data indicates that a temporary lack of supervision was present in all the cases of drowning, the proposed Regulations do not consider imposing any additional requirements for supervision. Aside from the challenges of practical enforceability any such requirement would not address the fundamental problem.

The data indicates most of the children who drowned entered the pool area when the pool is not in use. This is why compliant safety barriers are such a critical component to ongoing pool safety. Their purpose is to restrict access to the pool area—perhaps most importantly when the child is not under immediate and direct supervision of a parent or other adult. However, if a barrier degrades or is defective its ability to restrict access is compromised.

It is not within the scope of the Building Regulations or the Building Act to require adult supervision of young children at all times.

The objective of this RIS is to analyse the most effective, efficient and least costly means of ensuring that barriers are maintained in good repair and in a compliant condition.

In addition, there are certain matters that are not within the scope of the project to change:

- Amendments made to the Building Act that have already been passed into law by the Victorian Parliament cannot be altered by changes to the Building Regulations. For example, the Building Act

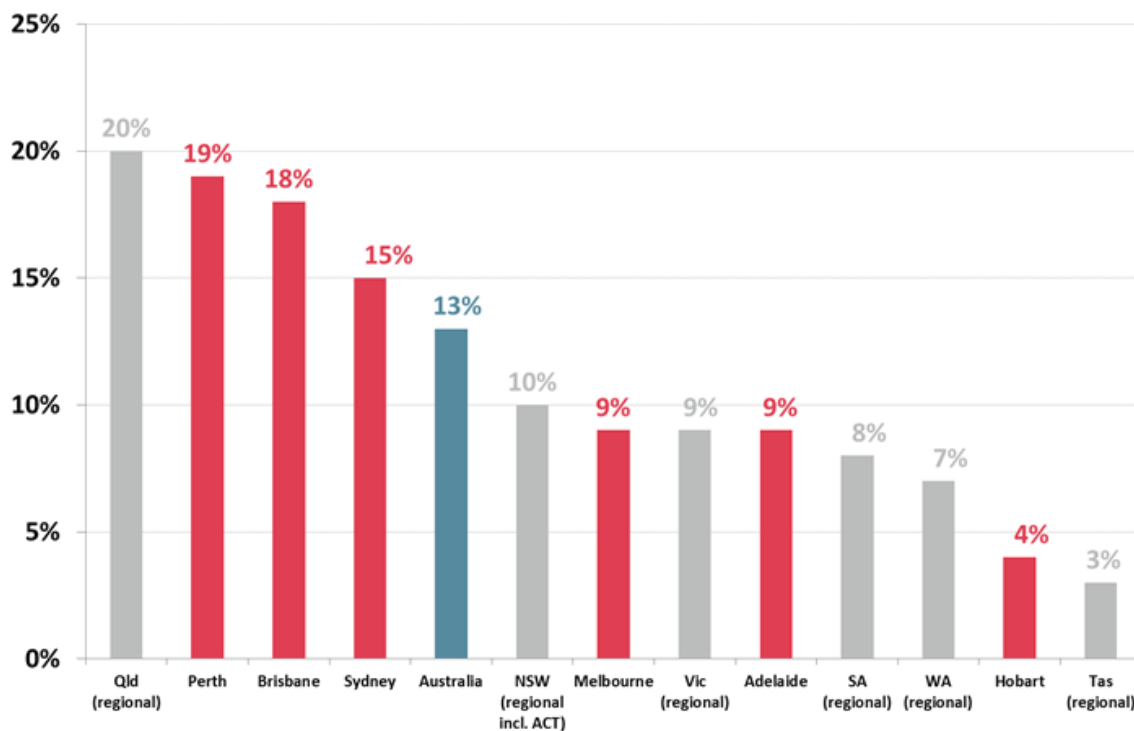
states that councils must keep and maintain the register of pools. Therefore, it is beyond the power of the Building Regulations to require that the register be kept and maintained by someone else.

- Because the Building Regulations are made under the Building Act they can only be applied to structures and activities that are within the scope of the Building Act. For example, it is not within the scope of the Building Regulations to regulate pools or spas that are not defined as 'buildings' by the Building Act.<sup>49</sup> This issue is discussed further in Chapter 6 as part of the broader discussion of the requirements in relation to relocatable pools.

This review analyses options for amending the Building Regulations to provide the requirements of the new scheme and ensure it operates effectively.

## 1.5 The approach in other jurisdictions

In preparing the proposed Regulations and this RIS, DELWP undertook a review of the approach to the regulation of swimming pools and spas in other jurisdictions. The available data indicates that approximately 12 – 13 per cent of households in Australia have a private pool. Unsurprisingly, the frequency of pool ownership varies sharply from state to state with pools being most common in jurisdictions with hotter and or more tropical climates such as Queensland (Qld), the Northern Territory (NT) and Western Australia (WA).



Swimming pool ownership around Australia, September 2018

Source: Roy Morgan Research Institute, 'Swimming pool ownership increases in Australia', <http://www.roymorgan.com/findings/7811-australian-swimming-pool-ownership-september-2018-201811230555>.

By comparison, states such as Victoria and Tasmania (Tas) have a much smaller number of private pools.<sup>50</sup> To assist in crafting Victoria's new pool safety regulations DELWP has analysed the main features of the regulatory approach adopted by jurisdictions of a similar size, or with a similar number of private pools.

<sup>49</sup> For example, although the Building Act defines a building broadly enough to include most relocatable pools, it may not be broad enough to include all inflatable pools.

<sup>50</sup> Data compiled by Roy Morgan Research Institute in 2018 suggest that the percentage of households with a pool within each jurisdiction has remained relatively static with Qld and Western Australia still showing the most frequency: <http://www.roymorgan.com/findings/7811-australian-swimming-pool-ownership-september-2018-201811230555>

### *New South Wales*

In New South Wales (NSW) a pool owner must register their pool and ensure its barrier is installed and maintained in accordance with the relevant standards. Swimming pool barriers in NSW are governed by the *Swimming Pool Act 1992* (NSW) and *Swimming Pool Regulation 2018* (NSW). The swimming pool register, maintained by the NSW Government, was established on 29 April 2013.

The NSW Act and Regulations require a pool owner to first complete an online self-assessment checklist to assess if the pool barrier meets the appropriate Australian Standards. There are three relevant standards in NSW.<sup>51</sup> Pools must comply with the current standard if they are substantially altered or rebuilt.

Pool owners are required to arrange an inspection:

- every three years when the swimming pool is part of multi-occupancy or tourist and visitor accommodation, or
- if the pool is part of the local council's adopted inspection program, or
- prior to sale or lease of that property (since 29 April 2016 the owner must have a compliance certificate or occupation certificate when they sell their property).

The inspector can be a council officer or a private certifier. After the inspection the inspector must issue either a certificate of compliance or a certificate of non-compliance. A certificate of compliance lasts for three years. The local council must be notified of any certificates of non-compliance. If pool owners do not register their pool or the pool does not comply with the relevant standard they can be penalised.<sup>52</sup> People can also be penalised for failing to securely close doors and gates to the swimming pool.<sup>53</sup>

### *Queensland*

The Qld scheme started in 2009 and had a five-year transition period. Since 1 December 2015 all pools in Qld must be registered online with the Queensland Building and Construction Commission (the QBCC). A pool owner can complete a pool checklist online. The relevant legislation is the *Building Act 1975* (Qld) and the *Building Regulations 2006* (Qld).

All pools, including spas and some portable pools must comply with one barrier standard.<sup>54</sup> Previously, Qld had 11 standards.

In Qld, an inspection is required for:

- all new swimming pools (a building certifier inspects at final inspection); and
- all other pools at point of sale and lease.

Pool owners must have a pool safety certificate, final inspection certificate or certificate of classification. These certificates are valid for two years or one year in the case of shared pools.

A pool inspector can be a building certifier or an individual that holds an appropriate qualification or statement of attainment and has passed a pool safety inspector test set by the QBCC. The inspectors are governed by a Code of Conduct and must act in the public interest.

In Qld, local government must inspect the pool and take enforcement action if they receive a pool safety complaint or notice from the QBCC. A private certifier can take enforcement action if pool owners are not taking appropriate action to ensure the pool complies with the standard. People can also be fined for not closing the gate or door to a pool.

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<sup>51</sup> AS 1926-1986, AS 1926.1 – 2007 and AS1926.1 – 2012 with different obligations for pools built before August 1990 and those built after August 1990 but before 1 July 2010.

<sup>52</sup> *Swimming Pool Act 1992* (NSW), ss 7(1), s 15(1), 30B.

<sup>53</sup> *Swimming Pool Act 1992* (NSW), s 16.

<sup>54</sup> Queensland Development Code mandatory part 3.4 and the Australian Standard 1926-2007 Parts 1 and 2 as modified by the Queensland Development Code.

### *Western Australia*

All private pools must be registered with the relevant local government in WA. The relevant legislation is the *Building Act 2011* (WA) and the *Building Regulations 2012* (WA). Each pool owner must ensure their pool barrier complies with the Regulations.

In WA there are different barrier standards that respectively apply to pools built before 1 May 2016 and pools built after 1 May 2016. The local government is responsible for conducting and arranging the inspections at least once every four years. The local government can issue infringement notices and start legal proceedings if a barrier is found to be non-compliant.

WA is currently in the process of reviewing its Regulations.

## **1.6 Conclusion**

Although the purpose of this document is to present a robust, evidence-based policy analysis with the aim of achieving an important policy outcome, the sad reality behind the data should not be forgotten. In the words of Justin Scarr, CEO of the Royal Life Saving Society of Australia:

*We must always be mindful that this is a report filled with the stories of real people impacted in a most tragic way by drowning. It includes people who lost their lives to drowning, the families they left behind, the rescuers who made valiant efforts to save their life, and the communities that are reminded as they pass the causeway, swimming pool, rock platform, beach or river swimming holes.<sup>55</sup>*

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<sup>55</sup> *Royal Life Saving National Drowning Report 2018, op. cit.*, page 4.

## 2. Proposed regulatory approach

### 2.1 Purpose

The purpose of this chapter is to set out DELWP's broad approach to the options analysis and to establish the base case against which the options considered in subsequent chapters will be measured.

As discussed in Chapter 1, the purpose of the proposed Regulations is to reduce the number of drownings of young children in private swimming pools and spas in Victoria. There are a range of possible broad approaches, both regulatory and non-regulatory, that could be used to achieve this aim. DELWP considered these before determining that the preferred options outlined in this RIS, and codified in the exposure draft, are the most effective and least costly means of achieving that purpose.

Chapter 2 explains DELWP's analysis of the other broad approaches that were considered:

- Making new regulations
- Increased enforcement action under the existing regulations
- Non-regulatory action such as information campaigns.

### 2.2 Base case

The base case is the future world where no further action is taken by government. This includes not making any new or amended regulations, and also not taking any new non-regulatory actions. The base case includes what existing regulatory and policy tools are already in place that are (or could be) used to address the problem.

Section 15A of the Building Act provides that regulations may be made in relation to:

- (a) the construction, installation, maintenance and operation of swimming pools and spas and associated services; and
- (a) the construction, installation, maintenance, operation and use of:
  - (i) equipment associated with swimming pools and spas, including safety equipment; and
  - (i) swimming pool barriers and spa barriers and associated services.

The Building Regulations (and their predecessor regulations since 2006) formally adopt the Building Code of Australia (BCA) into Victorian building requirements. This means that a building permit is required (for pools and barriers), and the barriers must meet the technical standard set out in the BCA.<sup>56</sup>

In addition, the Building Regulations provide that:

**Table 8: Existing requirements for the use and maintenance of pools and spas**

Current Regulation No.	Regulatory requirement
141	The owner of the land must take all reasonable steps to ensure that a barrier restricting access to the swimming pool or spa is properly maintained.
142	An occupier of the land must take all reasonable steps to ensure that a barrier restricting access to the swimming pool or spa is operating effectively.

<sup>56</sup> The BCA is issued every year and successive editions of it have provided different barrier standards that must be adhered to for pools constructed between 8 April 1991 and 30 April 2010 and since 1 May 2010. The current Regulations provide special arrangements for pools built before 8 April 1991 (as these are not subject to the BCA provisions).

Current Regulation No.	Regulatory requirement
143	An occupier of the land must take all reasonable steps to ensure that any gate or door forming part of a barrier restricting access to the swimming pool or spa remains closed except when a person is entering or leaving the part of the land that contains the swimming pool or spa.
144	A person who opens a gate or door forming part of a barrier restricting access to the swimming pool or spa must ensure that the gate or door is closed immediately after entering or leaving the part of the land that contains the swimming pool or spa.

The provisions in Table 8 are enforced by local councils.<sup>57</sup> Non-compliance with any of these regulations may attract a penalty of 50 penalty units (\$8,060 in 2018-19).

In addition to the existing regulations above, the September 2018 amendments to the Building Act discussed in Chapter 1 are due to commence on 1 December 2019. These are already legislated and will take effect regardless of any regulatory changes. However, only some of these provisions need to be considered as part of the base case. The provisions which form part of the base case are those that introduce new requirements regardless of whether any new regulations are made. However, there are also provisions that require additional regulations to be made to have any practical impact. For example, the Building Act now allows a regulation to be made that would require pool owners to arrange for a mandatory inspection of their barrier. However, if no regulation was introduced then pool owners would not have to arrange an inspection.

Those that form part of the base-case are discussed below in Table 9.

**Table 9: The effect of the legislative changes under the base case**

Required by the Act	Practical effect of Act without Regulations
<p><b>Council must establish a register</b></p> <p>Each council must establish and maintain a register of swimming pools and spas located in the municipal district of the council (section 216D(2)).</p>	<p>Councils would be required to take necessary steps to establish and maintain a register, including steps to locate and identify all swimming pools in their district. However, the specific information to be recorded in the register is unclear, as the Building Act provides only that the register must contain the prescribed information, and in the form and manner prescribed by the Building Regulations. Despite having no prescribed information, or manner or form, it is expected councils would record basic information (i.e., the location of each pool) in some form. In the absence of any Building Regulations, the Building Act itself does not compel pool owners to take any particular steps to register their pool or undertake inspections. However, the requirement for councils to establish a register could in practice lead to councils requesting residents to register pools.</p>
<p><b>Council must provide information</b></p> <p>A council must submit, on request and in the prescribed manner, all or any part of the information recorded in the register to the VBA or other prescribed person, agency or body (section 216D(5)).</p>	<p>No practical effect, as the information is required “in the prescribed manner” which has not been specified.</p>

<sup>57</sup> Under section 212 of the Building Act, councils are responsible for the administration and enforcement of the Building Regulations within their municipalities.



Required by the Act	Practical effect of Act without Regulations
<p><b>Council must keep the register private</b></p> <p>A council must ensure that no information in the register is published or made available to any other person, agency or body, except:</p> <ul style="list-style-type: none"> <li>• The VBA <b>may</b> publish information on its website regarding the number and types of swimming pools and spas that are located in any municipal district, but must not disclose details of any owner, or the specific location, of a swimming pool or spa</li> <li>• Councils <b>must</b> provide access to the register for owners, occupiers or inspectors (but only in relation to the particular pool or spa on land they own, occupy or for which they have been engaged to inspect respectively)</li> </ul>	<p>These provisions would have full effect without the need for regulations. Regulations may specify additional persons that must be given access to the register.</p>

The Building Act itself does not compel individual pool or spa owners to notify, register or otherwise inform a council of the existence of a pool. It may be that in meeting their obligations under the Act, councils write to residents asking for information. However, this is unlikely given competing priorities and finite resources. Most councils consulted suggest no new substantial activities to identify or locate pools would be undertaken in the absence of any regulations to give full effect to the intended registration and inspection scheme.

Therefore, without regulations, councils would still be required to establish a register of pools and spas if they did not already have one. However, there would be no requirement to provide information to assist councils with this process. It is possible that some pool owners might register voluntarily but DELWP believes that is unlikely to result in many additional voluntary registrations.<sup>58</sup> It is also possible that some councils could prioritise the registration of pools but based on consultations with councils DELWP believes this is unlikely.

### 2.3 Broad options considered

The feasible options for the proposed Regulations are limited to those matters required or permitted under the framework set out in the Building Act and subsequent amendments. For that reason, DELWP has identified three broad options that could be taken to address the issues discussed above in Chapter 1 within this framework.

#### Option 1—New regulations

As mentioned in the discussion of the base case, from 1 December 2019 councils will be required to establish and maintain a register of swimming pools and spas within their district. In the absence of utilising the regulation-making powers to provide the detail for requirements to the register, DELWP does not envisage the new requirements having a significant impact in reducing drownings of young children.

This option would see Government introducing new regulations giving practical effect to some, or all, of the new powers introduced last year. Specifically, the Government would make regulations prescribing:

- A mandatory requirement to register private pools and spas with council;
- the exact information councils need to include on the register of private pools and spas in their municipal area;
- the barrier standards that pools and spas will be required to comply with;
- how frequently pool and spa owners must have their safety barriers inspected;
- the fees that will be charged to owners to fund the establishment and maintenance of the registers; and

<sup>58</sup> See the discussion in Chapter 3 regarding the limitations of voluntary registration.

- suitable transitional arrangements that allow councils and owners time to prepare for the new scheme.

The essential role that these measures would have in reducing drownings is considered in detail in subsequent chapters. Specific details of the regulatory requirements that would be made under this option are discussed in subsequent chapters.

### **Option 2—Increased enforcement action under the existing regulations**

There are already a range of regulatory tools available to local councils for enforcing the safe use of pools and spas. Councils could prioritise the enforcement of these provisions with penalties of up to 50 penalty units with no further regulatory change.

Under section 212 of the Building Act, councils are responsible for administering the building requirements in their municipal district. These are significantly broader than just requirements relating to swimming pool and spa barriers and without additional resources any prioritisation of barriers will potentially come at the expense of monitoring and enforcing another critical aspect of the building requirements.

However, as discussed in Chapter 1, MBSs surveyed by the VMBSG have reported that resourcing and time constraints are significant impediments to their ability to enforce the existing regulations. This is because arranging and carrying out inspections, assessing levels of compliance and determining whether to take enforcement action can be time-consuming and complex. Although councils may recover some of the costs through penalties such as infringement notices or as a result of court action, they do not charge a direct fee for carrying out this core function.

### **Option 3—Non-regulatory action: information campaigns**

A non-regulatory approach would refrain from imposing any new regulations or undertaking additional enforcement activity and instead utilise non-regulatory initiatives, such as public awareness or education campaigns by authorities such as councils or the VBA.

The amendments in the Building Act in relation to the establishment and maintenance of pool registers by council which will commence on 1 December regardless of whether any further regulations are introduced. This will make it mandatory for councils to establish and maintain a register of pools and spas. However, in the absence of any requirement compelling pool or spa owners to register their pools and spas it is highly unlikely to result in councils obtaining a comprehensive list of the swimming pools and spas in their municipal areas. As will be discussed in more detail in Chapter 3, a comprehensive register is the critical first step in implementing a scheme that will reduce drownings amongst young children.

In this context, an information and public awareness campaign could focus on:

- promoting voluntary registration amongst pool owners;
- the preparation, promotion and dissemination of technical guidance material designed to assist owners in making their barriers compliant; and
- more general information to promote child safety around water.

Although funding such a campaign would come at a cost to Government, there would be no additional regulatory or financial burden on pool owners.

## **2.4 Preferred option**

DELWP has identified the making of new regulations as outlined in section 2.3 as the preferred option. This is based on a range of considerations, specifically:

- Without additional regulations it seems unlikely that the basic policy intent could be achieved. Most councils consulted as part of this project suggested no substantial new compliance action to identify or locate pools would be undertaken in the absence of regulations prescribing a registration and inspection scheme.

- Without additional regulations councils will still be required by the Building Act to establish registers, however there would be no means of recovering those costs from pool owners. As a result, the register would have to be funded from within existing council resources. This means that the costs would ultimately fall on the community in general, including those who do not own a pool or spa. The same would be true of any other method of funding to councils that was collected directly from pool owners. Given that only a comparatively small minority of Victorians own a pool or spa this seems an unfair burden on the rest of the community.
- A non-regulatory approach and information campaign has already been attempted. In mid-2018 the Minister for Planning instructed the VBA to establish a voluntary register for pool and spa owners along with checklists and other technical guidance material. The aim was to encourage pool owners to register their pools and to provide them additional information to carry out a self-assessment of their pool barriers. Tragically in the second half of 2018 two children died as a result of drowning in private pools or spas. In both cases the barriers were found to be non-compliant.

Based on these considerations DELWP believes that further regulations need to be introduced to achieve the desired policy outcome of reducing drownings amongst young children.

## 2.5 Consolidation of swimming pool requirements in the Building Regulations

The proposed Regulations will amend the Building Regulations to insert provisions establishing the new regulatory scheme for private swimming pools and spas. These requirements will be contained within a newly-created Part 9A in the Building Regulations. The proposed Regulations will also move the existing requirements relating to swimming pool and spas barriers in Divisions 1 and 2 of Part 9 of the Building Regulations into the new Part 9A. The benefit of this approach is that all of the requirements that specifically relate to pool and spa barriers will be contained within the same part of the Building Regulations. Apart from their relocation, no other change is being made to these existing requirements for swimming pool and spa barriers. Accordingly, there is no change in their effect or the costs they impose and it was not necessary to assess the impacts of these existing requirements in this RIS.

## 2.6 Unused heads of power

As previously discussed the amendments to the Building Act introduced a range of new heads of power to make regulations. DELWP's preferred approach is to utilise most of them to make regulations as the Victorian Government intended.<sup>59</sup> However, there are several heads of power for which DELWP does not, at this stage, propose to use to make regulations. This does not mean that regulations cannot be made in the future.

### *Prescribing fees for carrying out inspections and certification of safety barriers*

DELWP does not intend to make regulations using section 15A(3)(h)(iii) to prescribe the fees payable for the inspection of swimming pool and spa barriers and the issue of certificates of pool and spa barrier compliance and certificates of pool and spa barrier non-compliance.<sup>60</sup>

The practical effect of prescribing fees would be to mandate the amount that private swimming pool and spa inspectors could charge to pool owners for carrying out inspections and issuing certificates. DELWP does not at this stage support prescribing such a fee for the following reasons:

- Part of the intent to require private swimming pool and spa inspectors to carry out the inspection and certification work was to encourage more inspectors to enter the market and drive down costs for consumers. DELWP believes that this is best done by allowing price competition between inspectors.
- DELWP does not at this stage have enough credible data to confidently prescribe such a fee. There is a risk of setting the fee too low and discouraging building practitioners from entering the market

<sup>59</sup> See Minister Wynne's Second Reading Speech: "The regulations to be made after passage of the Bill, will be fundamental in establishing the new framework and will be subject to RIS analysis." Hon. Richard Wynne, Minister for Planning, *Second Reading Speech—Trades Registration and Other Matters Bill*, Hansard, 7 August 2018.

<sup>60</sup> Building Act, s 15A(3)(h)(iii).

resulting in too few inspectors compared to the number of pools, or prescribing the fee too high and risk imposing unnecessary burden on consumers.

- DELWP does not believe at this stage that prescribing such a fee is necessary to achieve the intended policy outcome of reducing drowning amongst young children.

However, DELWP will monitor the behaviour of inspectors in this market as part of its Forward Work Program (see Chapter 10) and may consider prescribing fees in the future if it becomes necessary.

*Prescribing fees for searches by councils for information relating to swimming pools and spas*

Section 15A(3)(h)(ii) of the Building Act allows the making of regulations to prescribe an additional fee that must be paid to help fund the cost to councils of carrying out information searches in relation to the swimming pools and spas located in their municipal area. The practical effect of prescribing such a fee would be to impose an additional cost on pool owners to offset the cost to council of carrying out information searches.

DELWP understands that many councils now maintain digital records that are comparatively easy to search. However, in order for some councils to determine a date of construction (and dates for any subsequent building work which altered the barrier) for older pools and spas, they may be required to search through hardcopy archives, some of which may be stored off site or may no longer exist. This can be time-consuming and resource-intensive. DELWP has also been advised that there are sometimes significant differences between the manner, form and level of accessibility with which different councils have retained their records, particularly older records. DELWP understands that this is due to a range of factors, including different levels of resourcing and past council amalgamations, that vary from council to council.

The intent behind Section 15A(3)(h)(ii) was to give the Regulations the power to prescribe another source of funding to assist councils recover the costs associated with such searches. Since the fee is intended to cover the cost of information searches related to determining the date of construction the fee would likely need to be collected as part of the initial registration process. Since DELWP has proposed that any new pools and spas will be added to the register as part of the building approval process—see Chapter 3—information searches of this nature are likely to only be necessary in the case of existing pools and spas.

After consideration DELWP has decided not to prescribe an additional fee for the following reasons:

- DELWP does not have enough information to prescribe an appropriate flat fee covering just information searches. Due to the significant differences between the manner and form of record keeping between different councils the costs of carrying out a search are also likely to differ significantly. Therefore, any prescribed fee amount is likely to exceed the needs of some councils and be insufficient for the needs of others.
- DELWP does not have enough information to set an appropriate fee to cover all the different kinds and types of pools and spas. DELWP understands that finding information in relation to a pool constructed in the last 10 years is likely to be much quicker and less resource-intensive for councils than finding information in relation to a pool from the 1990s. Since there is no way of telling ahead of time which pools and spas might require more extensive information searches the Regulations would have to prescribe a flat fee covering all pools and spas. Again, this is likely to lead to some owners bearing unnecessary costs.
- An alternative option would be to allow each council to set their own fees. This would ensure that all councils could recover the full cost of carrying out any searches but would be likely to lead to significant differences in the fees being charged between different municipal areas. DELWP does not consider this a desirable outcome. It not only lacks transparency but could also lead to pool owners in one municipality paying significantly more than pool owners in another municipality simply because of differences in the way their respective councils retain their records.
- There are alternatives to prescribing a specific fee to assist councils to cover the cost of carrying out information searches, such as the registration application fee. As the discussion in Chapter 8 regarding DELWP's cost benefit analysis makes clear, the registration fee has been prescribed with the intention that it should also contribute to the average costs associated with information searches.

In addition to these considerations, DELWP is aware that the successful implementation of the new scheme requires the cooperation and participation of pool owners. For that reason, DELWP does not believe that another fee, in addition to the proposed registration fee, should be imposed without a persuasive policy justification. However, DELWP has received feedback from some stakeholders that they believe that the cost of carrying out information searches may be higher than expected, and therefore is seeking additional stakeholder feedback.

#### *Renewal of registration*

Sections 15A(3)(a)(ii) and 15A(3)(a)(iii) of the Building Act allow regulations to be made to require pool owners to apply to periodically renew their registrations, in a similar manner to the way pet owners are required to renew the registration of their pets.

DELWP considered what prescribed period might be appropriate to require pool owners to renew, including whether it should be every 12 months to mirror the requirements on pet owners. However, unlike a pet which may have passed away in the preceding year there is no obvious additional information required from pools owners nor are many pools, except for relocatable pools which are discussed in Chapter 6, likely to be removed, drained or filled in.

The only purpose for renewal of registration would be to obtain an additional means of cost recovery to council. But this can be done more efficiently through alternative means, such as a document lodgement fee payable by the owner when they lodge their certificate of pool and spa compliance with council. This process and the fees payable are discussed elsewhere in the RIS.

Instead, it is proposed that registration will be a one-off requirement. Swimming pools and spas will remain registered until an owner demonstrates to the council's satisfaction that the pool no longer exists or is no longer capable of holding more than 300 mm of water.

In addition, because the removal of a pool from the register imposes minimal administrative burden on councils, no fee will apply.

#### **Questions for stakeholders:**

1. Do you agree that there should be no prescribed fee for the carrying out of an inspection and certification of a safety barrier? Please explain your response.
2. Do you agree that there should be no prescribed fee for councils to carry out information searches in relation to determining the date of construction of pools and spas? Please explain your response.
3. If you believe that a separate fee for council information searches should be charged, do you believe that the fee should be prescribed via regulations or set by individual councils? Please explain your response.
4. Do you agree that there should be no requirement for renewal of registration? Please explain your response.

## 3. Registration

### 3.1 Purpose

This chapter considers options for the registration of private swimming pools and spas by local councils. It sets out DELWP's preferred option based on an analysis of how effective each option would be in achieving the policy intent of preventing drownings. This chapter also considers other design options that relate to the registration of swimming pools and spas by councils.

The options considered in this chapter have been assessed by DELWP using a combination of cost-benefit analysis, testing with stakeholders and evaluation of their likely effectiveness in achieving the policy aim. The costs associated with the options, both to pool and spa owners as well as councils, have been drawn from the cost-benefit analysis prepared by the consultants engaged by DELWP. The fundamental consideration in assessing the options is the likelihood that they will contribute to achievement of the policy aim of reducing incidences of young children drowning in private swimming pools and spas.

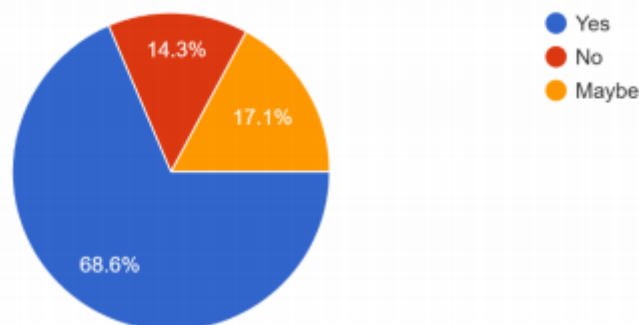
### 3.2 Background

DELWP was advised of the importance of establishing a register of private swimming pools and spas during consultation leading up to the commencement of the Building Regulations. Under section 212 of the Building Act local councils are responsible for administering the building provisions in their municipal area. This is a significant responsibility given the amount of building stock in many council areas. For example, one eastern inner-city council has reported that they have over 70,000 dwellings in their municipal area, which is expected to expand by a further 7,500 dwellings in the next 10 years. Policing the compliance of private swimming pools and spas is just one comparatively small part of this responsibility. Establishing a register is designed to assist them to carry out this function.

A register is simply a database or list of the private pools and spas in a municipal area. DELWP received feedback from numerous submissions during consultation on the development of the Building Regulations which highlighted the importance of a mandatory registration requirement in providing an easily accessible source of information for councils and other authorities for the purposes of education or compliance action.

However, the submissions also highlighted the importance of making registration mandatory for all pool and spa owners. Unless owners were required to register it is highly unlikely that they would do so voluntarily.

This advice is consistent with the results of the survey of MBSs carried out by the VMBSG. The survey results revealed that most councils have already established their own databases or registers for tracking the private swimming pools in their area. The following figure shows the responses to the question: *Does your council currently have any data base containing information as to the existence and location of swimming pools and spas within the municipality?*



#### Councils that currently have database recording existence and location of swimming pools and spas

Source: VMBSG Survey

However, of the respondents who reported maintaining such databases, only a small minority (6.3 per cent) believe that it “probably covers all pools and spas in the municipality.” The overwhelming majority have indicated that their data is incomplete. There were several reasons put forward for this including:

- the information was deduced indirectly from various sources such as building permit data and complaints;
- the register was based on old information that the council had yet to update;
- the register missed relocatable pools that were erected on a short-term basis;<sup>61</sup> and
- because councils derive most of their information from building permit data any pool that was constructed illegally would not be included, unless it was the subject of a complaint and enforcement action.

In response to this feedback the Victorian Government proposed amendments to the Building Act which require councils to establish and maintain a register of private swimming pools and spas in their municipal area. The amendments were passed by the Victorian Parliament in September 2018 and are due to commence on 1 December 2019. As a result, those councils who do not presently have a register will be required to implement one. All councils will also be required to add pools and spas to the register as they become aware of them.

### 3.3 Nature of the problem

The purpose of requiring councils to establish a register is to assist them in enforcing the requirements of the Building Act and Building Regulations in relation to private swimming pools and spas. DELWP believes that this will better position councils to act on incidents of barrier non-compliance that increase risks of young children gaining unintended access to the pool or spa.

Although the amendments to the Building Act have already been passed and it is not within the scope of the Building Regulations to modify or limit them, the Building Act does leave significant aspects of the operation, content and administration of the register to be prescribed through the Building Regulations. Specifically:

- whether pool and spa owners should be required to register their pools or spas;
- the procedures that pool and spa owners must follow as part of the registration process; and
- the information to be recorded on the register.

These questions are fundamental to both the effectiveness of, and the burden imposed by, the registration process. This chapter will set out DELWP’s preferred option in relation to each of these questions.

### 3.4 Mandatory registration requirements for pool and spa owners

A mandatory registration requirement would place an obligation on land owners to apply to councils to register their pools or spas.<sup>62</sup> As has been discussed, most councils who maintain a register do not have comprehensive information regarding the swimming pools and spas in their area. This is primarily because councils rely on information gleaned indirectly from a range of sources such as building permit data. The intent of the mandatory registration requirement would be to ensure that council registers are as comprehensive as possible.

There are two categories of swimming pools and spas which need to be added to the register:

- Existing swimming pools and spas or those under construction as at 14 April 2020; and
- New swimming pools and spas that are constructed after 14 April 2020.

Both categories present specific challenges and will be dealt with through different registration processes.

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<sup>61</sup> DELWP’s proposed approach for dealing with relocatable pools is discussed in detail in Chapter 6.

<sup>62</sup> For swimming pools and spas located on common property, the obligations of the new scheme which fall upon owners would be assigned to the relevant owners’ corporation as the owner of the common property on behalf of the lot owners.

### *Existing pools and spas*

Although the exact number of pools and spas currently in Victoria is unknown, DELWP has reviewed available data sources and believes there are approximately 220,000. Although the information provided by the survey of MBSs suggests that many of these are likely to already be recorded on a register or database, there will be a significant number that are not.

DELWP is proposing a prescribed date by which an application must be made to the relevant council to register an existing pool or spa. The proposed date is **14 April 2020**.

DELWP did consider alternative options for the registration process, such as giving councils the discretion to set the due dates for their municipalities. However, DELWP believes that a prescribed date for all pools and spas across the state is preferable because:

- It ensures consistency from one municipality to another. This ensures fairness by requiring all pool owners to comply with the same requirement regardless of where they live.
- Prescribing a date in the proposed Regulations allows greater transparency as it can be presented for public consultation through the RIS process.
- DELWP is aware that it will take some time for public awareness and education campaigns to effectively disseminate the new requirement amongst the community. The message will be easier to convey if there is only one date that pool owners need to be aware of.

The 14 April 2020 prescribed date is viewed as appropriate for the following reasons:

- It will take some time for councils to install the infrastructure and establish the procedures necessary to receive and process registration applications.
- It allows a period from the date the proposed Regulations commence on 1 December 2019 until the registration deadline on 14 April 2020 during which the new requirements can be disseminated to the community. This period also extends over summer when pool usage is more common and pool safety is likely to be much more prominent.
- 14 April 2020 coincides with other forms of council registration, such as pet registration which is due at approximately the same time each year.
- It ensures that all existing pools and spas throughout the state will be added to the register in a timely manner.

Councils will have the freedom to determine how they receive applications. For example, they may accept applications made online, by hard copy through the mail and/or by attendance at council offices. Based on consultation with different councils DELWP believes that the method of application should be kept as flexible as possible to accommodate the different capabilities and preferences of both councils and pool owners.

There will be two processes by which an existing permanent or relocatable pool can be entered on the register:

- the land owner applies directly to council; or
- the council must add any pool or spa that they are aware of to the register.

### *New pools and spas*

Owners of newly constructed pools and spas will be required to apply for registration within a prescribed period of no more than 30 days after receiving the relevant certificate of final inspection or occupancy permit. As part of the application for registration, owners will also be required to provide the first certificate of pool and spa barrier compliance. The certificate will be issued by the relevant building surveyor as part of the building inspection and approvals process, specifically following the final inspection carried out under existing regulation 169(d).



A certificate of pool and spa barrier compliance is required because unlike an occupancy permit or certificate of final inspection, a certificate of compliance certifies that the safety barrier meets the technical standards required by the Regulations.<sup>63</sup>

DELWP considered whether the registration process could be integrated in the building approval process without the need for owners to apply through a separate application process. Building surveyors are already required to provide certain documentation to council during the building approval process and potentially a certificate of compliance could be added to that list.

DELWP decided not to pursue this option because doing so would place the obligation for lodging the first certificate of compliance and paying the lodgement fee on the building surveyor. DELWP considered that this was inappropriate. The core of the proposed Regulations is the responsibility of the owner to apply for registration and provide the certificate of compliance to the council within the required timeframes. Therefore, requiring a building surveyor to take these actions would confuse this responsibility and could lead to disputes between owners and building surveyors.

The proposed Regulations require that upon receipt of an application for registration, councils must add the pool or spa to the register and to confirm that in writing to the owner and advise of the date by which the next certificate of pool and spa barrier compliance is required.

DELWP acknowledges that a register, in and of itself, will not necessarily lead to fewer drownings. However, a comprehensive register will significantly increase the effectiveness of the new inspection and certification requirements—discussed in later chapters—that should lead to less drownings.

### ***Option 1—Base case***

Under the base case, after 1 December 2019 councils must establish and maintain a register of swimming pools and spas within their municipal districts in accordance with the Act's requirements. There will be no formalised registration process under which owners would provide details of their swimming pools and spas for the register. Instead, councils would add details of swimming pools and spas to their registers as they become aware of their existence. This would most commonly be when council becomes aware of a newly constructed swimming pool or spa through receiving building permit documentation. However, councils would also list pools and spas on the register after they become aware of them through a variety of other means including aerial photography, sale listings, valuation records, notifications from neighbours and other parties.

DELWP is not aware of any definitive data regarding what proportion of existing pools are already on existing council registers. Data provided in response to the survey of MBSs suggests that it varies from council to council depending on resources and compliance activity.<sup>64</sup> It is reasonable to assume that this variation would continue under the base case. Some councils may encourage their residents to voluntarily register their swimming pools and spas. However, they could not compel such action. DELWP anticipates that because of differences in resources, priorities and the extent of the municipal area they are responsible for, under this base case there is likely to remain the significant variations between councils that was revealed by the VMBSG survey.

### ***Option 2—Mandatory registration***

This option would result in the proposed Regulations making it mandatory for owners to apply to register their swimming pools and spas with their local council. Failure to apply for registration within the required timeframe would be an offence. The regulations would also prescribe the information that each council must

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<sup>63</sup> Under section 46(1) of the Building Act an occupancy permit is evidence that the building or part of a building to which it applies is suitable for occupation. Section 46(2) states that the occupancy permit is not evidence that the building or part of the building complies with the Building Act or the Building Regulations. Section 38(2) states something similar in regards to certificates of final inspection. This is not the same as certifying that the safety barrier meets the specific technical requirements.

<sup>64</sup> See discussion above under Section 3.2.

keep on the register as well as the prescribed form that would be used for applications (these are discussed in subsequent sections of this chapter).

### *Benefits*

Compared with the base case that puts all of the onus on councils, a mandatory registration requirement on owners that is underpinned by an offence is likely to result in a more complete picture of the swimming pools and spas within a municipality. This is true even in the case of councils who take a proactive approach. For example, DELWP was advised by one council that they had been conducting an audit of swimming pools in their municipal area for the last eight years and still occasionally discover pools they weren't aware of. Greater awareness among councils will help councils target education of pool owners and enforce barrier requirements to reduce the risk of drowning.

Since 2012 three Coronial inquests into the drownings of young children have recommended the creation of a mandatory swimming pool and spa register as an essential tool to help reduce drownings.

The need for a mandatory registration requirement is demonstrated by the reluctance of pool owners to voluntarily register their pools. This has been conclusively demonstrated by the comparatively small number of pool owners who have chosen to register their pools in response to the establishment of the VBA's Voluntary Swimming Pool and Spa Register. This was an initiative of the Victorian Government to promote pool safety but has also provided the opportunity to test the viability of a non-regulatory option for registration.

In November 2018 the VBA established a register of pools at the request of the Minister for Planning and invited Victorian pool owners to voluntarily add their pool or spa. The VBA publicised the creation of the register and cooperated with the Victorian Government and organisations such as LSV to promote the register to pool owners.

The register itself was set up independent of existing council registers or databases. The only pools that appear on the register are those that pool and spa owners have chosen to add. Unfortunately, at the time of writing the VBA have reported that fewer than 120 people out of Victoria's estimated 220,000 pool and spa owners have chosen to voluntarily register their pool or spa, despite over 32,000 individual visits to the VBA pool safety website.

DELWP believes that this demonstrates that even pool owners who are concerned and interested enough to take the time to familiarise themselves with pool safety by visiting the VBA's pool safety website, will not necessarily take the next step to voluntarily register themselves.

The proposal for a mandatory registration requirement is based on similar legislation in place in NSW and Qld which places an obligation on swimming pool and spa owners to register. In those jurisdictions the register was established to promote pool safety and prevent drownings amongst young children by providing a source of information to assist with education and compliance.

An additional benefit of mandatory registration by pool owners is that the accompanying registration fee will assist council in meeting the cost of establishing and maintaining the register. The maximum fee levels proposed by DELWP are considered in Chapter 9, but it is important to note that if the register is to function effectively it must be adequately resourced.<sup>65</sup>

In the preparation of this RIS, DELWP has consulted with a range of councils to understand the likely burden administering the register will impose. The costs of the requirements contained in the proposed Regulations are listed in Table 11 (below). DELWP anticipates that in the absence of a mandatory registration requirement not all of these costs would be relevant. However, councils would still need to provide resources as set out in Table 10 below.

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<sup>65</sup> The absence of additional funding was highlighted as a key factor in the lack of utility in the NSW pool register. *Independent Review of Swimming Pool Regulation*, NSW Office of Local Government accessed at <https://www.olg.nsw.gov.au/sites/default/files/OLG%20-%20Lambert%20Swimming%20Pool%20Review%202015%20-%20Final%20Report.pdf>.

**Table 10: Estimated costs of no mandatory registration requirement (\$ million) <sup>66</sup>**

Activity	Cost to pool owners	Cost to councils
Cost of establishing registers across all councils	0	1.13
Councils register pools	0	0.47
<b>Total</b>	<b>0</b>	<b>1.60</b>

In the absence of a mandatory registration requirement councils would have to fund the register from elsewhere in their existing resources. Given that DELWP understands that less than 10 per cent of Victorian households own a pool or spa DELWP believes that it is reasonable to require this relatively small minority to cover the cost of establishing and maintaining the register rather than impose the cost on the broader community.<sup>67</sup>

This cost will be felt disproportionately by councils which do not currently have a register but will be obliged after 1 December 2019 to create one.

#### Costs

The costs listed in Table 11 do not include the direct cost of paying the registration fee. The analysis in relation to the registration fee is discussed in detail in Chapter 9. Table 11 lists DELWP's estimates of the average cost to council in time and resources of each activity involved in establishing the register based on information provided by a range of different councils.<sup>68</sup>

**Table 11: Estimated costs of the proposed registration requirements (\$ million)**

Activity	Cost to pool owners	Cost to councils
Cost of establishing registers across all councils		1.13
Informing residents about need to register		0.46
Owners apply to register pools (includes locating information on date of construction) (does not include registration fee <sup>69</sup> )	1.28	
Councils register pools		0.47
Councils determine date of construction <sup>70</sup>		0.70
Councils send notices confirming registration details and date of next inspection		0.70
Some owners appeal councils' determination of date of construction	0.35	0.70
<b>Total</b>	<b>1.63</b>	<b>4.16</b>

Assuming the total cost of \$1.63 million is shared equally by all of Victoria's estimated 220,000 pool and spa owners this equals \$7.40 per pool owner.<sup>71</sup> Taken together with the proposed registration fee of \$37.00

<sup>66</sup> Figures are based on a 10-year period and are expressed as net present value (NPV) in 2019 dollars. A real discount rate of 4 per cent was used.

<sup>67</sup> Roy Morgan, *Swimming pool ownership increases in Australia*, *op.cit.*

<sup>68</sup> For further information about the cost assumptions please see Appendix A. For further information regarding the councils engaged by DELWP please see Chapter 11 Summary of Stakeholder Engagement.

<sup>69</sup> Fees are used to recover the costs to council. Fees are discussed in Chapter 9.

<sup>70</sup> This is discussed later in this chapter.

<sup>71</sup> Please note this doesn't include the projected growth in future pool and spa installations.

discussed in Chapter 9, the mandatory registration requirement is anticipated to impose a one-off cost of approximately \$44.40 per owner.

A review of the NSW model is illustrative of some of the challenges faced by the registration requirement. The registration requirement in NSW was introduced using a similar approach to that in the proposed Regulations of introducing the law with a 12-month period of delay until it took effect.

Based on what occurred in NSW there are likely to be a minority of pool owners who will fail to apply for registration by the required date. DELWP understands that in NSW between 10 per cent and 20 per cent of swimming pools remained unregistered with councils two years after the requirement was first introduced.<sup>72</sup> Based on this information DELWP acknowledges that there is likely to be a minority of pool owners who do not comply with the requirement when it takes effect.

### ***Preferred option***

Based on the analysis above DELWP's preferred option is mandatory registration. This is the action that will best deliver the policy aim of ensuring that councils have more comprehensive records of the swimming pools and spas in their municipal areas. This can provide the basis for more effective compliance activities aimed at reducing non-compliant barriers which in turn will reduce the risks of young children gaining unintended access to the pool or spa.

In addition, although a mandatory registration requirement will undoubtedly impose a cost burden on owners, DELWP has sought to minimise it. Given the cost of installing a permanent pool<sup>73</sup> compared to the \$44.40 total cost of registration DELWP does not believe that cost will be a significant disincentive to registration.

DELWP accepts that there is likely to be a degree of non-compliance. However, this is an ongoing challenge for every similar registration requirement. For example, a minority of people still routinely fail to either register or renew the registration of their pets. However, non-compliance can be minimised through a combination of:

- appropriate enforcement action; and
- a public information and awareness campaign.

The proposed Regulations create an escalating series of penalties beginning with an infringeable offence punishable by an on-the-spot fine of 2 penalty units (\$330.44 in 2019-20) which will likely address the bulk of non-compliance, through to the powers available to council MBSs under Part 8 of the Building Act.<sup>74</sup>

DELWP is also committed to working with a range of stakeholders including local councils, the water and child safety organisations and the swimming pool and spa industry to ensure that the information regarding the mandatory registration requirement is widely disseminated.

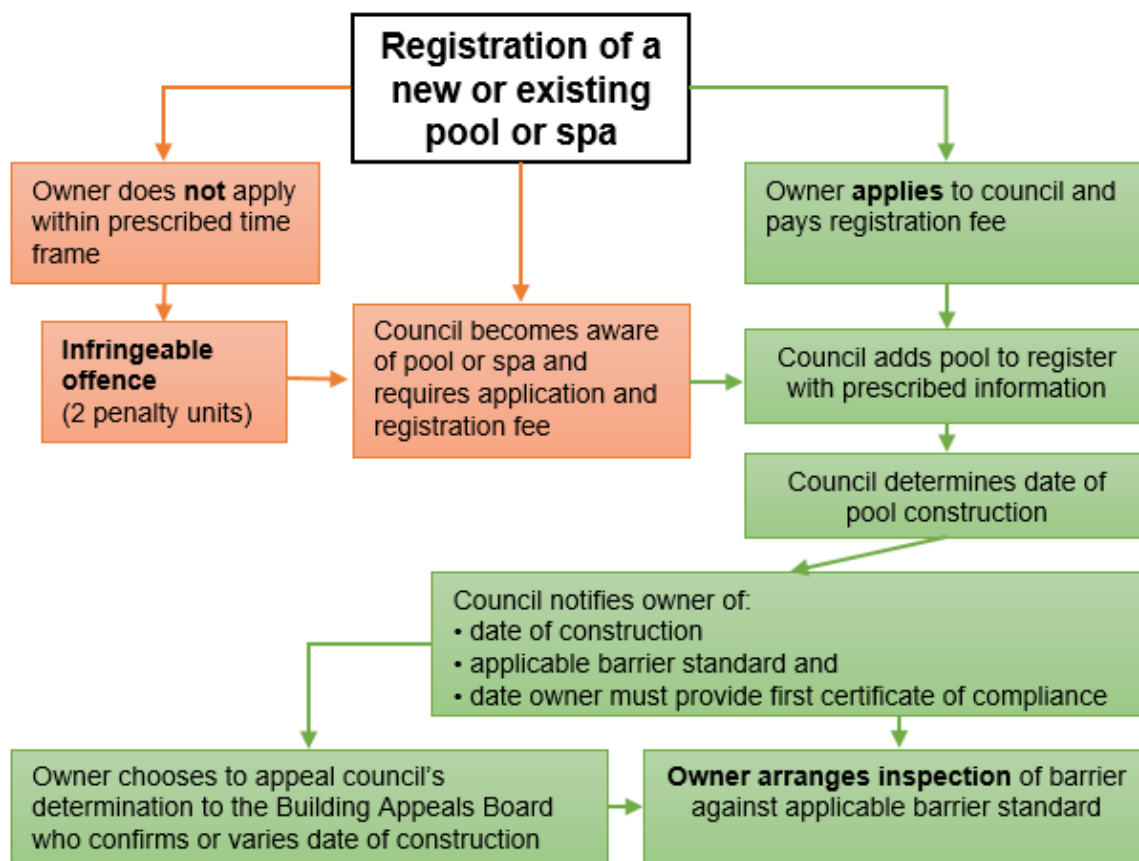
The proposed registration processes have been set out in the flow chart below:

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<sup>72</sup> NSW Office of Local Government, *Independent Review of Swimming Pool Regulation*, accessed at <https://www.olg.nsw.gov.au/sites/default/files/OLG%20-%20Lambert%20Swimming%20Pool%20Review%202015%20-%20Final%20Report.pdf>.

<sup>73</sup> The cost varies significantly depending on the design and size, but DELWP understands that even a cheaper installation is likely to cost between \$5,000 and \$10,000.

<sup>74</sup> This belief is based on the reported experiences of councils enforcing other mandatory registration regimes. For example, in 2016 Knox City Council visited 800 homes to enforce pet registration but only ended up issuing 282 fines, Seedy K., 'Woman fined \$311 for late pet registration', *The Herald Sun*, 16 January 2017, accessed at <https://www.heraldsun.com.au/business/woman-fined-311-for-late-pet-registration/news-story/f724d9d2a9736011fb255916d79cc1cb>.



Flow chart: Swimming pool and spa registration process

**Questions for stakeholders:**

5. Do you support mandatory registration of all swimming pools and spas? Please explain your response.
6. Is the proposed deadline of 14 April 2020 for owners of existing swimming pools and spas to apply to register an appropriate timeframe? Please explain your response.
7. Is the requirement for a registration application for new swimming pools and spas to be submitted within 30 days of the owner's receipt of a certificate of final inspection/occupancy permit appropriate? Please explain your response.
8. Do you support no fee being required for an application to remove a swimming pool or spa from the register? Please explain your response.

### 3.5 Information that must be recorded on the register

The amendments to the Building Act required councils to establish and maintain a register of pools and spas in their municipal area. The Building Act further requires that the register must contain the information prescribed in the Building Regulations. The intent is to give the proposed Regulations the power to set a minimum benchmark for the information recorded by every council on their registers.

The type of information held on a register is critical to the cost and effectiveness not just of the registration requirement, but of the overall inspection and independent certification system. This was highlighted by the NSW Office of Local Government in a report issued in 2015 which found the following weaknesses with their swimming pool register:

- no information on the technical standard that applies to the pool;
- limited information on any exemptions that apply;
- where a pool is non-compliant there is no information on the reasons for non-compliance and what rectification work is undertaken and the outcome; and
- no history of pool inspections and outcomes.

Although the NSW swimming pool register is kept centrally, it was reported that some councils were continuing to maintain their own registers due to the difficulties with using the state-wide register.<sup>75</sup>

Nevertheless, there are limitations on what can be added to the register. The Building Act only allows information to be added, and therefore requiring other items, such as documents, or copies of the certificates of compliance or non-compliance, is not within the scope of the proposed Regulations. This limitation is discussed further in Chapter 10.

### **Option 1—Base case**

The base case would avoid prescribing any specific information that would need to appear on the register. DELWP understands that there are often differences in the type and detail of information currently kept by those councils who currently maintain a register. These differences would likely continue and potentially worsen as councils without a register established one.

This has the potential to undermine the effectiveness and practicality of the proposed inspection and certification of safety barriers. For example, building practitioners engaged to carry out inspection and certification of a barrier may not know what standard they should be assessing the barrier against.

### **Option 2—Minimal prescribed information to be kept on the register**

The proposed Regulations have sought to limit the prescribed contents of the register to only information necessary for the effective functioning of the scheme. The intent is to avoid imposing unnecessary burden on either councils or owners. It should be noted that this is only the information that *must* be included on the register kept by every council; councils may add further information if they wish to.

#### *Benefits*

The proposed prescribed information and the policy rationale for its inclusion is laid out below in Table 12.

**Table 12: Information that must be recorded on the register**

<b>Information required</b>	<b>Policy rationale</b>
The name and address of the owner of the land on which the pool or spa is located.	<p>The address where a pool or spa is located is required for inspection/certification or enforcement purposes.</p> <p>While the address where a pool or spa is located does not change, the name or address of an owner may change and should be kept up to date.</p> <p>The proposed Regulations will therefore councils to update the land owner's name when they receive notification that the property has changed hands.</p>

<sup>75</sup> *Independent Review of Swimming Pool Regulation*, op.cit., page 78.

The date of construction determined by the council.	The date of construction is relevant to the applicable barrier standard.
The applicable pool barrier standard that applies to that pool or spa based on the council's determination of the date of construction and knowledge of any later alterations to the barrier.	This information is required for inspectors to assess compliance against the applicable barrier standard.
Whether the swimming pool or spa is relocatable or permanent.	This information is relevant to the state-wide picture of the profile of pools and spas in Victoria, including their risk profile. It also assists councils in carrying out their regulatory activities, for example it would allow them to target relocatable pools and spas.
The date of the most recent certificate of pool and spa barrier compliance lodged with council.	This information is required so that council has a record of when the barrier was last certified as compliant. It is also relevant to setting the date by which the next certificate is due.
If the council has granted has allowed the pool owner to provide a document in lieu of certificate of compliance under proposed regulation 147W.	This information is necessary to ensure that councils are aware that the pool owner has provided a document that is not a certificate of compliance which demonstrates the compliance of the pool barriers.
The date by which the next compliant barrier certificate for the pool or spa is required to be lodged with council.	This will be required to assist council in enforcing the requirement on pool owners to provide the next certificate of compliance.
The date of issue and permit numbers of any building permits issued after the date of construction	This information is necessary to record if any subsequent version of the barrier standard applies after the date of construction.

In addition, the Building Act requires councils to share information recorded on the register with the VBA to assist with their regulatory activities. Prescribing the types of information listed above will ensure that the VBA can depend on all councils being able to provide consistent types of information and date from their registers.

The cost of establishing and maintaining a register with this information is detailed in Table 11 (above).

Upon receipt of a notice of acquisition in relation to the sale of land which contains a registered swimming pool or spa, councils will be required to update their register to record the details of the new owner. They will then need to write to the new owner to confirm certain matters including the date that the next certificate of pool and spa barrier compliance is required to be provided by.

The other obligation in the proposed Regulations for councils to update the register is when a certificate of pool and spa barrier compliance is lodged and it relates to an inspection carried out by a relevant building surveyor following works which altered the barrier associated with a registered pool or spa. If the alteration to the barrier was certified against a later barrier standard than that which is listed on the register, the council must update the applicable barrier standard on the register.

### ***Option 3—Additional information that could be prescribed to be kept on the register***

DELWP acknowledges that there is further information that could be added to the register and is seeking feedback from stakeholders on this. This would be in addition to the prescribed information under Option 2 above.

DEWLP is limiting its consideration of additional information to be added to the register to the information contained in the certificates of pool and spa barrier compliance and non-compliance as set out in Table 13 below.

## Benefits

Because copies of certificates are unable to form part of the register, the information contained on them is not automatically treated as part of the register despite them being lodged with council. This has potentially significant practical implications. For example, the name and registration number of the relevant swimming pool and spa inspector is recorded on the certificate but is not prescribed information under the proposed Regulations and would not be required to be kept on the Register. This means that if the VBA was seeking to identify which safety barriers had been inspected by a specific inspector, they would not be able to access that information by examining a council register.

In addition, because the information set out below will be collected as part of the certificate of pool and spa barrier compliance process there would be no additional burden on either pool owners or pool inspectors in the collection of the information. The additional information that could be included on the register and the policy rationale for why it could be prescribed as being required on the register is set out in Table 13.

**Table 13: Additional information that could be included on the register**

Information	Policy rationale
Identity of the pool inspector, including name and registration number	This would allow those who examined the register, including councils, the VBA and pool owners to identify which practitioners have carried out inspections at specific addresses. This could assist the VBA in their regulatory activities.
Is the applicable barrier standard built using a Deemed to Satisfy or a Performance Solution	A barrier constructed in accordance with a performance solution may be compliant with the BCA and the proposed Regulations, but may be built according to different technical requirements than those contained in the deemed-to-satisfy standard. To carry out an inspection the pool inspector needs to know what technical requirements they are assessing the safety barrier against.
List of faults identified in past inspections	This could be useful for council in developing an understanding of the risk profile of the individual pools in their municipal area. It may also assist future policy development by comparing lists of faults to identify frequent causes of non-compliance.
The type of pool (whether the pool in-ground, above-ground, or indoor or outdoor, or a spa pool).	This is additional information that may be relevant to the state-wide picture of the profile of pools in Victoria, including their risk profile.

## Costs

DELWP does not have specific costings for requiring these additional pieces of information. However, every additional prescribed information requirement increases the complexity of the registration process and requires councils to spend time and resources on entering it onto the register. In addition, the more complex the requirements, the higher the likelihood that information will be recorded incorrectly.

## Preferred Option

DELWP prefers Option 2 as it represents the appropriate balance between ensuring that the register includes information critical to the operation of the proposed Regulations, without imposing any additional unnecessary burdens on either councils or pool owners. DELWP believes that the base case would over time lead to potentially significant differences in the contents of the registers kept by individual councils. DELWP views this as an undesirable outcome.

Although the information collected under Option 3 could be useful for particular purposes, DELWP does not believe that there is sufficient justification to require it as part of the register. Although this means that



information may not be as easily accessible in the short term, DELWP has committed to exploring ways to remedy this. This is discussed further in Chapter 10.

**Questions for stakeholders:**

9. Do you agree with the information proposed to be prescribed as required to be kept on the register? Please explain your response.
10. Is there any other information that should be required to be included on the register? Please explain your response.
11. What, if any, additional obligations should be placed on councils to keep the register up to date? For example, if after inspecting a safety barrier, an inspector believes that the applicable barrier standard recorded on the register is not accurate, should council be required to update the register? Or can this be left to the discretion of councils?

### 3.6 Barrier standards and determining the date of construction

One of the key features of the proposed Regulations intended to reduce child drownings is to improve the level of compliance in relation to swimming pool and spa barriers. For this to take place it is necessary for an owner to know what standard their barrier should comply with. As discussed in Chapter 1, there are a range of barrier standards that apply to swimming pools and spas in Victoria.

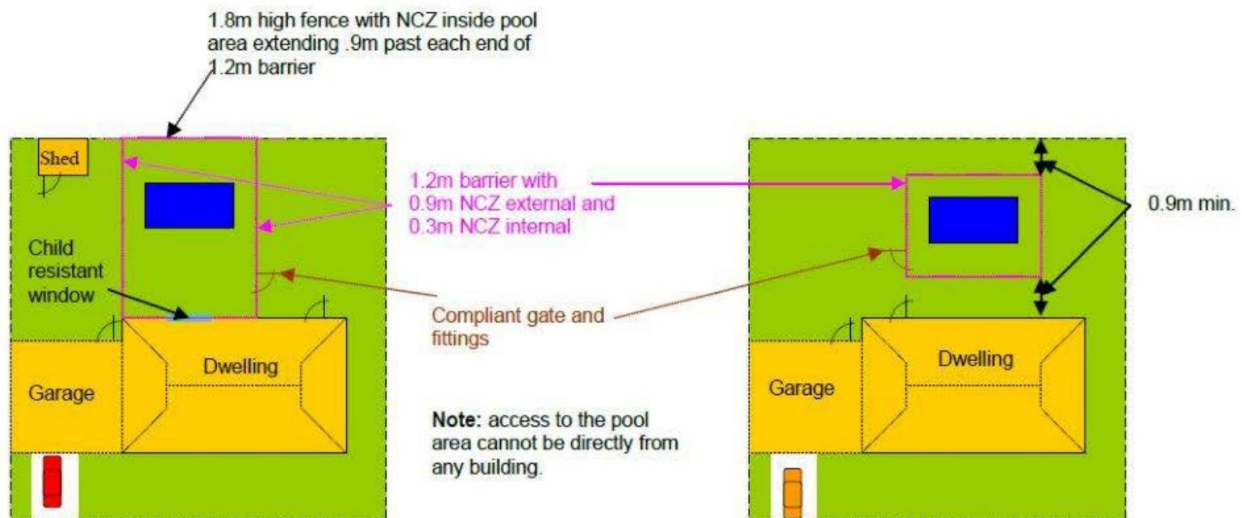
This is due to the evolving nature of the regulatory requirements since swimming pools and spas were first required to be fenced in 1991. Over time, both the NCC and the relevant Australian Standard have been progressively amended and these amendments have been incorporated into the Building Regulations. Because there have been no retrospective requirements imposed on pool owners, swimming pools and spas across Victoria have been built to comply with multiple versions of the barrier standards depending on when they were constructed.<sup>76</sup>

#### *Building Regulations 2017 RIS*

As part of the review undertaken prior to the sunset of the Building Regulations 2006, in 2017 DELWP proposed several new requirements to improve swimming pool safety. The most prominent proposed reform was that all existing pool owners should be retrospectively required to upgrade their existing pool barrier to comply with the 2012 version of the Australian Standard 1926.1. Examples of pool barriers that comply with AS 1926.1:2012 are included below:

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<sup>76</sup> The only retrospective requirements imposed on pool and spa owners was the requirement introduced in 1994 that all swimming pools and spas constructed prior to April 1991 must install a safety barrier regardless of the requirements that were in force at the time the pool or spa was constructed.



Pool barrier incorporating boundary fence and part of dwelling

Isolation pool barrier

However, at that time DELWP did not propose introducing either a mandatory registration requirement, or independent inspection and certification. Many individuals and groups responded to this proposal expressing a wide range of concerns, including:

- The questionable effectiveness of a mandatory requirement for an isolation barrier in the absence of other requirements, such as mandatory registration and certification.
- The practicality of enforcing the requirement given the reluctance of pool owners to cover the potentially high cost of the remedial building work as well as the substantial cost to councils of enforcing the upgrade.
- The perceived unfairness, particularly on the part of pool owners, of being required to upgrade pool barriers that they believed were compliant with the law at the time they were built.

After considering this feedback and further analysis of the available data, the Victorian Government decided not to proceed with the proposed requirement for all existing barriers to upgrade to comply with AS 1926.1:2012.

#### *Barrier standards for pools and spas built prior to 8 April 1991*

As outlined in Chapter 1, the requirement to install pool fences for all new pools and spas was introduced in April 1991. In 1994 this was broadened by the introduction of a retrospective requirement that all pools built prior to April 1991 must also install a safety barrier. Rather than referencing the relevant Australian Standard, the earlier pools were required to comply with the Building Regulations. These requirements have remained unchanged since they were introduced in 1994.

Key stakeholders have advised DELWP that some of the requirements, specifically in relation to window coverings, may need to be strengthened. In particular, some stakeholders believe that the reference to “securely fitted fly screen” in regulation 139 of the Building Regulations is not precise enough and is therefore open to different interpretations of what level of secureness is required. Because these requirements are contained in the Regulations, rather than in an incorporated document like the relevant Australian Standard, these changes could be implemented through a regulatory amendment introduced in the proposed Regulations.

However, DELWP has chosen not to put forward any amendments to the existing requirements as part of the proposed Regulations for the following reasons:

- DELWP is unaware of any specific weaknesses in relation to the window covering requirements that could be addressed through a regulatory amendment. Further information or data is required about the underlying problem to ensure that any amendment effectively addresses it.
- DELWP has made a general policy decision not to impose additional retrospective requirements on existing pool owners.
- Amending the Building Regulations would require owners of all pools and spas built prior to April 1991 to meet the newly redefined requirement, even potentially undertaking additional work to meet the new requirement. This would impose an additional cost on pool owners that would need to be analysed to determine whether it was justified by the benefits. Without further information regarding the nature of the problem DELWP is unable to assess the benefits that would be generated by addressing it.
- It is possible that these issues could be addressed through guidance material, such as a practice note issued by the VBA.

DELWP acknowledges that this issue is of concern to some stakeholders and is therefore inviting further feedback.

**Question for stakeholders:**

12. Do you have any information or data supporting an amendment to the requirements in relation to windows in walls used as barriers for pools constructed prior to 8 April 1991? If so, what amendments should be introduced to address these issues?

### 3.6.1 The date of construction sets the basis for the applicable barrier standard

Following the Building Regulations 2017 RIS process, DELWP conducted further detailed analysis of the available coronial data and identified that six of the 27 fatal drownings since 2000 involved pools that had four-sided isolation barrier configurations. The data indicated that the most important factor for a safe pool environment was not which standard the barrier was originally built to, but rather whether it had been maintained sufficiently so that it continued to meet that standard. In twenty of the cases not only was the barrier non-compliant with the applicable standard, but non-compliance likely played a direct role in the death.

Based on this analysis and the stakeholder feedback received in response to the RIS for the proposed Building Regulations 2017, DELWP determined that there will be no requirement introduced that would require retrospective action on existing barriers to upgrade to a later standard. For that reason, imposing retrospective barrier requirements is not considered as an option in the following analysis.

The intent of the proposed Regulations is to require compliance with the law at the time the barrier was built and/or altered. To do this it is necessary to determine the date the pool or spa was constructed. The date is critical because the requirements of the barrier standard have changed and evolved over time to take account of changes in technology, provide additional clarity or to address weaknesses in the requirements. Each iteration of the Australian Standard has been incorporated into Victorian law on a given date to supersede the previous version. The proposed Regulations use the term *applicable barrier standard* as representing the set of technical requirements that were in force at the date of construction of the swimming pool or spa, or later date on which building work was carried out to alter the barrier.

The VBA has provided DELWP with a comprehensive list of the barrier standards that apply in Victoria and the dates on which they came into law. DELWP believes that if the date of construction can be determined, along with the date of any subsequent alterations to the barrier, this will be enough to identify the applicable barrier standard. This list is provided in Appendix C.

### 3.6.2 Multiple applicable barrier standards may apply to a single swimming pool or spa

Stakeholders have advised DELWP that there are instances where different sections of a pool or spa barrier may be subject to different technical requirements. This might be the case where part of the barrier is altered in compliance with a later barrier standard whereas the remainder of the barrier is left unaltered and in compliance with the standard that was in force at the date of construction.

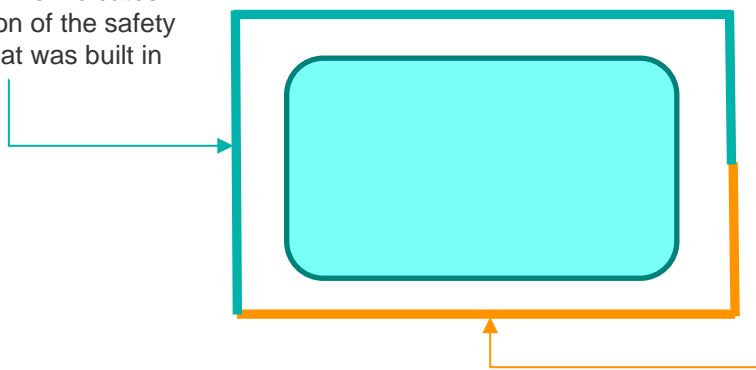
This might occur for a variety of reasons including:

- Renovations to a building that impact on part of a barrier;
- Significant landscaping changes that impact on part of a barrier;
- A need to replace part of a barrier due to damage or significant wear and tear.

DELWP is not aware of how many pools or spas may be in this situation but acknowledges that it may be more likely in relation to older pools and spas simply because the longer period of time provides more opportunity for the circumstances described above to arise.

For example, a swimming pool may have been constructed in 2001 with a barrier that complied with the requirements that were in place at the time. Ten years later in 2011 the pool owner may undertake renovations on the house or otherwise need to replace a portion of the pool barrier. This work on the affected section of the pool barrier must be carried out in compliance with the version of the technical standard in force at the time the work is carried out. This example is illustrated below:

The blue line indicates the section of the safety barrier that was built in 2001.



The orange line indicates the section of the safety barrier that was altered in 2011.

The practical outcome of an alteration to a barrier that is carried out in compliance with a later technical standard is that some pool barriers may have more than one applicable barrier standard. As discussed in section 3.6.1, DELWP has made a policy decision not to require pool or spa owners to retrospectively upgrade their existing safety barriers. As a result, in these cases each section of the pool barrier will be assessed against the technical requirements applicable at the time the section was constructed. The definition of *applicable barrier standard* in the proposed Regulations provides for situations where part of a barrier may have been altered in compliance with a different standard to the rest of the barrier.

DELWP understands that pool barriers with multiple applicable barrier standards may impose additional administrative burden on councils when determining the date of construction and nominating the applicable barrier standards. For example, this may require councils to check records to see if any relevant building permits were issued after the date of construction of the swimming pool or spa that altered the safety barrier. The potential costs of this additional burden have been factored into the cost benefit analysis and the proposed registration fees.

However, DELWP understands that the ability of councils to readily access this information may vary and stakeholders are invited to provide comment regarding their views on any additional burden that may result from the possibility of two more applicable barrier standards applying to one pool/spa.

**Question for stakeholders:**

13. Do you have any information or data regarding how many swimming pool and spa barriers are likely to have multiple applicable barrier standards, i.e. because of alterations to part of a barrier?
14. To what extent do you believe a system of mandatory self-assessment by owners of the compliance of their safety barriers would increase the safety of swimming pools and spas across Victoria?  
Please explain your response.

### 3.6.3 Options for determination of the date of construction

DELWP considered the following options regarding how the date of construction for a swimming pool or spa may be determined.

#### ***Option 1—Base case***

The base case under this option would not prescribe council as the authority for determining the date of construction. This would mean that no one would have the authority to make a determination about the date of construction. Essentially the opinion of the pool owner and the council would be equally valid and there would be no authority to make a definitive judgement or settle a dispute if they disagreed.

This would not change the obligation on pool owners to ensure that the pool barrier is brought into compliance with the barrier standard that applied at the time the pool was constructed. However, for the reasons discussed above, it is unlikely that many pool owners will have access to the information necessary to accurately determine the correct standard in which case they would need to approach councils anyway.

Alternatively, it could encourage some pool owners to nominate a date of construction that coincides with an applicable barrier standard that they believe imposes fewer obligations. The only way to challenge such a determination would be for council to undertake enforcement action and demonstrate during that process that the pool owner was wrong. This is both costly and time consuming.

#### ***Option 2—Council determines the date of construction***

DELWP believes that to fulfil the specific policy intent of improving compliance with the standard that applied at the time of construction, it is critical that a credible determination is made in relation to the date of construction. Under this Option councils will determine the date of construction based on range of different sources of information that are prescribed in the proposed Regulations.

Because the proposed Regulations apply to all swimming pools and spas, including those built before the Building Act or Building Regulations were introduced, the intent is to give council the widest possible scope and discretion to reach a determination regarding the date of construction. It should be noted that councils are not obliged to use *all* of these sources of information if, for example, a pool owner is able to provide records of building approvals then council may choose to rely on that and look no further.

Once the council has reached a determination as to the date of construction and registered the swimming pool or spa they must notify the owner in writing as to the date of construction and applicable barrier standard.

DELWP is aware that despite the role of councils being confined to determining the date of construction, because that determination will largely define what barrier standard the pool owner must comply with, there is the potential for a pool owner to disagree.<sup>77</sup>

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<sup>77</sup> An obvious example might be where a council determines the date of construction as being after 1 May 2010, and therefore the applicable barrier standard would require a four-sided isolation barrier where one doesn't currently exist.

For that reason, the proposed Regulations allow pool owners an avenue of appeal. If they disagree with the determination of the relevant council, they have a period of 30 days from the day they receive notice of the determination to appeal to the Building Appeals Board (BAB). Under the Building Act, the BAB may affirm, vary or substitute the determination of the relevant council.<sup>78</sup>

### *Benefits*

The key benefit of giving council the authority to decide the date of construction is that their determination can be definitive and binding. In the absence of such a determination there is no way to determine the critical question of what barrier standard should be applied. This undermines one of the fundamental mechanisms intended to reduce drownings amongst young children: improving the compliance of barriers with the relevant technical standard.

Councils are in a good position to make an impartial determination for the following reasons:

- Councils are more likely to have access to the information required to make a credible determination, such as historic building approval data.
- Owners have a right of appeal in regard to a council's determination of the date of construction

Councils can also draw on a range of resources derived from their various functions, such as planning data or records of compliance action, that are simply not available to individual pool and spa owners.

For this reason, the prescribed criteria which councils may use to reach a determination are broad enough to allow councils to draw on a wide range of relevant sources such as aerial photography and records of property sales. The intent is to give councils the flexibility to draw on a wide range of information sources as necessary to reach a determination.

### *Costs*

DELWP accepts that there are costs and challenges associated with this approach. The most obvious cost will be to councils who will need to undertake the administrative work necessary to determine the date of construction.

DELWP understands that determining the date of construction of some pools will be comparatively simple because information, such as records of building approvals, is easily available and is often kept in digital form. However, councils have advised DELWP that in general terms, the older the pool, the less likely it is that information will be readily available. It may require councils to undertake time consuming and laborious tasks, such as searching through off site archives of hard copy documents. There is also the risk that such documentation simply no longer exists.<sup>79</sup>

However, DELWP notes that any burden involved in conducting information searches for building approval records would only potentially be an issue for councils during the transition phase when all existing pools and spas are being registered and therefore having their dates of construction determined and applicable barrier standards identified. All newly constructed pools and spas will automatically be tied into the registration process at the conclusion of the building approvals process. In addition, the proposed regulations include a process through which councils are notified of any alterations to the barrier of a registered pool or spa in order that the applicable barrier standard can be updated. For these reasons, the need to conduct information searches after the transition phase should be limited.

More information regarding the costs to councils of determining a date of construction are contained in Chapter 8 and Appendix B.

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<sup>78</sup> Section 149 of the *Building Act*. The estimated costs to councils and pool owners has been factored into the costs of the registration requirement, see Table 11 above.

<sup>79</sup> For example, one council reported to DELWP that because of the amalgamation of several different councils into one municipal area during the 1990's many of the inherited records are incomplete or lost.

An additional concern is where pool owners disagree with the council's determination and choose to appeal the date of construction to the BAB. DELWP believes that it is essential that pool owners should have a reasonable opportunity to exercise a right of appeal. However, DELWP acknowledges that defending their determination at the BAB is likely to cost council time and resources. These costs have been factored into the cost-benefit analysis set out above in Table 11.

### ***Option 3—Pool owner determines date of construction***

Like Option 2 this option seeks to ensure that a binding and definitive determination can be made in relation to the date of construction. As discussed above, DELWP believes this is essential for the operation of the regulations. Under this option pool owners would notify council of the date of construction of their pool as part of the registration application. Council would then enter this date of construction into the register and notify the pool owner of the applicable barrier standard.

The regulations would prescribe certain kinds of information that pool owners must have regard to when reaching their determination. This is essential to ensure that the determinations of pool owners are transparent and credible. However, the types of information prescribed in the regulations would be broad.

DELWP recognises that there is likely to be significant differences in the level of knowledge between different pool owners regarding when a pool or spa was constructed. For example, if the current property owner purchased the property and the pool or spa was already in place it is possible that they may not have access to any documentation associated with its construction or installation. Requiring pool owners to have regard to information they cannot access would potentially mean that no date of construction could be accurately determined.

#### *Benefits*

This option would remove the burden of determining the date of construction from council. As discussed above, there is potential, particularly in the case of older pools, that reliable information will be costly and time-consuming for councils to access. This would simplify the work undertaken by councils when registering a pool or spa they would only need to enter the date of construction determined by the pool owner onto the council register and then notify the owner of the applicable barrier standard. It would ensure that pool owners would not challenge the determinations of councils at the BAB and remove the potential costs to councils of defending their determinations.

DELWP believes that if this option were adopted the proposed registration fee discussed in Chapter 9 could be reduced.

It may also have the unquantifiable, but still tangible, benefit of making it more likely that the pool owner accepts the date of construction and as a result the requirements imposed by the applicable barrier standard. Under Option 2 there is the potential for pool owners to disagree with the determinations of councils. Even if this resentment doesn't result in an appeal to the BAB, it may make the owner less likely to readily comply with the requirements and therefore reduce the risk of drowning amongst young children.

#### *Costs*

Requiring pool owners to determine the date of construction places the burden of carrying out the necessary searches for information on individual pool owners. This may be a comparatively minor cost in the case of a pool owner with direct access to relevant information, such as building approval documentation.

However, houses change hands and documentation may be lost or destroyed. This becomes more likely for older pools and spas. For this reason, the costs of reaching a determination are likely to be disproportionately high for owners of older pools. Although this is also true under Option 2, councils have established record keeping procedures and are far more likely to be able to access historic documentation than an individual pool owner.

DELWP believes it is likely that some owners would have to approach councils anyway to gain access to the documentation. This is administratively inefficient and could be more costly for pool and spa owners than paying the registration application fee designed to assist councils to cover the costs of carrying out such information searches.

In addition, unlike a pool owner who disagrees with the council's determination of a date of construction there is no avenue of appeal for a council who may disagree with a pool owner. This appeal right is set out under section 144(2) of the Building Act but only relates to determinations by councils.

For example, a council may have access to additional documentation not available to the pool owner that indicates a different date of construction. Unless the pool owner approached council to request that information, or council volunteered it, there would be no means of correcting the date of construction.

#### *Preferred option*

DELWP's preferred option is Option 2. Although councils will be taking on the administrative burden of gathering enough information to decide the date of construction, the broad criteria for reaching that determination will assist in this task. In addition, the registration fee payable by all pool owners will help resource this function.<sup>80</sup>

DELWP also believes that it is likely that many home owners will have limited access to the documents required to reach a determination in relation to the date of construction. Therefore, the proposed Regulations have given council the authority to determine the date of construction based on the following criteria:

- information provided by the owner in the registration application; or
- information held in the records of the relevant council; or
- any other relevant information.

DELWP also acknowledges that the determinations of councils are likely to be challenged by some pool owners. However, the intent of the proposed Regulations is that pool owners should have had every opportunity to provide councils with any information relevant to the date construction as part of the initial determination. The criteria for deciding the date of construction specifically requires councils to consider any information provided by the pool owner before reaching a final determination. For this reason, DELWP believes that the number of appeals should be small.

#### **Question for stakeholders:**

15. Do you agree that councils should be responsible for determining the date of construction? Please explain your response.

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<sup>80</sup>. The fees are discussed further in Chapter 9.



## 4. Inspection and certification

### 4.1 Purpose

This chapter considers options for requiring the inspection of swimming pools and spas to determine whether their safety barriers are compliant. It assumes that the preferred option identified in Chapter 3 is implemented and that owners are subject to mandatory requirements to register their swimming pools and spas. This chapter also considers other design options that relate to the broad option selected as DELWP's preferred option for implementing inspection and certification requirements. This includes a discussion of the identity of the registered practitioners that can carry out the inspection and certification function, including the proposed introduction of the new building inspector (pool safety) class.

### 4.2 Background / Nature of the problem

DELWP's review shows that over time, swimming pool and spa safety barriers that were compliant with the relevant technical standards at the time of construction can become non-compliant. This occurs for a variety of reasons including lack of maintenance, natural wear and tear and changes to surrounding landscaping. The coronial data shows that non-compliant safety barriers are a significant contributing factor to the drowning of young children in private swimming pools and spas.

Despite the clear risks to life and safety associated with non-compliant safety barriers, the current regulatory framework contains no requirement on owners to organise regular checks to ensure their barriers remain compliant. In addition, although local councils are charged with monitoring the ongoing compliance of these structures, a significant proportion of MBSs report that resourcing issues heavily constrain their ability to be proactive in this area.

*No current regulatory requirement for checking the ongoing compliance of safety barriers*

The building permit requirements set out under the Building Act and the Building Regulations provide a framework under which building work is independently assessed by a building surveyor for compliance with the regulatory requirements at the time of construction. Following the completion of each mandatory notification stage, the relevant building surveyor must ensure the work is inspected, either by themselves or by another registered building surveyor or registered building inspector.

When the building work includes the construction of a swimming pool or spa there is a mandatory inspection required upon the completion of work on the swimming pool or spa and related safety barrier.<sup>81</sup> The relevant building surveyor must organise an inspection to check, among other things, the compliance of the completed safety barrier. This provides a level of assurance that all newly constructed swimming pools and spas have a compliant safety barrier in place prior to their use.

However, the current regulatory requirements do not provide for any ongoing, mandatory checks of safety barriers after the initial post-construction inspection. Like most structures, swimming pool and spa safety barriers are subject to wear and tear and gradual deterioration through ordinary use and exposure to the elements. For example, hinges and latches used in a gate or door forming part of the barrier may rust, jam or otherwise fail to ensure that the gate automatically closes. This can compromise the operation of the barrier rendering it non-compliant and therefore no longer effective in restricting unintended access to the pool area.

Feedback provided by MBSs during the policy development process overwhelmingly reported that, in their experience, most deterioration to safety barriers tends to emerge between three to four years. The most common response to questioning on this matter was three years, with one MBS suggesting two years. Aside from the views of MBSs, DELWP was unable to locate any other evidence regarding the average period of time for safety barriers to deteriorate. In addition, alterations and additions to adjacent buildings and landscaping elements can also have a more immediate impact on the compliance of the safety barrier.

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<sup>81</sup> The prescribed mandatory notification stages for construction of a swimming pool or spa, including the final inspection, are set out under regulation 169 of the Building Regulations 2018.

The level of non-compliance reported by councils and private inspectors strongly suggests that owners are failing to adequately maintain their barriers and/or knowingly or unknowingly allowing other conditions to arise that affect the compliance of the barrier. In the absence of mechanisms providing for mandatory regular compliance checks, there is a much lower possibility that these issues get identified and addressed.

#### *High level of existing non-compliant safety barriers*

Information provided from both private industry and councils suggests fail rates on a first inspection of swimming pool and spa safety barriers in the order of 80 – 90 per cent. Of the 35 responses received from MBSs in the VMBSG survey, over half reported a 90 per cent or greater fail rate for their first inspections of safety barriers. It is possible that this data is skewed towards non-compliance as most councils generally only inspect following a complaint or other notification of a barrier-related concern. Nonetheless, irrespective of the cause of the inspection, the rate of non-compliance is concerning.

Brimbank City Council has conducted proactive swimming pool audits and have informed DELWP that they based their audits on building permit data held by Council. This represents a more random sample, compared with data from any council who only audits following complaint/referral, as the selection method for the audits was based on building approval records indicating there was a swimming pool on the property. Significantly, the fact that the construction of these swimming pools was subject to a building permit indicates that a compliant barrier should have been in place at the time the swimming pool was completed. Despite this, Brimbank City Council's MBS advised that from the 129 inspections carried out over a 12-month period, the estimated failure rate at the first inspection was between 80–90 per cent.

From a private industry perspective, one submission received in response to the Regulatory Impact Statement for the draft Building Regulations 2017 stated that of 423 audits conducted by the company in the preceding two years, 422 barriers failed on the first inspection. Typical causes included fence boundary changes due to wear and tear, landscaping and house alterations, overgrown trees, hinges and components worn out and ground movements causing connections, posts and latching components to move.

#### *Council resourcing constraints*

Under section 212 of the Building Act, local councils are responsible for the administration and enforcement of certain parts of the Building Act as well as the Building Regulations within their municipal districts. In addition, MBSs have a suite of enforcement powers available to them under Part 8 of the Building Act in certain situations, including where the condition or use of a building poses a danger to the life, safety or health of persons using the building or any member of the public. Where an MBS becomes aware of non-compliant swimming pool and spa safety barriers, enforcement action under Part 8 is a common approach to addressing the situation.

However, the existing compliance approach varies between councils with the VMBSG survey suggesting most councils have adopted a reactive approach to compliance. Nearly 95 per cent of the survey respondents indicated that safety barriers usually come to be inspected through a complaint or referral.

Some councils administer a proactive audit program, but resource constraints limit the number of inspections they are able to carry out. Of the 34 MBSs who responded to the VMBSG survey question enquiring as to any reason for limits on the extent of council safety barrier audit activity, 30 respondents directly mentioned a lack of staff or resources.

The existing regulatory framework does not provide any regular income stream that funds compliance activities relating to checking the compliance of swimming pool and spa barriers. Councils do not receive building permit levy income, or any other dedicated stream of income, to fund their building control activity so this is funded through the rate base and/or through building control related fees, penalties or charges.

### **4.3 Aim of the proposed requirements**

The aim of the proposed options covered in this chapter is to ensure that the compliance of all private swimming pool and spa safety barriers are regularly checked and certified as compliant with the relevant technical standards. This will directly reduce the conditions under which young children may gain unsupervised access to swimming pool or spa area and contribute to policy goal of reducing drowning incidents in these circumstances.

## 4.4 Broad options considered

This section analyses the broad options considered by DELWP relating to requirements for the inspection and certification of safety barriers. Three broad options are assessed against the base case and then against each other in DELWP's selection of the preferred option. Section 4.5 then proceeds to examine various design options and features associated with the preferred broad option. These broad options and design options have been assessed by DELWP using a combination of cost-benefit analysis, testing with stakeholders and evaluation of their likely effectiveness in achieving the aim set out in Section 4.3. Ultimately, the preeminent consideration in assessing the options is the likelihood that they will contribute to achievement of the policy aim of reducing incidences of young children drowning in private swimming pools and spas.

The three broad options analysed below (not counting the base case) were considered by DELWP to be the three most feasible means of implementing an effective regulatory mechanism requiring owners to arrange for an inspection of their safety barriers to ascertain their compliance with the technical requirements. A fourth option was considered during the policy development process that would have placed the inspection role with local councils. However, DELWP held several concerns regarding the feasibility of this option. Firstly, the experience of WA in administering a scheme under which councils hold the responsibility for inspecting safety barriers was examined. A November 2017 Ombudsman Western Australia report found that 8,639 private swimming pools in WA were overdue for their four-yearly barrier inspection as at 30 June 2015.<sup>82</sup> These overdue inspections were spread across 59 local governments.<sup>83</sup> One of the underlying causes for the delays identified by the WA Ombudsman was resourcing issues that were exacerbated by the maximum fee that councils could charge for inspections being set too low.

The discussion in section 4.2 highlighted the resourcing constraints faced by MBSs and the building departments of most councils across Victoria. DELWP's view is that this clearly demonstrates that councils would not be able to effectively carry out the inspection function of the new scheme based on existing resourcing levels. This could be addressed through setting of inspection fees at the level required to ensure councils are resourced to discharge the inspection function. However, DELWP believes that inspection fees that would be charged by councils are likely to be higher than those set by the market where private building surveyors and building inspectors compete to provide inspection services.

There are also concerns with obliging some of the smaller regional councils to undertake the inspection function. Some smaller councils have very limited resources dedicated to building, even lacking full-time permanent MBSs. Requiring these councils to administer the inspection function under the new scheme is not likely to be the most effective way to administer the scheme in these areas.

In addition, there is no compelling basis for excluding private building surveyors and building inspectors from carrying out inspection and certification functions under a new scheme. These practitioners presently assess the compliance of safety barriers at the point of construction and will continue to hold responsibility for this function once the new requirements commence. DELWP could see no strong policy rationale for excluding these practitioners from assessing compliance post-construction given the nature of the task is the same.

Finally, DELWP notes that this option would appear to be inconsistent with the heads of power under the Building Act which clearly envisage inspections being carried out by a range of registered practitioners which include private building surveyors and building inspectors. For these reasons, DELWP dismissed the option of requiring councils to carry out the inspection of safety barriers and hence it is not included in the options analysis below.

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<sup>82</sup> Ombudsman Western Australia, *Investigation into ways to prevent or reduce deaths of children by drowning*, Perth, 2017.

<sup>83</sup> Ibid.

## Option 1—Base case

Under the base case, there will be no mandatory requirements upon owners to arrange for an inspection and certification of their safety barriers. Owners may elect to carry out a voluntary self-assessment of the compliance of their barriers utilising the VBA's checklists<sup>84</sup> or organise for a third party to assess the compliance of their barriers. However, there would be no formalised certification or notification requirement meaning that the outcome of the inspection would be left with the owner. There would be no requirement for owners to notify their council that the barrier has been inspected and determined to be compliant.

Councils will continue to enforce the compliance of safety barriers within their municipality in line with their existing powers under the Act. The requirement upon all councils to maintain a register of the swimming pools and spas within their municipality will assist them in taking more proactive audit activity as there will be a clear record of properties which have these facilities. However, the absence of complete and accurate information regarding which swimming pools and spas within their municipality have been inspected and found to be compliant will hinder the effective prioritisation of audit resources.

## Option 2—Mandatory owner self-assessment

One option considered by DELWP was to require swimming pool and spa owners to undertake mandatory periodic self-assessment of the compliance of their safety barriers. The amendments to the Building Act provide the power to make regulations requiring swimming pool and spa owners to assess and report to councils on the compliance of their safety barriers. Owners who were unwilling or unable to carry out the assessment themselves could also arrange for other persons to carry out the self-inspection on their behalf if they felt more comfortable doing so. It is likely that regulations giving effect to this option would require a mandatory self-assessment every three years. As discussed in section 4.5.2, stakeholders report poorly maintained barriers most commonly begin to show signs of deterioration around the three-year mark.

Universal guidance material or checklists that would assist owners to determine the compliance of their safety barrier would be prepared and made freely available. This material could take a similar form to the self-assessment checklists that were published by the VBA in October 2018.<sup>85</sup> In addition, the regulations would require the owner to notify the relevant council that they have completed the self-assessment and possibly provide some form of evidence. Completion of the self-assessment would be noted against the swimming pool or spa on the council's register. If the owner's self-assessment resulted in a determination that the safety barrier was non-compliant, the owner would need to arrange for the barrier to be made compliant prior to them undertaking a subsequent self-assessment.

If the owner of a registered swimming pool or spa did not inform the council of the completion of a self-assessment within the required timeframe, the regulations could provide councils with the power to issue an infringement notice. MBSs would also have the option of visiting the property to conduct their own inspection of the compliance of the safety barrier and take appropriate action under the existing powers in the Building Act if required.

MBSs could opt to selectively audit swimming pools and spas for which it has received notification that a self-assessment has been completed as a mechanism to maintain oversight of the accuracy of the self-assessment's determination of compliance. To encourage pool owners to carry out an honest assessment there would be a fine for making false or misleading statements in a self-assessment.

### *Benefits*

It is acknowledged that under the base case, some swimming pool and spa owners may voluntarily elect to assess the compliance of their barriers. However, DELWP believes that putting in place a mandatory obligation upon owners to conduct self-assessments, with a penalty attached for non-compliance, is clearly more likely to result in a greater number of self-assessments being undertaken. Accordingly, compared with the base case, the mandatory self-assessment option would result in more non-compliant barriers being

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<sup>84</sup> Available at: <https://www.vba.vic.gov.au/consumers/swimming-pools>

<sup>85</sup> Checklists can be accessed at: <https://www.vba.vic.gov.au/consumers/swimming-pools>.

identified and likely rectified. This option would therefore contribute to the underlying policy aim of reducing drownings of young children in private swimming pools and spas.

Mandatory self-assessment will also increase the knowledge of swimming pool and spa owners regarding the types of issues that affect the safe operation of a barrier. Owners will be required to familiarise themselves with the technical requirements that are considered when assessing compliance in order to carry out the self-assessment task. In the VMBSG Survey, MBSs were asked about their experiences with the level of awareness of owners regarding barrier requirements and almost all respondents indicated that owners generally have little to no knowledge of the factors relevant to compliance.

The increased knowledge that owners would hold under a mandatory self-assessment regime should mean that barriers are more likely to be properly maintained than would occur under the base case. Additionally, owners would be more mindful of actions that can comprise the compliance of the barrier, e.g. placing items such as sheds and BBQs against the barrier and certain changes to surrounding landscaping. This improvement in knowledge should generally reduce the rate of non-compliance that occurs in between self-assessment exercises. DELWP could not accurately estimate the magnitude of increased compliance with barrier requirements arising from greater owner awareness of maintenance and compliance matters, save for noting that it should lead to an overall improvement.

Finally, councils will also benefit under this option as they would be able to better prioritise their audit activity. Under the base case, council audits are likely to continue to be conducted on either a reactive basis (following a complaint etc.) and/or proactively on a random basis. The proactive random audits would generally be carried out from the list of swimming pools and spas recorded on the register. Under a mandatory self-assessment regime, if council did not receive confirmation of a completed self-assessment in regard to a registered pool by the required date, then councils would be able to prioritise audit activity for this property. This would be a more informed, efficient approach to compliance activity than would occur under the base case.

#### *Costs*

It is estimated that the cost of this option would be \$117,839,788 (Net Present Value (NPV) over 10 years). All swimming pool and spa owners will incur a cost in carrying out self-assessments. The costs involved are the time costs involved in accessing the self-assessment guidance material and understanding it, carrying out the self-assessment and providing notification to the council that they have completed the check and that the barrier is compliant.

The cost noted above does not allow for likely consequential actions by councils that may be taken to determine whether the self-assessments are correct (e.g. audits).

### **Option 3—Mandatory periodic inspection and certification by a registered building practitioner**

This option would result in the creation of new regulatory requirements that oblige swimming pool and spa owners to engage either a registered building surveyor or registered building inspector (hereafter collectively referred to as 'inspector') to undertake an inspection of their safety barrier. If the inspector determines that the safety barrier is compliant with the applicable barrier standard, they must issue a certificate of pool and spa barrier compliance and provide a copy to the owner. The owner, or their agent, will then be responsible for providing the certificate to the relevant council and paying the document lodgement fee.<sup>86</sup> Councils will be required to record details of the certificate of pool and spa barrier compliance on the register.

The 2018 Act amendments provide regulation-making powers that envisage pool and spa owners arranging for inspections to be carried out by certain classes of registered building practitioner in order to check the compliance of their safety barriers. In addition, the amendments provide that following an inspection, the registered building practitioner will record the result of the inspection in the form of a certificate of pool and spa barrier compliance or certificate of pool and spa barrier non-compliance. The classes of registered building practitioner that the Building Act permits to issue certificates of barrier compliance and non-compliance are building surveyors, building inspectors and any other class of building practitioner whose

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<sup>86</sup> Fees are discussed in Chapter 9.

registration authorises them to carry out inspections of swimming pools and spas and associated safety barriers. Further discussion on the identity of persons who may inspect and certify the compliance of safety barriers under the proposed scheme is discussed in section 4.5.

### *Benefits*

DELWP's view is that this option would likely result in a significantly higher rate of detection of non-compliance when compared against the base case. Requiring owners to engage trained and knowledgeable registered building practitioners to carry out inspections on a periodic basis is clearly more likely to achieve the policy aim than relying on owners, the majority of whom would not have any particular technical knowledge, to voluntarily assess the compliance of their barriers.

Significantly, the independence of the inspection process provides a strong platform for ensuring that the non-compliance is addressed quickly and thoroughly which may not necessarily occur under the base case. Under the base case, non-compliance would only be identified following a voluntary self-assessment check by the owner or following an inspection by a third party engaged by the owner. Under these circumstances, there is no guarantee that the non-compliance will be rectified expediently or in a manner that ensures the barrier is brought into full compliance. The use of independent registered building practitioners provides opportunity for mandatory processes to be prescribed to ensure non-compliance is appropriately addressed. Options for addressing determinations of non-compliance are addressed in Chapter 5.

Councils will also benefit under this option as they would be able to reallocate and more efficiently prioritise their resourcing in this area. Under the base case, most councils are likely to continue to carry out proactive auditing of the compliance of swimming pools and spas. However, under a new scheme where every swimming pool and spa must be inspected on a periodic basis by a trained registered building practitioner, councils would be able to prioritise their limited resources in a different manner as random auditing becomes almost redundant under such as scheme.

Taking these benefits as a whole, this option will result in more incidences of barrier non-compliance being identified and prioritised for rectification. Accordingly, DELWP believes that Option 3 would make a significant contribution to the policy aim of reducing incidences of young children drowning in private swimming pools and spas.

### *Costs*

It is estimated that owners will be charged approximately \$200 by inspectors undertaking an inspection of a swimming pool or spa safety barrier. This figure is an upper estimate based on the price of inspections in other states, as well the average hourly pay for building surveyors in Melbourne and their other associated business costs. Following the inspector issuing a certificate of barrier compliance, the estimated time cost involved for an owner to lodge the certificate with their local council is estimated to be \$3.79. Accordingly, the cost incurred by owners for each inspection and certification cycle is estimated to be \$203.79. Under the preferred design option of requiring a new certificate of barrier compliance to be provided every three years, most owners of existing swimming pools and spas could be expected to pay this amount no more than three times over the 10-year period costed giving a maximum total cost of \$611.37.<sup>87</sup> This figure does not include the lodgement fee that owners must pay when lodging the certificate of barrier compliance. That fee is discussed in Chapter 9.

As an overall total, the cost of inspections for owners under the preferred option is \$186.50 million (NPV) over 10 years. This is the total cost of engaging registered building practitioners to carry out an inspection and includes costs associated with re-inspections following a determination of non-compliance- this is discussed further in Chapter 5.<sup>88</sup> There are also time costs for owners associated with lodging certificates of pool and spa barrier compliance with council. Over 10 years, the total cost associated with this activity is estimated as \$1.18 million (NPV). However, it should be noted that this figure includes time costs associated with the lodgement of certificates of pool and spa barrier non-compliance too. The proposed Regulations require the inspector who issues such a certificate to lodge it directly with the council. Accordingly, although

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<sup>87</sup> This cost does not take into account any costs associated with findings of non-compliance. Those costs are considered in Chapter 5.

<sup>88</sup> The cost-benefit analysis assumes that 50 per cent of barriers will require a second inspection.

not a time cost incurred directly by owners, the modelling assumes that inspectors will pass their time cost on to the owner through the inspection fee.

Councils will incur a cost in updating the register following receipt of certificates of barrier compliance. Over the 10-year period, the total estimated cost of this activity is \$1.24 million.

#### **Option 4: Mandatory periodic inspection by a registered building practitioner with mandatory self-assessment in the 'off-years'**

This option is essentially a combination of the key features from Options 2 and 3. Under Option 4, the regulations would require owners to organise a periodic inspection of their pool or spa safety barrier by an RBS or registered building inspector. However, in the intervening years between these independent inspections, the regulations would also require owners to conduct a self-assessment of their barriers and lodge a report or other confirmation of the self-assessment outcome with council. Essentially, if the regulations required an independent inspection every three years, a self-assessment would be required to be completed in years one and two of the cycle. Some stakeholders support mandatory self-assessment in 'off-years' as a potential way of identifying barrier non-compliance that could arise in the period between independent inspections.

If this option is to be pursued, a decision would need to be made on how owners would document completion of their self-assessment. NSW has a self-assessment checklist as part of their registration process. This is a simple checklist that owners use to self-assess whether a safety barrier meets the appropriate Australian Standard.<sup>89</sup> Applicants are directed to a list of private certifiers if they need to make their barriers compliant and there is a tab with frequently asked questions. There is no fine for incorrect completion of a self-assessment. In Qld owners must first register their pool and then can complete an interactive pool compliance checklist online.<sup>90</sup> This checklist is to be used as a guide and is not an acknowledgement of compliance. This is also no penalty for incorrect completion.

#### *Benefits*

As a combination of Options 2 and 3, the benefits of this option broadly reflect those listed under the discussion of those two options. The primary benefit of this option is that it would result in mandatory inspections of the safety barrier being carried out on an annual basis, either by the owner or by an inspector. Compared with the voluntary obligations held by owners under the base case, this option is more likely to result in timely identification of non-compliant matters if self-assessments are done correctly.

Councils will also benefit under this option from being able to more efficiently prioritise their audit activity. Under the base case, most councils are likely to continue to carry out proactive auditing of the compliance of swimming pools and spas. However, this option allows councils to rely on periodic reports from inspectors regarding the compliance of any given barrier within their municipality. In the intervening years, they can focus their attention on properties for which they do not receive a completed self-assessment notification.

Another benefit of Option 4 is that owners would become more familiar with the requirements of the safety barrier standard which should lead to more vigilance and greater awareness of how to identify issues that could lessen the barrier's effectiveness. This could assist owners' identification of issues outside of a mandatory assessment or self-assessment and consequently lead to quicker action to address them.

Altogether, it is likely the benefits of this option will increase the chance that non-compliance in barriers will be identified and addressed before they allow unintended, unsupervised access by young children to the pool or spa area.

#### *Costs*

The nature of the costs associated with this option are similar in nature to those of Options 2 and 3. However, this option would result in higher costs overall as it broadly combines the costs of the two options, noting also that the self-assessment costs will be greater than under Option 2 as a self-assessment would be required two out of every three years rather than just every third year. Regarding the self-assessment

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<sup>89</sup> The NSW self-assessment checklists can be accessed at: <https://www.swimmingpoolregister.nsw.gov.au/checklists>

<sup>90</sup> The QLD online checklist can be accessed at: <https://www.qbcc.qld.gov.au/pool-checklist/>

aspect, there is a time cost for owners to educate themselves about the different pool safety barrier standards (since most owners would not be trained building practitioners). There is also a time cost for owners to complete the self-assessment and then a further time cost involved in reporting it to councils.

In the years when the owner is required to engage an inspector to conduct an inspection, the owner will incur the costs noted above in the discussion of Option 3 (payment of inspector's fee and time cost to lodge the certificate of pool and spa barrier compliance).

Councils will also incur costs under this option. This includes the costs associated with processing the owner's notification of a completed self-assessment and the certificate of pool and spa barrier compliance following completion of an inspection by an inspector. Although not modelled, DELWP notes that the costs of recording both these forms of inspection outcomes may be higher than the council's costs under Options 2 and 3 combined owing to the increased notifications that would be received. This may also necessitate larger and/or more complex registers to record the outcomes of both forms of inspection.

### Preferred option

DELWP's preferred option is Option 3—Mandatory periodic inspection and certification by a registered building practitioner. This option will be more effective in ensuring that non-compliant barriers are identified, and that subsequent action is likely to be taken to address the non-compliance, without imposing additional and unnecessary costs upon owners or councils. DELWP believes it is therefore more likely to achieve the policy aim of reducing incidences of drowning of young children in private swimming pools and spas.

Although the mandatory self-assessment option would result in lower costs for swimming pool and spa owners, DELWP considers it unlikely that it will achieve the aim of providing the robust, ongoing monitoring of safety barrier compliance required to ensure that they continue to fulfil their intended function. There are two reasons for this: the willingness of owners to complete a thorough, practical self-assessment, and the level of knowledge and understanding required to carry out a technically sound assessment.

Broadly, DELWP has concerns that the utility of a self-assessment under Options 2 or 4 would be heavily reliant on the commitment of each respective owner to undertake a complete and thorough assessment. There is already an existing offence provision that requires the owner of the land on which a swimming pool or spa is located to take all reasonable steps to ensure that the safety barrier is properly maintained. Yet the very high rate of non-compliance suggests that owners are not aware of this obligation, choose not to comply with it, or lack the knowledge required to ensure effective maintenance.

On 19 October 2018, the VBA published self-assessment checklists on their website providing swimming pool and spa owners with the opportunity to take voluntary action to check their safety barriers and bring them into compliance, ahead of the planned commencement of a new mandatory framework. Freely available for download, the availability of these checklists was broadly publicised by the Victorian Government, VBA and industry stakeholder groups.

Unfortunately, the number of persons who have downloaded these checklists is only a fraction of the estimated number of swimming pools owners in Victoria. Data provided by the VBA reveals that, as at 19 June 2019, there have only been 17,118 unique downloads of the three checklists.<sup>91</sup> This represents less than 8 per cent of the total number of private permanent swimming pools and spas estimated to exist around Victoria. It is unknown how many of these downloads actually lead to a self-assessment of a safety barrier being conducted, or whether any rectification work was undertaken if defects were detected.

The compliance of swimming pool and spa barriers is a critical life-safety issue yet the lack of interest in the voluntary checklists combined with the existing high level of non-compliance creates doubt that any system that primarily relies on an owner's willingness and ability to undertake a robust self-assessment is the best way to achieve the desired outcome. It is acknowledged that the self-assessment system would be underpinned by council enforcement action which may include random audits of barriers to check the veracity of self-assessments. However, it is questionable whether this enforcement action would provide

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<sup>91</sup> Three checklists were published with the difference between them being each reflected different technical requirements from the three broad versions of the standards that apply depending on the age of the pool. Checklist 1 has been downloaded 3,900 times, Checklist 2 has been downloaded 4,056 times and Checklist 3 downloaded 9,162 times.



enough of a motivating factor given the existing lack of compliance with the current regulatory requirements regarding maintenance and safe operation of barriers.

DELWP also holds concern regarding whether the average will be able to accurately determine the compliance of their pool or spa safety barrier. Although it is envisaged that guidance material and/or a checklist will be produced to assist homeowners to undertake their self-assessment, it is unlikely that such material could fully cover the information needed to make an accurate determination of compliance in all circumstances.

The requirements of the various barrier standards are complex and there are countless potential scenarios that might affect the compliance of the barrier. Guidance material or checklists are unlikely to be able to comprehensively cover off on the range of possible scenarios or factors that might be relevant to a self-assessment exercise. The function of the checklists in NSW and Qld demonstrate this limitation as both jurisdictions caveat their checklists as only providing an indication or guide regarding whether a barrier meets the technical requirements, not a determination of compliance.

There are also instances where undertaking a self-assessment will be more complicated, such as where different sections of a barrier around a single pool may be subject to multiple barrier standards (usually because of alterations to the pool area). These more complicated scenarios are likely to be difficult for the owner to assess and would be more effectively inspected by a qualified building practitioner.

At best, a self-assessment is likely to provide a strong indication regarding the compliance of a barrier and highlight obvious areas of non-compliance. The absence of a check by a person trained to understand the requirements of the various barrier standards and apply them to real world installations raises questions regarding the effectiveness of Option 2. In effect, this option may result in councils not being much better off than the base case with regards to having assurance over the compliance of swimming pool and spa safety barriers within their municipality.

At the point at which the owner notifies them of the completion of a self-assessment, they may have cause to question whether an owner has in fact comprehensively completed a self-assessment with the full attention required, and/or whether the self-assessment itself offers any comfort regarding the compliance of the barrier.

Option 3—Periodic mandatory inspection by a suitably qualified registered building practitioner is DELWP's preferred option as it provides for an independent check of the safety barrier by a person who possesses the technical knowledge required to make an informed determination regarding compliance. This option will involve greater costs for swimming pool and spa owners compared with the mandatory self-assessment regime under Option 2.

However, DELWP believes that this option is significantly more likely to achieve the aim of ensuring that the compliance of all private swimming pool and spa safety barriers are regularly checked and certified as compliant with the relevant technical standards. As such, it will better contribute to the new Regulations achieving the policy goal of reducing incidents of young children in private swimming pools and spas.

Option 4 would also significantly contribute to the achievement of the policy aim as it is essentially Option 3, but with added requirements for mandatory self-assessment in the 'off-years'. For the reasons noted above, DELWP holds doubts regarding the effectiveness of self-assessments and therefore any option which proposes to make such assessments mandatory.

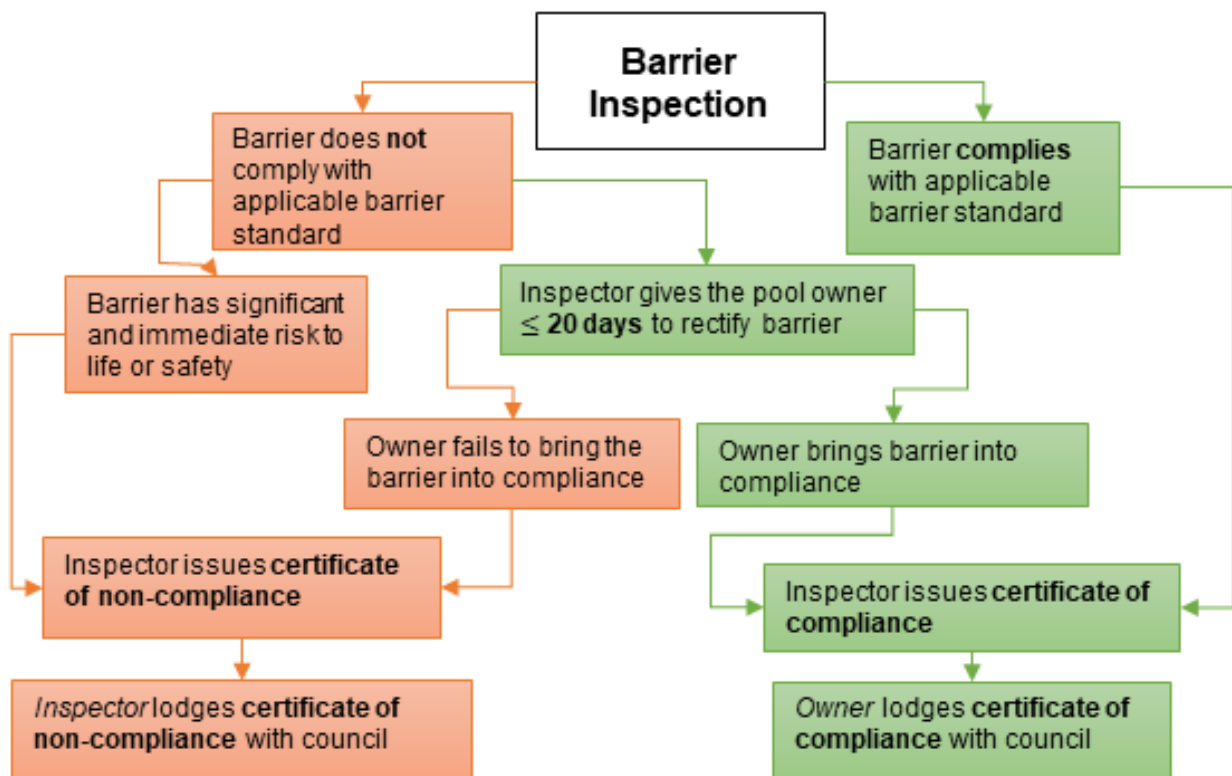
Although the mandatory self-assessment in 'off-years' is likely to create some additional benefit in identifying non-compliance in the period between independent inspections by an inspector, this comes at significant costs to both owners and particularly councils. DELWP does not believe that the potential additional benefits outweigh the extra costs, particularly when the magnitude of the benefits is largely dependent on the self-assessments being conducted robustly and reported honestly- something that DELWP has reservations over.

For these reasons, Option 4 was not the preferred option. However, DELWP recognises that there is likely benefit in encouraging owners to voluntarily conduct self-assessments in the 'off-years' under the preferred option. DELWP will consider messaging reinforcing the value of voluntary self-assessments, as well as how this might be facilitated, closer to the commencement of the new requirements.

DELWP acknowledges that it is unlikely that 100 per cent of owners will comply with the requirements of the preferred option. As with any law or regulatory requirement, there will always be a proportion of persons who knowingly or unknowingly fail to comply. However, DELWP believes that the level of non-compliance with the proposed inspection requirements will be low for the following reasons:

- Owners will have already registered their pool and therefore be aware of the broader regulatory scheme and its components, including the inspection and certification requirements; and
- Presence of an offence relating to a failure to provide a certificate of pool and spa barrier compliance by the due date which is also an infringeable offence.

The proposed Regulations include an offence relating to a failure by the owner to provide a certificate of barrier compliance to council by the applicable date nominated by council. Councils may commence a prosecution against owners who have committed this offence with the maximum penalty being 10 penalty units (\$1,652.20 in 2019-20). Significantly, this offence will also be prescribed as an infringement offence permitting councils to issue an on-the-spot fine of 2 penalty units (\$330.44 in 2019-20) upon contravention. DELWP views the presence of an infringement offence as a particularly strong incentive for owners to ensure they arrange for an inspection and certification of their barriers in line with the requirements of the scheme.



Flow chart: Swimming pool and spa inspection and certification process

**Question for stakeholders:**

16. Do you agree that the average period for operable components of a barrier to fail in the absence of appropriate maintenance is approximately three years? Please explain your response.

## 4.5 Implementation options for the preferred option

### 4.5.1 First certificate of barrier compliance

The proposed Regulations provide for several mechanisms for swimming pool and spa owners to attain their first certificate of pool and spa barrier compliance and the timing depends on:

- whether it is pre-existing (prior to commencement of the new scheme); or
- whether it is a newly constructed; or
- whether it is a relocatable swimming pool or spa.

It is necessary to set different mechanisms for each of the above categories as their differing characteristics means that appropriate timeframes vary for each group to obtain their first certificate. These three categories were selected as the clearest and most logical way of separating groups of swimming pools and spas based on their broad construction dates and whether they are of a permanent or relocatable form. The proposed timing for the first two categories is discussed below and the timing for relocatable swimming pool and spas is discussed in Chapter 6.

#### *Pre-existing swimming pools and spas*

In the case of pre-existing pools, i.e. those constructed, or for which construction commenced, prior to the registration deadline of 14 April 2020, the proposed Regulations provide a staged approach for when the first certificate of compliance must be provided. These pre-existing swimming pools and spas will be divided into three groups based on the date of construction that has been determined by the relevant local council. The proposed timeframe applicable to each group is detailed in Table 14 below.

**Table 14: Due dates for lodgement of first certificate of barrier compliance for pre-existing pools and spas**

Date of construction determined by council	Due date for first certificate of barrier compliance
On or prior to 30 June 1994	30 October 2020
On or after 1 July 1994 but prior to 1 May 2010	30 April 2021
On or after 1 May 2010	29 October 2021

The intent behind this staged approach is to spread out the timing of the inspections occurring across Victoria which is important for a number of reasons. Firstly, it allows time for the number of inspectors to grow in order to meet the market demand. It will take time for the establishment of training and registration processes for the new class of building inspector (pool safety).

Although the current cohort of registered building surveyors and registered building inspectors can provide these services, the DELWP is concerned that this number may not be large enough for the purposes of servicing the market's needs across Victoria. Accordingly, setting an early certification deadline for most swimming pool and spa barriers is likely to be ineffective and potentially counterproductive due to the shortage of registered building practitioners. Further discussion on this matter is included below in section 4.5.5.

The most significant reason for the proposed staged approach is that it will space out the flow of certificates of barrier compliance and certificates of barrier non-compliance being lodged with councils. Feedback received from MBSs during the policy development process highlighted the importance of ensuring the scheme does not result in the council being overwhelmed by documentation and matters requiring their attention at any one time. This is particularly important in the case of lodgement of certificates of pool and spa barrier non-compliance with councils, as these certificates will require council to take action to address the non-compliance. The staged approach should result in a staggered supply of documentation to councils, enabling them to process much of what has been received in one round before the next round falls due.

It should be noted that the proposed approach requires the oldest swimming pools and spas to be checked (and have their certificates of pool and spa barrier compliance lodged) first as they are viewed as being of higher risk on average. The decision to prioritise this group is based on the fact that the older the swimming

pool or spa, the longer it has been since it was likely subject to some oversight by a building professional. The components of barriers associated with older swimming pools and spas are also likely to have suffered more wear and tear or been affected by changes made to the property (e.g. landscaping, building alterations).

Finally, it is noted that these dates represent the respective deadlines for each of the three groups. There is nothing preventing owners whose pools fall into one of the latter two groups from choosing to arrange for an earlier inspection and certification of their barrier and providing the certificate to council if they choose to do so.

During the policy development phase, some MBSs expressed views that the proposed timing for these dates are not spaced far enough apart. This feedback appears based on views that where a certificate of barrier non-compliance is issued, the ensuing follow-up action taken by council may take an extended period of time to resolve and possibly run over a period of several months if not longer before compliance is achieved. MBSs report that this reflects their current experience taking enforcement action under the Act where some instances of non-compliance can take six months or longer to resolve. They hold concerns that the proposed six-month spacing between the dates when each group is required to provide their first certificate of barrier compliance will see councils still dealing with a high number of non-compliance matters when the documentation for the next group starts to arrive.

In addition, it has also been put forward that the date which the initial group will be required to provide their first certificate of pool and spa barrier compliance by (30 October 2020) may be too soon after the proposed registration deadline for existing swimming pools and spas (14 April 2020). Following receipt of a registration application, councils must determine the date of construction of the swimming pool or spa.

As discussed in section 3.6.1, this may include council determining whether any subsequent alterations to the barrier need to be considered as part of this process. Varying views have been expressed regarding the time it will take councils to complete this process. If this process and/or the other tasks associated with processing registration applications are determined to be time-consuming, more time may need to be allowed between the registration deadline and the date that the first certificates for existing pools and spas fall due.

DELWP acknowledges the concerns raised by some MBSs regarding the proposed timing of the staged approach. This is likely to be more of an issue for those municipalities with a large number of existing swimming pools and spas. However, the proposed regulations maintain the proposed timing while further feedback and evidence is sought through this consultation process. Given the risks associated with non-compliant safety barriers, DELWP is committed to seeing all existing swimming pools and spas brought into compliance as soon as practically possible. However, this needs to occur within a timeframe that is reasonable for owners and feasible for councils noting their existing concerns regarding resources. Further feedback from stakeholders is sought regarding the proposed timing of the staged implementation approach.

**Question for stakeholders:**

17. Do you agree with the proposed timeframes for when owners of swimming pools and spas constructed or under construction prior to 14 April 2020 must provide their first certificate of pool and spa barrier compliance? Please explain your response.
18. How long does it usually take councils to resolve matters of swimming pool and spa safety barrier non-compliance? Which factors influence the time taken (e.g. age of barrier)?

*Newly constructed swimming pools*

As stated earlier in section 4.2, any building work involving construction of a swimming pool, spa or associated safety barrier must be inspected by a registered building surveyor under the existing building permit processes. Although the issue of the occupancy permit or certificate of final inspection provides some assurance regarding the compliance of the safety barrier upon the completion of construction, the preferred

option includes a requirement for the relevant building surveyor to issue a certificate of pool and spa barrier compliance (once the inspection of the final mandatory notification stage has been completed).

The requirement for a certificate of pool and spa barrier compliance to be issued at this stage is designed to ensure appropriate attention is given to the strict technical compliance of the safety barrier, particularly in circumstances where the building permit relates to work that is much broader than construction of a swimming pool. For example, where it covers the construction of a new home which includes a garage and swimming pool. The provisions in the Building Act relating to occupancy permits and certificates of final inspection specifically state that these documents are not evidence that the building (in this case, the barrier) complies with the Building Act or Regulations. However, the compliant barrier certificate is evidence that the barrier has been inspected and that it complies with all of the technical requirements of the applicable barrier standard.

#### **4.5.2 Frequency that owners must arrange for a new certificate of barrier compliance to be obtained**

The policy intent underpinning the inspection and certification requirements in the preferred option is to ensure that the compliance of barriers is checked periodically by a suitably qualified individual. As noted above, the current non-compliance rate and the reasons for non-compliance demonstrate that it is not enough for a barrier to be inspected for compliance solely at the completion of works in the expectation that it will remain compliant throughout its lifespan. It is vital that there is a regular assessment undertaken to determine if the barrier continues to operate effectively or if a lack of maintenance or other change to the environment has compromised its compliance.

The shorter the period between which owners will be required to ensure that a new certificate of barrier compliance is provided to council, the greater the cost burden imposed upon owners. However, shorter periods also provide for less time before a trained eye is required to assess the safety barrier to check that it remains compliant. DELWP considered three main options regarding the frequency at which swimming pool and spa owners must arrange for certification of their safety barriers.

It is noted that there are other potential options that could also be implemented. For example, rewarding 'good behaviour' of owners whose barriers pass on the first inspection or who complete a self-assessment in intervening years by providing a longer deadline for the lodgement of their next certificate (e.g. five years). However, DELWP's preliminary assessment was that the increased complexity of such arrangements outweighed any additional benefits granted.

#### **Option 1—Requiring a new certificate of pool and spa barrier compliance to be provided every three years**

The preferred option is to require owners of swimming pools and spas to organise for a new certificate of barrier compliance to be provided every three years. DELWP also considered alternative frequencies under this option, including requiring new certificates every two or four years. Setting a universally-applicable frequency provides absolute clarity to owners, councils and inspectors regarding how often the inspection and certification process must occur.

It is noted that WA requires an inspection to be undertaken every four years or less. However, a point of difference between the requirements in WA and the proposed Victorian scheme is that local government is responsible for undertaking the inspections in the former. The limited resources possessed by councils make it difficult for mandatory inspections to be any more frequent. Indeed, a November 2017 Ombudsman WA report found that over 8,600 private swimming pools in WA were overdue for their four-yearly barrier inspection as at 30 June 2015.<sup>92</sup>

Table 14 below provides estimates of the different costs were the scheme to use different inspection frequencies, including at the point of sale/lease discussed under Option 2.

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<sup>92</sup> Ombudsman Western Australia, *Investigation into ways to prevent or reduce deaths of children by drowning*.

**Table 15: Cost of regulations under different inspection options**

Option	Total cost (NPV over 10 years)	Difference
Every three years (proposed frequency)	\$398,637,279	-
Every two years	\$486,240,206	22% higher than the proposed Regulations.
Every four years	\$390,774,582	2% lower than the proposed Regulations.
Inspection upon sale/lease of property	\$197,420,810	50% lower than the proposed Regulations

These costings demonstrate that increasing the inspection frequency to two-yearly results in a significant increase to the overall costs of the regulations (22 per cent increase) whereas decreasing it to requiring an inspection every four years only results in a modest cost saving (2 per cent decrease). The differences in costs reflect that, if inspections occur more/less frequently, the rate of non-compliance is also expected to be lower/higher and the average cost of rectification is also likely to be lower/higher.

The rate at which barrier components commonly deteriorate and fail was identified as a relevant factor that could assist in setting the appropriate frequency under this option. As mentioned earlier, feedback from MBSs indicates most deterioration to safety barriers tends to emerge between three to four years. This suggests that requiring an inspection to be carried out every two years may be unnecessarily onerous for owners as it is unlikely to result in the detection of a significantly increased amount of non-compliance when compared against the three and four yearly options. However, DELWP acknowledges that there may be differing views regarding the time it takes for components of a compliant barrier to deteriorate to the point where its safety is compromised. A consultation question has been included below seeking further information and views from stakeholders on this point.

The three-year period has been selected as an appropriate period balancing the burden imposed upon owners with the need to ensure that not too long a period passes between inspections to reduce the risks of barriers becoming non-compliant. It also takes account of the common feedback provided by MBSs that safety barriers begin to deteriorate at the three-year mark. Feedback is sought whether stakeholders view three years as the appropriate time period for this option or if a different period is preferred.

### **Option 2—Requiring a new certificate of pool and spa barrier compliance to only be provided upon sale or lease of land**

Under this option, there would be no prescribed frequency with which owners would be compelled to provide a new certificate of barrier compliance. Instead, the obligation would only arise when the owner either leased the property to new tenants or sold the land. Upon either of these events, the owner would be required to arrange an inspection and ensure a certificate of pool and spa barrier compliance is issued in order that it can be provided to the purchaser or new tenant. This ensures that the purchaser or new tenant can be confident that the relevant safety barrier is compliant. It not only provides them with peace of mind over the safety of the pool area, but in the case of purchasers provides reassurance that they are not being passed any obligations to rectify existing non-compliance.

This option reflects the approach taken in NSW and Qld where certification is required at the point of sale or lease. Table 15 above shows that the overall cost of a scheme which features inspections on this basis is approximately 50 per cent lower than the cost of a scheme requiring periodic inspections on a three-yearly basis.

Option 2 is not the preferred option as it fails to achieve the primary aim of the proposed inspection and certification requirements: to ensure that safety barriers are checked regularly for compliance. Research conducted by Royal Life Saving Australia found that rates of compliance with fencing laws are more than

twice as high in states with regular inspections compared to those without.<sup>93</sup> Accordingly, DELWP believes it is much less likely to achieve the underlying policy aim of reducing incidences of young children drowning in private swimming pools and spas. The frequency at which a property is sold or leased is arbitrary and properties can have the same owner for many years. If a property has the same owner for a decade or longer, the absence of a mandatory requirement to have the safety barrier around the pool inspected during that long period of ownership poses an unacceptable risk. This risk is highlighted by the significant non-compliance of existing swimming pool and spa safety barriers reported by councils and private industry as discussed earlier in this chapter.

### **Option 3—Requiring a new certificate of pool and spa barrier compliance to be provided at councils' discretion**

This option would result in the Regulations not prescribing a particular time period for when owners must organise a new certificate of compliance to be provided by, but instead leave it to the relevant council's discretion. Under this option, the council would have discretion to determine how often they require a new certificate of barrier compliance to be provided for all swimming pools and spas registered within their municipality, or on a case by case basis. The latter approach may be useful where a council has reason to require a new inspection and certification be completed sooner. This option could also include placing an upper limit on councils' discretion similar to the approach taken in WA, e.g. new certificate must be provided every five years or sooner. This would ensure that no council was able to implement a time period that was too inconsistent with the policy aims.

Overall, this approach allows councils to administer the frequency requirement based on their own view of the risks involved as well as any relevant resourcing considerations. However, in practice DELWP believes that it is likely that most councils would adopt a broad, universally-applicable frequency requirement in the region of requiring a new certificate of barrier compliance every three to five years. Accordingly, in practice this option may look very similar to Option 1. For the sake of simplicity, it is desirable that the same frequency for the requirement is used across all municipalities. This will reduce complexity for owners moving between municipalities and particularly for those who own investment properties in a couple of different locations. However, DELWP acknowledges that some councils may view the discretion under this option as preferable. Feedback from stakeholders is sought on which option is preferred.

#### **4.5.3 Currency requirement for lodged certificates**

DELWP views it as vital to the effective operation of the scheme that all certificates of compliance periodically lodged with council relate to a recent inspection. A certificate that relates to an inspection that was carried out months or years prior does not provide an accurate indication of the state of compliance of the barrier at the time the certificate is lodged. This would circumvent the policy intent that an inspection of the barrier, and certification that it remains compliant, occurs approximately every three years.

To ensure that the new requirements give effect to the policy intent, the proposed Regulations require that any certificate of pool and spa barrier compliance lodged with the council must be dated not more than 30 days before the date it will be lodged. This is referred to as a 'currency' requirement.

DELWP selected the 30-day period as an appropriate 'currency' period based on the following considerations:

- It allows a reasonable amount of time for the owner to lodge the certificate with council following receipt of the certificate; and
- This length of time provides owners with flexibility in scheduling the inspection and certification of their barrier as they approach the date a certificate must be lodged with council; and
- A maximum period of 30-days was viewed as ensuring that lodged certificates are a contemporary reflection of the current compliance of the barrier; and

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<sup>93</sup> Peden AE, Mahony A (2018) Trends in Child Drowning Over the Last 25 Years. Royal Life Saving Society – Australia, Sydney Australia.

- The 30-day period matches the relevant period that Certificates of Roadworthiness remain 'current' for prior to them being presented to VicRoads.

DELWP viewed the 30-day currency period for certificates under Victoria's roadworthiness scheme as an appropriate point of reference given that both schemes involve an independent inspection to certify compliance for safety reasons and the provision of a certificate evidencing compliance to a government authority.

**Question for stakeholders:**

19. Do you believe that 30 days is an appropriate maximum 'currency' period for the lodging of a certificate of pool and spa barrier compliance? If you believe an alternative period is more appropriate, please indicate the period in your response.
20. If periodic inspection and certification of barriers is required under the new scheme, what is the most appropriate interval for requiring owners to provide a new certificate of barrier compliance? Please explain your response.

#### 4.5.4 Other practical matters relating to inspection and certification

Upon the issue of a certificate of pool and spa barrier compliance, the inspector must provide a copy to the owner. The owner then has the responsibility of lodging the certificate with council within the required timeframe. A document lodgement fee must be paid at the time the certificate is lodged with the council.

The proposed Regulations will provide councils with a general discretion to extend the period for provision of a certificate of pool and spa barrier compliance under certain circumstances. These include where building work being undertaken on the land means inspection within the required period would not be appropriate, where a building notice, building order or emergency order has been issued by the MBS, or where the council is satisfied an owner has provided a reasonable excuse as to why it was not possible to provide the certificate of compliance within the required period.

The circumstances set out in the proposed Regulations are those that DELWP considered to be appropriate for councils to consider granting an extension of time. They were selected as appropriate as they could reasonably be expected to arise and granting extensions of time in these circumstances would not be seen to undermine the integrity of the scheme.

It is intended that certificates of pool and spa barrier compliance will be issued on a standard form and the proposed Regulations contain a template form that inspectors must use for this purpose. The use of a standard form will maximise efficiency for inspectors and councils as it will ensure all certificates being issued under the scheme contain the same information in the same format.

#### 4.5.5 Who can issue certificates of barrier compliance and non-compliance?

The 2018 amendments to the Building Act are prescriptive regarding the power to make regulations relating to the issuing of certificates of pool and spa barrier compliance and non-compliance. In particular, they specify that the Building Regulations can provide for these certificates to be issued by registered building practitioners in the classes of: building surveyor, building inspector, or any other class whose registration authorises the carrying out of inspections of swimming pools and spas and associated safety barriers.

The proposed Regulations also provide that an MBS can issue a certificate of pool and spa compliance if satisfied that the pool barriers are compliant (after taking enforcement action under Part 8 of the Building Act). Where compliance is brought about through such action, the MBS will issue the certificate of compliance himself/herself and place it upon the register.

In order for the new regulatory scheme to be effective, it is vital that there are enough qualified persons available to meet the market demand for inspection and certification of swimming pool and spa safety barriers. Analysis undertaken by DELWP estimates that approximately 100 – 120 full time equivalent (FTE) persons will be needed to inspect every pool once every three years under the proposed scheme.



DELWP holds concerns that the current number of registered building surveyors and registered building inspectors may not be enough to support the operation of the new scheme. Data from the VBA shows that as of 9 May 2019, there were 1,028 persons holding registration in at least one of the building surveyor or building inspector classes. It is difficult to predict how many of the current population of registered building surveyors and building inspectors intend to carry out swimming pool and spa inspections for the purpose of the new scheme. However, given the much broader scope of work available to them under their respective registration classes, DELWP considers it unlikely that many will choose to offer these services full-time. Those that do decide to carry out barrier inspections for the purpose of the scheme may choose to do so on a part-time basis, picking up work in this area when other areas of their work are quiet.

DELWP also held concern that the current practitioner population may be an issue in regional Victoria and therefore that the owners of swimming pools and spas in these locations may find it especially difficult to engage a practitioner for an inspection. Additional analysis on the location of the current population of registered surveyors and inspectors has determined that approximately 657 practitioners are located in metropolitan Melbourne, 302 are located in regional Victoria and 69 are registered with the VBA under an interstate address.<sup>94</sup> On face value, these figures do not suggest a particular shortage of registered building surveyors and building inspectors in regional Victoria broadly, although the case may vary from region to region particularly away from the major regional centres.

The Australian Institute of Building Surveyors (AIBS) put forward their view that a new class is not required due to the number of persons who are qualified and eligible for registration as a building surveyor or building inspector but currently choose not take out registration. These persons may make this choice as their current employment positions do not require them to hold registration or they are not willing to incur costs associated being registered (e.g. insurance). AIBS believe that these persons would consider becoming registered in order to take advantage of the new market opportunities that the proposed regulatory scheme will create. However, at the time of writing, they were unable to provide any data regarding of the number of currently eligible but unregistered persons or an estimate of how many may elect to take up registration in order to carry out inspections once the new scheme commences.

In the absence of further information and evidence regarding the size of this group and the reasons for why they elect not to maintain active registration, DELWP is unconvinced that the new scheme would entice these persons to take out registration. Further feedback is welcomed from stakeholders on this topic.

#### **4.5.6 Proposed new class of Building Inspector (Pool Safety)**

The proposed Regulations include the creation of a new class titled building inspector (pool safety). This creation of this new class aims to increase the number of people qualified and available to perform safety barrier inspections in order to meet the needs of the Victorian market. It is also expected that the creation of the new class will put downward pressure on the costs of any mandatory inspections.

The proposed Regulations include amendments to Schedule 9 of the Building Regulations to create a new class of building inspector (pool safety) and insert prescribed qualifications that applicants must hold in order to be registered in the new class. In particular, the prescribed eligibility requirements for the pool safety inspector class are:

1. The successful completion of a course in swimming pool and spa safety barrier inspection approved by the VBA from an RTO; and
2. At least six months of practical experience.<sup>95</sup>

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<sup>94</sup> This analysis was based on the post code of the address that the VBA has on file for each practitioner. The designation of each post-code as either metropolitan or regional was based on the Australian Government Department of Home Affairs' *Postcodes of regional Australia and low population growth metropolitan areas*. Accessed via: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/skilled-regional-provisional-489/regional-postcodes>.

<sup>95</sup> As a class of building inspector, applicants for the building inspector (pool safety) class must also hold a professional indemnity insurance policy in line with the Building Practitioners' Insurance Ministerial Order.

These proposed requirements are based on feedback from stakeholders provided during the policy development phase, particularly the VBA who will be responsible for administering the registration of persons in the new class. The VBA undertook a review of the existing training qualifications and competencies and determined that there is nothing currently in existence that provides relevant and sufficient knowledge to undertake the scope of work in inspection of swimming pool and spa safety barriers described by the proposed Regulations. This accords with DELWP's investigations into this matter as well as representations from other stakeholders. It also follows a similar path to that taken by the Queensland Building and Construction Commission who developed their own course: *10660NAT in Swimming Pool Safety Inspections*.<sup>96</sup> The VBA advises, and DELWP agrees, that this course is unsuitable for delivery of training for the purposes of the new building inspector (pool safety) class in Victoria owing to the significant differences between the jurisdictions' regulatory schemes. This includes divergences in the technical standards adopted setting the requirements for barriers as well as differing obligations and functions incurred by registered inspectors under each jurisdiction's scheme.

It is proposed that the VBA will work with an approved training provider to develop a suitable training course. This process would also include consultation with key stakeholders. Although the course could not be finalised until the proposed Regulations are made later this year, initial planning and development could begin prior and it is anticipated that the training course could be settled by early 2020 with delivery beginning shortly thereafter. The VBA would retain a discretionary ability to approve RTOs to deliver this training using their broad discretion to approve eligibility requirements. Any training provider approved to deliver this course would need to be able to provide a verifiable statement of satisfactory completion to persons who successfully undertake the course to present to the VBA with their registration application.

The duration and cost of the VBA-approved training course is yet to be determined. As a reference point, the Swimming Pools and Spas Association Victoria (SPASA) deliver the *10660NAT in Swimming Pool Safety Inspections* course in Qld over a three-day period for a fee of \$1,495.<sup>97</sup> The duration of the VBA-approved course will primarily depend on the content that is to be delivered. DELWP anticipates that it is likely to be longer than the Qld course owing to the differences in regulatory requirements noted above.

The training course outlined above would be a non-accredited training course. The Australian Skills Quality Authority (ASQA) accredits training courses in accordance with the national Standards for vocational education and training (VET) Accredited Courses 2012. According to the ASQA website, "Accreditation means the course is nationally recognised and that a registered training organisation can issue a nationally recognised VET qualification or VET statement of attainment following its full or partial completion."<sup>98</sup> As the development of an accredited course typically takes between 12 – 18 months, there will not be enough time to develop a Victoria-specific accredited training course prior to the commencement of the new scheme. Ultimately, it is intended that the relevant qualification for the building inspector (pool safety) class is an accredited training course. However, the non-accredited training will serve as the eligibility requirement in the interim until the accredited course can be developed and rolled out. Further information on this is discussed in the forward work program at Chapter 10.

The proposed eligibility requirements for registration in the building inspector (pool safety) class also require a minimum of six months of relevant practical experience. The VBA believes this requirement will provide them, as well as consumers, with confidence that applicants for this class have appropriate breadth and depth of experience across all levels of pool compliance. This experience would be required to be gained under the supervision of a registered building practitioner that could include building surveyors and inspectors, but also domestic builders including those who are limited to relevant areas of work including swimming pools and spas or gates and fences. Although experience gained under a registered domestic builder may not be as directly relevant as inspection work, the VBA are of the opinion that individuals who install barriers develop some skills and knowledge on job that would go towards the experiential learning requirements of this class. Accordingly, the VBA would consider the relevance of such experience on a case by case basis.

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<sup>96</sup> This course was later adapted for delivery of relevant training in New South Wales.

<sup>97</sup> <https://www.spasa.com.au/education-training/pool-barrier-inspection-courses/pool-barrier-inspection-course-qld/>

<sup>98</sup> <https://www.asqa.gov.au/about/australias-vet-sector/standards-vet-accredited-courses>

Some future applicants for the building inspector (pool safety) class may have already obtained the necessary experience required to meet the proposed eligibility requirement. They may be a registered building practitioner who has undertaken work that could be assessed by the VBA as satisfying the experience criteria. Alternatively, they may not be currently registered but have worked with a registered practitioner gaining experience that would also satisfy the VBA. In practical terms, the VBA advise that a log book in the form of a spreadsheet detailing the pool inspection, date, address, appropriate technical standard applied, mentor/supervisor and comments would provide adequate evidence of their level of practical experience.

DELWP understands the rationale behind the VBA's desire to set a minimum period of experience as part of the eligibility requirements. However, it remains unclear how feasible it will be for future persons seeking registration in the building inspector (pool safety) class to obtain the necessary experience. This may particularly be an issue for persons coming from a non-building industry background. It is acknowledged that the VBA has broad discretion under the Building Act to consider equivalency in the event a candidate does not hold the prescribed qualifications. However, a determination of equivalency requires some form of relevant experience on which to base the determination.

More generally, DELWP views it as critical that the eligibility requirements for this new class are set at the appropriate level for the responsibilities these practitioners will hold. The consultation questions set out below seek feedback from stakeholders on the proposed eligibility requirements.

**Question for stakeholders:**

21. Do you consider the size of the existing cohort of registered building surveyors and building inspectors to be enough to support the efficient and effective operation of the proposed scheme? Please explain your response.
22. If the new building inspector (pool safety) class is to proceed, are the proposed qualification and experience requirements suitable for the proposed scope of work? Please explain your response.
23. Do you foresee any issues with applicants for the new building inspector (pool safety) class successfully meeting the proposed experience requirements? Please explain your response.

# 5. Procedures for dealing with non-compliant barriers

## 5.1 Purpose

This chapter considers options for addressing non-compliance identified following an inspection carried out by a registered building practitioner. This chapter takes the preferred option in Chapter 4 as given, assuming that a regulatory scheme including periodic mandatory inspections by a registered building practitioner will be implemented. Inspections carried out under this scheme will result in a determination that the barrier is either compliant or non-compliant.

Chapter 4 already set out the brief process that follows a determination of compliance. This chapter considers options for the more complicated processes that are necessary to remedy non-compliant barriers identified by an inspector. Chapter 5 also considers other design options that relate to the scheme's proposed processes to bring non-compliant barriers into compliance.

## 5.2 Background / Nature of the problem

Councils have a range of powers available to them under the Building Act that they can exercise when dealing with non-compliance. In particular, council MBSs can issue a variety of notices and orders under Part 8 of the Act. These can require owners to act to address aspects of a building that contravene the building regulatory requirements or pose a danger to the life, safety or health of any member of the public. In addition, councils can prosecute certain offences against the Building Act and Regulations. Feedback from MBSs via the VMBSG survey indicates that minor works orders are the most commonly utilised compliance tool for enforcing barrier requirements, followed by the building notice/order process and warning letters. Prosecution is a less utilised method.

As noted in section 4.1, resourcing constraints limit the ability of councils to be proactive in identifying and addressing non-compliant swimming pool and spa barriers. Furthermore, results from the VMBSG survey indicate that MBSs believe that the enforcement powers presently available to them are slow, cumbersome and resource intensive. These factors inhibit the timely and effective resolution of instances of non-compliant barriers. In response to a question asking if the range and level of penalties currently available to enforce the pool barrier requirements is enough and appropriate, 45.7 per cent of respondents answered no, 40 per cent answered yes, and the remainder were unsure or answered with a comment.

In general, MBSs who expressed dissatisfaction with the effectiveness of the current powers in responding to barrier non-compliance stated that it is very resource intensive to address these matters under the orders and notice processes. Multiple MBSs also report that owners don't take such enforcement actions seriously which can lead to delays in taking steps to rectify the non-compliance, if such action is taken at all.

Resourcing constraints hinder many councils' abilities to follow up in these instances and ensure that the process runs its course in a timely manner. Commencing a prosecution is viewed as inefficient as it uses significant council resources, both in terms of time and money, and several MBSs highlight that the fines imposed by magistrates are generally insufficient to act as a deterrent.

When the issues above are viewed in conjunction with the high rate of non-compliance reported by councils, it is easy to understand the viewpoint of many MBSs that they do not believe that current arrangements are enough to ensure compliance of private swimming pool and spa barriers.

### Question for stakeholders:

24. How effective do you believe the current enforcement powers available to MBSs under the Building Act are at addressing non-compliance of swimming pool barriers? Please explain your response.

### 5.3 Aim of the proposed requirements

The aim of the proposed options discussed in this chapter is to ensure that all non-compliance identified through an inspection is fully addressed in a timely manner. This will ensure that private swimming pools and spas are made safer through rectification of issues that may permit unintended access to the pool area. This directly contributes to the broader policy aim of reducing incidences of young children drowning in these facilities.

### 5.4 Broad options considered

This section examines the broad options considered by DELWP for addressing non-compliance identified during an inspection carried out by a registered building practitioner. Two broad options are assessed against the base case and then against each other in DELWP's selection of the preferred option. Section 5.6 examines various design options and features associated with the preferred broad option.

The broad options considered in this section, and design options covered in Section 5.6, have been assessed by DELWP using a combination of cost-benefit analysis, testing with stakeholders and evaluation of their likely effectiveness in achieving the aim set out in Section 5.3. The costs associated with the options, both to pool and spa owners as well as councils, have been drawn from the cost-benefit analysis prepared by the consultants engaged by DELWP. The fundamental consideration in assessing the options is the likelihood that they will contribute to achievement of the policy aim of reducing incidences of young children drowning in private swimming pools and spas.

#### Option 1—Base case

Under the base case, during an inspection for the purposes of the new scheme, inspectors<sup>99</sup> will identify that a barrier is non-compliant and notify the owner of the matters that need addressing. However, there would be no further actions required of inspectors to ensure that the barrier is brought into compliance. The proposed Regulations would not include any prescribed mechanism for requiring that the identified non-compliance is addressed. In addition, there are no existing powers available to building surveyors or building inspectors performing an inspection function for the purpose of the new scheme to cause any identified non-compliance to be addressed. Private building surveyors are able to issue notices and orders under Part 8 of the Act in respect of buildings, land or places for which they have been appointed to carry out a function under the Act. However, the carrying out of inspections for the purpose of the new scheme is not a function for which private building surveyors can be appointed under Part 6 of the Act.

The only exception to this would be if the person who carried out the inspection was an MBS. In these circumstances, if the MBS identified non-compliance they would be able to utilise the powers available to them under Part 8 of the Act, including issuing a building notice or emergency order. However, based on feedback received from stakeholders DELWP believes it is unlikely that many MBSs will carry out inspections of swimming pools and spas under the scheme.

For the vast majority of inspectors who are not MBSs, at best they could refer the non-compliance to the relevant council to action. DELWP considers it likely that most registered building surveyors and building inspectors will refer more significant and high-risk issues of non-compliance to council owing to their understanding of the risks involved.

Even if the inspector did not choose to refer the non-compliance to council, the council would be able to identify instances where a certificate of barrier compliance had not been provided by the required date for a registered pool or spa and proactively follow up on the reason why using their existing authority under the Act.

Outside of the non-compliance being referred to council and them taking action, it would be left to the owner to take steps to rectify the non-compliant matters at their discretion. The owner would also have the choice

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<sup>99</sup> As per the use of this term in Chapter 4, the term *inspector* is used in this chapter to broadly refer to any registered building surveyor or registered building inspector. Persons registered in these classes fall within the definition of *swimming pool and spa inspector* under the Building Act.

regarding how quickly they arrange for the non-compliant matters to be rectified depending on their personal circumstances. The owner may also decide not to address the identified non-compliant matters.

The existing level of non-compliance reported by councils raises questions regarding the degree to which owners are prepared to take proactive steps to remedy their barriers. Potentially, the fact that non-compliance has been identified through the mandatory inspection scheme, rather than remaining unidentified and undisclosed, could result in owners taking steps to make their barriers compliant at a greater rate than is currently the case. However, DELWP's view is that it remains questionable whether this would occur in all cases, particularly where the cost of the works required is high.

## **Option 2—All non-compliance is referred to council for action**

Under this option, the proposed Regulations would require that following an inspection resulting in a determination of non-compliance, the inspector must issue a certificate of pool and spa barrier non-compliance and provide it to the relevant council. This process would be followed irrespective of the nature of the non-compliance meaning that councils would receive notification regarding both minor and major matters. Upon receiving a certificate of pool and spa barrier non-compliance, the council would need to address the matter using their existing powers available under the Act. Following completion of any rectification work to bring the barrier to compliance, council would require a certificate of pool and spa barrier compliance to be issued, either by the council MBS or a private inspector.

### *Benefits*

Compared with the base case, DELWP expects this option will increase the frequency and speed with which issues of barrier non-compliance are rectified. Under the base case, the primary trigger for ensuring that identified non-compliance is addressed would be in cases where the inspector refers the non-compliance to council for action. DELWP assumes that inspectors would generally refer significant issues of non-compliance (no safety barrier in place, sections missing, gate does not self-latch etc) under the base case and that Councils would action these. Accordingly, it is not expected that Option 2 would see a dramatic increase in the number of significant non-compliance issues addressed compared with the base case.

However, it is less certain that inspectors would refer minor issues of non-compliance to councils for action under the base case whereas all non-compliance would be sent to the council under this option. Accordingly, subject to council resourcing, Option 2 is more likely to see an increase in the number of minor matters of non-compliance rectified.

Rather than leaving it to the will of owners to address non-compliance, this option ensures that the non-compliance is brought to the attention of the party responsible for enforcing compliance against the requirements—the local council. Upon receipt of notification of non-compliant barriers, councils would be able to prioritise taking action in line with its views of the associated risk profile and available resources. Through prioritising the higher risk matters, councils will ensure that non-compliance that poses the more serious risk to the safety of young children is addressed first. DELWP acknowledges that council resource constraints may limit their ability to respond to all instances of non-compliance raised under this option. However, having these matters brought to their attention at least provides the opportunity for them to act.

Another benefit of Option 2 is that it will always include a recheck of barrier compliance following the completion of rectification work. This is important as under the base case, even when an owner has to act to bring a barrier into compliance, there is no guarantee that they will spend further money to organise an inspection to confirm that the work has made the barrier compliant. Accordingly, this option is more likely to see non-compliant barriers brought into compliance thereby reducing the chances of young children drowning following them gaining unsupervised access to a swimming pool or spa due to a faulty safety barrier.

### *Costs*

The estimated costs associated with Option 2 are set out in Table 16 below.

**Table 16: Estimated costs of Option 2—All non-compliance is referred to council for action (\$ million NPV)**

Activity	Cost to pool owners	Cost to councils
Cost of rectification	155.42	
Council actions in responses to non-compliance		126.46
<b>Total</b>	<b>155.42</b>	<b>126.46</b>

This option will involve costs for the owners of swimming pools and spas whose barriers have been determined to be non-compliant. The most significant cost is the rectification costs involved in bringing non-compliant pool barriers into compliance. This cost is estimated to be \$155.42 million over the 10-year period costed. The total rectification cost has been modelled on an average estimated cost of \$500 per instance of rectification work. This was derived from discussions with councils about existing cases of non-compliance and takes into account the broad range of works that can be required from minor, low-cost repairs through to replacement of the entire barrier (which is relatively rare). The other key assumption underpinning the estimated total rectification cost is that 50 per cent of first inspections of a pool or spa safety barrier will result in a determination of non-compliance. This assumption was based on data from the VMBSG survey, the experiences of other states who have implemented inspection programs and consultation with councils.

Although not a cost directly attributable to this policy option, the total estimated cost to owners of inspections under this option would be \$147.10 million over 10-years. This cost has been included as Option 2 does impact the inspection costs for owners. Under the preferred broad option in Chapter 4, the cost of inspections was estimated at \$186.50 million over 10 years. The reason for this difference is that under this Option 2, owners would not need to pay inspectors for second inspections in instances where a first inspection revealed certain non-compliance as all identified non-compliance would immediately be subject to a certificate of barrier non-compliance.

This option will also impose costs on councils who will be required to take action in respect of the non-compliance matters that are brought to their attention when they receive a certificate of barrier non-compliance. The total cost to councils of the enforcement action under this option is estimated at \$126.46 million over the 10-year period. The costs to council consist of time costs involved in activities taken to address non-compliant matters such as issuing notices.

The total cost associated with Option 2 is estimated to be \$281.88 million (NPV) over the 10-year period costed.

### **Option 3—Inspectors can oversee rectification of minor non-compliance matters**

Under this option, the Building Regulations will provide inspectors with the ability to oversee rectification of minor barrier non-compliance matters while major non-compliance will be referred to the relevant council for action. Following an inspection in which the inspector determines a barrier is non-compliant, the proposed regulations allow for two actions that may result:

- Inspector provides the owner with a period (not longer than a prescribed maximum period) to bring the barrier into compliance; or
- Inspector issues a certificate of pool and spa barrier non-compliance and provides it to the relevant council.

Under the first action above, the inspector must nominate a date by which the identified non-compliant matters must be fixed as well as the date that the inspector will return to re-inspect the barrier to check whether compliance has been achieved. If the reinspection determines that the barrier is now compliant, the inspector will issue a certificate of pool and spa barrier compliance. If the barrier remains non-compliant, the inspector must issue a certificate of pool and spa barrier non-compliance and provide this to council, regardless of the nature of outstanding non-compliance. If, for whatever reason, an inspector is unable to reinspect the swimming pool or spa, the owner would be required to engage a new inspector to conduct an inspection. In these circumstances, the findings of the first inspector would no longer have any relevance. If

the second inspector determined that the barrier was compliant, they would issue a certificate of pool and spa barrier compliance. If the second inspector found non-compliance, they could provide the owner with a period of time to bring the barrier into compliance, assuming it was not a matter for which a certificate of pool and spa barrier non-compliance must be issued as set out below.

The proposed Regulations prescribe certain circumstances where the inspector must immediately issue a certificate of pool and spa barrier non-compliance and provide it to council. The prescribed circumstances are where the inspector believes:

- the barrier cannot, or will not, be brought to compliance within the maximum time period that an inspector is allowed to provide under the first path; or
- where the nature of the non-compliance includes certain prescribed matters;<sup>100</sup> or
- where the nature of the non-compliance poses a significant and immediate risk to life or safety.

Upon issuing a certificate of pool and spa barrier non-compliance, the inspector must provide a copy of the certificate to the owner and lodge it with the council as soon as practicable. Following the receipt of a certificate of pool and spa barrier non-compliance, the council will utilise their existing powers under the Building Act to address the non-compliance. Which of those powers council elects to use in relation to any given matter will depend on the nature of the non-compliance and council's view on the most appropriate action to manage the risk.

#### *Benefits*

The benefits of Option 3 when compared against the base case are similar to those listed for Option 2 above. When compared against the base case, Option 3 is more likely to result in identified non-compliance being addressed and therefore barriers being brought into compliance. This is because it will put in place a structured system that will enable full oversight of the rectification of non-compliant pool barriers by a private inspector or council MBS as appropriate. This is compared with the base case where there is no regulatory mechanism requiring owners to address non-compliance identified by an inspection and would rely on the non-compliance being referred on to councils from inspectors and/or voluntary proactive rectification works by owners.

As was the case with Option 2, this option also has a significant benefit compared to the base case in that the barrier will be reinspected following the completion of any rectification work and a compliant barrier certificate issued if appropriate. For these reasons, DELWP considers that Option 3 will result in a reduction in the number of non-compliant barriers. The coronial data establishes a clear link between barrier non-compliance and the potential for fatal drowning incidents of young children in private swimming pools and spas. Accordingly, DELWP believes that Option 3 will contribute to the policy aim of reducing the number of drownings of young children in private pools.

#### *Costs*

The costs associated with this option are set out in Table 17 below.

**Table 17: Estimated costs of Option 3—Inspectors can oversee rectification of minor non-compliance matters (\$ million NPV)**

<b>Activity</b>	<b>Cost to pool owners</b>	<b>Cost to councils</b>
Cost of rectification	155.42	
Council actions in responses to non-compliance		48.06
<b>Total</b>	<b>155.42</b>	<b>48.06</b>

<sup>100</sup> See Section 5.6.2 for further discussion on these matters.



Option 3 will involve costs for the owners of swimming pools and spas whose barriers have been determined to be non-compliant. As with Option 2, the estimated cost of rectification of non-compliance is \$155.42 million over a 10-year period.

It is noted that the cost of inspections under this option is \$186.50 million (NPV) over 10 years. This is higher than in Option 2 due to the fact that owners will have to pay inspectors for a second inspection in instances where the inspector oversees the rectification of non-compliant matters. This cost is not listed in Table 17 as it is not a cost involved in responding to non-compliance. However, it is noted as the different options being considered under this Section do impact upon the total inspection costs.

This option will also impose costs on councils where they receive a certificate of barrier non-compliance and are required to take action in respect of the non-compliance matters detailed in the certificate. Council will not incur costs in all instances of identified non-compliance as inspectors will oversee the rectification of minor non-compliance matters. The total cost to councils of the enforcement action under this option is estimated at \$48.06 million over the 10-year period.

The total cost associated with Option 3 is \$203.48 million (NPV) over the 10-year costing period.

## 5.5 Preferred option

DELWP's preferred option is Option 3—Inspectors can oversee rectification of minor non-compliance matters. As set out in the beginning of Section 5.4, DELWP's selection of the preferred option was based primarily on how likely each option was to achieve the fundamental policy aim of reducing incidences of young children drowning. The cost-benefit analysis of the options was also drawn upon as well as consideration of other benefits associated with each option.

Proceeding with the base case is not preferred as DELWP does not believe that it will result in the level of rectification of non-compliance required to accomplish the aim set out in section 5.3. Both Options 2 and 3 will result in the creation of a system under which there is independent oversight over all identified non-compliance as well as a clear mechanism through which this non-compliance could be addressed.

However, Option 3 is preferred to Option 2 as it considers the existing resource constraints on councils in the design of the enforcement mechanisms. Essentially, the preferred option operates as a triage process under which only the more significant, high risk incidences of non-compliance are referred to council for action.

Option 2 would result in certificates of barrier non-compliance being lodged with council for every instance of non-compliance, no matter the severity of the non-compliance or level of risk it poses. This option fails to address the resourcing constraints broadly reported by MBSs that hinder their ability to address non-compliant swimming pool and spa barriers. Significantly, the new regulatory scheme will result in every existing swimming pool and spa across Victoria being inspected during the initial transition arrangements.

Given the high level of non-compliance broadly reported across municipalities by MBSs and by the private inspections sector, the cost-benefit analysis modelling anticipates that 50 per cent of inspections will identify non-compliance. DELWP believes that councils would not have enough resources to deal with the significantly increased volume of non-compliant pool barriers that would be brought to their attention under Option 2. At the very least, most councils would find it difficult to address these matters in a timely manner, meaning that it would take longer to see non-compliance remedied.

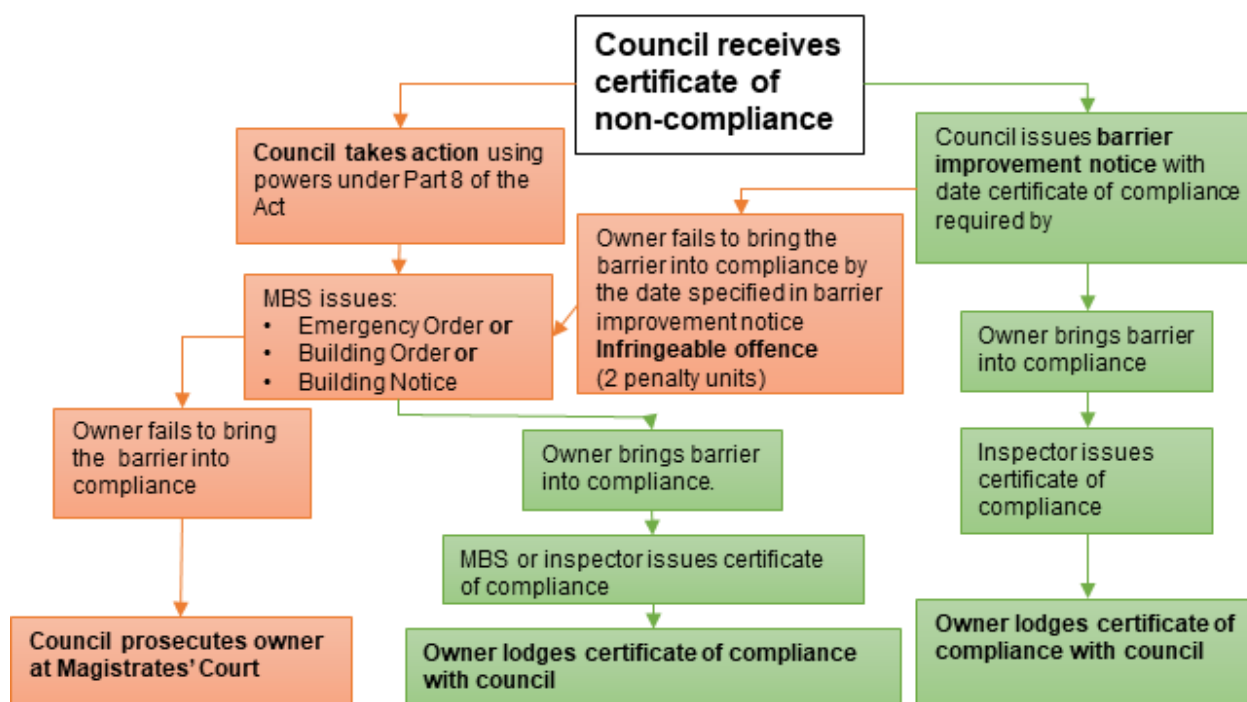
Option 3 is a more efficient means of addressing the broad range of non-compliance that will be detected by inspections. Many minor areas of non-compliance (e.g. replacing a latch, lopping off an overhanging tree branch) can be rectified quickly and cheaply.

Referring these matters to council is unnecessary and inefficient as the powers available to councils under the Building Act could be viewed as over and above what is necessary to bring about compliance in these circumstances. For example, given the nature of the rectification work required, it may be the case that by the time the council gets around to issuing a notice or order, the non-compliance has already been addressed. Accordingly, the preferred option has a significant benefit over Option 2 in that inspectors have the ability to oversee the rectification of non-compliance of this nature.

DELWP acknowledges that the costs to owners are increased where inspectors must reattend the property for a reinspection under Option 3. The overall increase in cost to owners under the preferred option must

also be weighed against the significant savings to councils due to the reduction in compliance activity that they would be required to undertake. Option 3 is significantly cheaper than Option 2 (\$203.48 million versus \$281.88 million) primarily due to the lower costs incurred by councils in responding to non-compliance. Overall, DELWP views the increase in the efficiency and effectiveness of a scheme where inspectors and councils share the responsibility for overseeing rectification work as justifying any small increase in costs for any one group of stakeholders.

Overall, DELWP prefers Option 3 as it is a more efficient and effective allocation of responsibility for oversight of the rectification of identified non-compliance. Therefore, as this option is viewed as the most effective means of ensuring non-compliant safety barriers are addressed, it will also have the greatest contribution towards promoting the underlying policy aim of reducing incidences of young children drowning in private swimming pools and spas.



Flow chart: Processes when council receives a certificate of pool and spa barrier non-compliance

**Question for stakeholders:**

25. Do you agree with the proposal to provide swimming pool and spa inspectors with discretion to oversee the rectification of minor instances of non-compliance? Please explain your response.
26. Is it likely that there will be many instances of non-compliance identified where the inspector forms a belief that there is no significant and immediate risk to life or safety? Please explain your response.

## 5.6 Implementation options for preferred option

### 5.6.1 Maximum prescribed period for inspectors to oversee rectification

As discussed under section 5.4, the preferred broad option includes two potential actions that can result following an inspector's determination that a safety barrier is non-compliant:

- Inspector provides the owner with a period (not longer than a prescribed maximum period) to bring the barrier into compliance; or
- Inspector immediately issues a certificate of pool and spa barrier non-compliance.

Under the first action, the inspector may provide the owner with a period of time to bring the barrier into compliance before they reinspect to determine if the barrier has been made compliant. The policy intent here is that inspectors can oversee the rectification of minor non-compliance matters whereas more significant issues get referred to council in the form of a certificate of pool and spa barrier non-compliance.

The proposed regulations set the maximum number of days that an inspector can nominate as the period in which non-compliance must be addressed by the owner at 20 business days. This period has been selected by DELWP as balancing the competing priorities of allowing enough time for most instances of minor non-compliance to be rectified but ensuring that more significant works that would necessarily take place over longer periods are referred to councils.

**Question for stakeholders:**

27. Is the proposed maximum period of 20 business days the appropriate limit for the period that inspectors can provide owners to address non-compliance? Please explain your response.

### 5.6.2 Matters requiring the issue of certificate of barrier non-compliance

There are a broad range of potential matters that may be identified in an inspection and cause the inspector to determine that the barrier is non-compliant with the relevant technical standards. It should be remembered that there are varying technical standards that apply depending on the date that the barrier was constructed. Potential issues that could result in a determination of barrier non-compliance include:

- section of barrier is missing
- barrier fixings have become loose
- climbable object (e.g. barbeque, pool filter and pump, pot plant) is placed within the prescribed non-climbable zone immediately adjacent to the barrier
- height of any part of the barrier is below the required minimum
- gap between bottom of the barrier and the ground is greater than maximum allowed
- gate opens inwards towards pool area
- gate fails to self-close from any open position
- gate latch is located at height or position that is prohibited
- retaining wall forming part of the barrier is below the minimum height or slopes at an angle greater than is allowed
- window forming part of the barrier opens more than maximum permitted distance

The issues noted above can affect the effective operation and compliance of a safety barrier. Some matters pose a more immediate, higher risk to life safety as the nature of non-compliance involves increased opportunity for young children to inadvertently access the pool or spa area.

For example, if a section of the barrier is missing, or the barrier gate fails to close and self-latch there is an objectively greater risk of this non-compliance resulting in young children entering the pool or spa area unsupervised than non-compliance issues such as the height of the barrier is 50mm below what it needs to be or a window forming part of a barrier opens slightly more than maximum permitted distance. Although the latter are equally non-compliant, DELWP's view is that such matters do not carry the same immediate risks.

The key feature of the preferred broad option is that more minor issues of non-compliance (i.e. those not posing an immediate risk or requiring significant rectification works) are not referred to council and instead remain with inspectors to oversee them being addressed. Major non-compliance matters, being those posing greater risks of young children gaining unsupervised access to the swimming pool or spa, will be referred to councils in order that they may be dealt with using the broader suite of enforcement powers available to MBSs.

### Option 1—Base case

Under the base case, inspectors would be required to issue a certificate of pool and spa barrier non-compliance where they are of the opinion that:

- The barrier cannot, or will not, be made compliant with the maximum 20 business period permitted; or
- A barrier is non-compliant in a manner that poses a significant and immediate risk to life or safety.

Under both cases above, the inspector has broad discretion to determine whether the non-compliance identified warrants the immediate issuing of a certificate of barrier non-compliance.

### Option 2—Prescribe certain matters as always requiring a certificate of pool and spa barrier non-compliance

As outlined in the discussion of broad Option 3 above, the proposed regulations prescribe various types of barrier non-compliance under which an inspector must always immediately issue a certificate of pool and spa barrier non-compliance. The policy intent here is to remove any discretion that the inspector has regarding whether they themselves oversee the rectification of these matters or whether they instead issue a certificate of pool and spa barrier non-compliance and provide it to council for action.

The removal of this discretion is to ensure that the most serious incidences of non-compliance are always referred straight to council who have a broader suite of powers available to them to appropriately address the situation.

For example, the relevant MBS could issue an emergency order requiring the owner to take steps to temporarily make the pool area safe prior to the rectification work occurring. These powers are not available to inspectors who are not MBSs. The matters proposed to be prescribed for this purpose are contained in Table 18 below.

**Table 18: Prescribed matters requiring immediate issue of certificate of barrier non-compliance**

1	A gate forming part of the barrier is unable to be locked
2	A gate forming part of the barrier is unable to be completely closed
3	Any part of the barrier is missing
4	Any part of the barrier is less than 1 metre in height measured above ground level from the approach side

The matters were selected by DELWP on the basis that they would appear to give rise to more significant risks of young children gaining unsupervised access to a swimming pool or spa. Further feedback is sought from stakeholders regarding whether the matters prescribed are appropriate and/or whether additional matters should be listed.

#### *Benefits*

Compared to the base case, Option 2 will remove discretion from inspectors regarding the way in which they respond to non-compliant barriers which demonstrate one or more of the prescribed matters. DELWP views this as a benefit as it will ensure that those matters which pose the most serious risks to the safety of young children will be immediately referred to council for appropriate action.

DELWP views inspectors' likely compliance with this Option 2 as 100 per cent or close to it. The Regulations will be clear in stating that there is no discretion provided with regards to the actions that must be taken by the inspector in the prescribed circumstances. In addition, the operation of these provisions will be taught as part of the training course that is developed for the new building inspector (pool safety) class. DELWP expects that other registered building surveyors and building inspectors carrying out functions under the scheme would understand the importance of this feature and fully comply.

#### *Costs associated with this option*

DELWP was unable to estimate the costs associated with this option due to a lack of clarity regarding the overall non-compliance profile, specifically how often the prescribed matters would arise in the field. However, it is not expected that this option would introduce any significant additional costs over the base case.

#### **Preferred option**

DELWP's preferred option is Option 2—Prescribe certain matters as always requiring a certificate of pool and spa barrier non-compliance. Under the base case, it will be left to the discretion of the individual inspector to determine if those types of non-compliance trigger the immediate issue of a certificate of barrier non-compliance. The associated risk that the inspector will decide to instead provide the owner with a period (which may be up to 20 business days) to bring the barrier to compliance is of significant concern to DELWP.

Option 2 is preferred as it removes the discretion from the inspector in these instances, ensuring that the highest risk non-compliance is referred to council for their attention. Moreover, councils are the most appropriate party to deal with these matters as they have a broad suite of powers under the Act to respond to the non-compliance as appropriate, including ordering that steps are taken to mitigate the risk until the non-compliance can be rectified (e.g. requiring a temporary fence to be installed). As Option 2 provides for a more effective means of dealing with higher risk barrier non-compliance matters, Broadly, DELWP expects that the more immediate, automatic referral of the highest risk non-compliance matters to Council under Option 2 will decrease the window of opportunity for these matters to facilitate unintended access to the pool or spa by young children. Accordingly, DELWP believes that it will assist in addressing the policy aim of reducing incidences of young children drowning in private swimming pools and spas.

#### **Question for stakeholders:**

28. Are there any other criteria, apart from the immediacy of risk of young children gaining unsupervised access to the swimming pool or spa, that should be considered in prescribing matters for this purpose? Please explain your response.
29. Are the non-compliance matters proposed to be prescribed as always requiring the immediate lodgement of a certificate of pool and spa barrier non-compliance with council appropriate? Please explain your response.
30. Are there any matters that are not listed that should be prescribed in the proposed Regulations? Please explain your response.

#### **5.6.3 Barrier improvement notices**

Under the preferred option, council MBSs will be required to address instances of non-compliant barriers that are brought to their attention via the lodgement of a certificate of pool and spa barrier non-compliance. Although inspectors will assist by overseeing the rectification of instances of minor non-compliance, it is still expected that councils will be referred a significant number of non-compliant matters, at least during the transition period for existing swimming pools and spas.

DELWP anticipates a higher rate of non-compliance during the initial transition period as the scheme will be addressing the legacy non-compliance issues of existing swimming pools and spas. Modelling undertaken for the cost-benefit analysis estimates that approximately 50 per cent of inspections will find return a determination of non-compliance on the first inspection.

As outlined under Part 4.2, the VMBSG survey highlighted the views of MBSs that the current enforcement powers available to them under the Building Act are inefficient in addressing cases of barrier non-compliance. The respondents also strongly indicated that the availability of an infringement notice process would significantly aid in achieving compliance. Of the 35 MBSs who answered the question on this topic, 28 stated that an infringement notice process would assist councils in their efforts to ensure compliance of swimming pool and spa barriers. The belief that such processes would be of benefit was often strongly stated, e.g. “essential”, “[w]ould be a quantum leap”, “owners would take this more seriously” and “absolutely imperative.” Although most respondents did not provide reasons for their response to this question, DELWP considers that MBSs support the introduction of such an enforcement tool due to a perception that it would be a less resource-intensive, more effective enforcement tool than what is currently available to them.

### **Option 1—Base case**

Under the base case, MBSs would continue to have access to the same powers that are presently available to them under the Act. Accordingly, upon receipt of a certificate of barrier non-compliance, they would exercise their discretion regarding what enforcement action is appropriate under the circumstances.

### **Option 2—Create ability for councils to issue barrier improvement notices and infringement penalties**

This option would result in the Building Regulations providing the ability for councils, following the receipt of a certificate of pool and spa barrier non-compliance, to issue a barrier improvement notice requiring the owner to provide a certificate of pool and spa barrier compliance within a specified period not less than 14 days. A failure to provide a certificate of barrier compliance within the nominated period is an offence that will be subject to an infringement penalty. Councils will also have the option of choosing not to issue a barrier improvement notice and instead utilise the existing powers under the Building Act to bring about compliance.

DELWP considers it appropriate to set a minimum 14-day period in order to ensure that councils provide a reasonable amount of time for owners to comply with the barrier improvement notice before they breach the associated offence and are potentially subject to an infringement penalty. If the nature of the non-compliance warrants action being taken within a shorter timeframe, the MBS may utilise their powers under the Act.

The period of 14 days was selected by DELWP as an appropriate balance between setting a reasonable minimum period for owners to comply but also not making it too long so as to restrict the council’s ability to address non-compliance under this pathway within a reasonably expeditious timeframe. Stakeholder feedback is welcomed on whether 14 days is an appropriate minimum period for this purpose.

#### *Benefits*

Compared to the base case, this option provides a less-resource intensive alternative to councils to make owners rectify barrier non-compliance. It directly addresses concerns that MBSs have put forward regarding the efficiency and effectiveness of the current powers under the Act.

Councils will save time and resources under this option as they do not necessarily need to visit the property to personally inspect the non-compliance as the inspector has already identified the items needing attention. Councils can proceed to issue a barrier improvement notice simply on the basis that a certificate of barrier non-compliance has been issued in respect of the swimming pool or spa. Further, owners will need to engage an inspector to certify that the barrier has been brought into compliance in order to discharge their obligation to obtain a certificate of pool and spa barrier compliance and provide it to council within the nominated timeframe.

The ability for councils to issue an infringement penalty if the barrier improvement notice is not complied with in the specified timeframe provides impetus for owners to comply with the notice and ensure the necessary rectification work occurs. Importantly, the issuing of an infringement penalty is significantly more efficient for

councils to administer compared with commencing a prosecution under the Act. The more immediate financial penalty faced by owners under the infringements process is likely to be more effective in encouraging them to address their non-compliance than the threat of prosecution

Overall, DELWP expects this option will lead to quicker rectification of non-compliant barriers and free up council resources to more effectively prioritise their enforcement action for higher risk matters. Issuing of the barrier improvement notice will be less resource intensive for MBSs and is anticipated to be more effective in spurring owners into rectification action. As discussed in Chapter 1, the coronial data clearly establishes that non-compliant barriers are almost certainly a significant contributing factor to the drowning of young children. Accordingly, this option will contribute to the broader goal of reducing the rate of young children drowning in private swimming pools and spas.

#### Costs

There will be a minor cost associated with councils issuing barrier improvement notices under this option. This includes negligible costs associated with establishing a barrier improvement notice template. These costs would be similar or likely less than the costs of taking action using existing powers in the Building Act (e.g. issuing of building notice or minor works order). Accordingly, given the similarity in costs to the base case, this has not been separately costed.

#### Preferred option

DELWP's preferred option is Option 2: Create ability for councils to issue barrier improvement notices and infringement penalties. The reasons for preferring this option over the base case are outlined in the discussion of the benefits of the option above.

#### Question for stakeholders:

31. Is there an approach other than the proposed barrier improvement notice process, that would better assist councils to effectively and efficiently respond to non-compliance raised through lodgement of certificates of pool and spa barrier non-compliance? Please explain your response.
32. Do you agree that 14 days is a reasonable minimum period of time for owners to be required to comply with a barrier improvement notice issued by a council? Please explain your response.

#### 5.6.4 Exemption from building permit requirements for replacement of part of a barrier

All building work undertaken in Victoria is subject to the building permit process set out under the Building Act and Regulations. The building permit process is intended to ensure that the building work when constructed complies with the Building Act, Building Regulations, NCC and relevant Australian Standards and the building or structure is suitable to occupy or use.<sup>101</sup> It is an offence under the Building Act to carry out building work without a building permit that is in force.

Work to rectify non-compliant aspects of a barrier is building work, irrespective of whether the work involved is an alteration, repair, maintenance, replacement or other task. Accordingly, unless subject to an exemption the owner of a swimming pool or spa that is determined by an inspector to be non-compliant must select a building surveyor and apply for a building permit in order to bring their barrier to compliance.

Schedule 3 of the Building Regulations lists certain work that is exempt from the requirement to obtain a building permit and occupancy permit as well as some or all the requirements of the Building Regulations.

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<sup>101</sup> VBA, Practice Note 32-2018, accessed at: [https://www.vba.vic.gov.au/data/assets/pdf\\_file/0016/21085/PN-32-When-is-a-building-permit-required.pdf](https://www.vba.vic.gov.au/data/assets/pdf_file/0016/21085/PN-32-When-is-a-building-permit-required.pdf).

There are already exemptions relating to the repair, renewal or maintenance of part of an existing building if the work meets certain conditions (e.g. will not adversely affect the safety of occupiers or the public). There is a similar exemption relating to alterations to a building, although unlike the former exemption, this still requires the alteration work to comply with the requirements of the BCA. DELWP believes that these exemptions would apply to certain rectification work undertaken to make a safety barrier compliant. However, stakeholders have highlighted that the application of these exemptions could be interpreted differently. In addition, there is no current exemption that covers the replacement of a part or parts of a swimming pool or spa barrier.

### **Option 1—Base case**

Under the base case, owners will be required to apply for a building permit in instances where an inspector has determined that their pool or spa barrier is non-compliant in a manner that requires replacement of one or more parts or components of that barrier. If the non-compliant aspect requires repair or alteration, it is likely that owners will receive varying advice regarding whether a building permit is required to be in force for the work. Overall, owners will incur the costs and time delays associated with building permit process for most work required to bring a barrier to compliance.

The cost of engaging a building surveyor to provide a building permit is not prescribed under the regulatory scheme and is therefore subject to market pricing. DELWP was unable to establish a clear estimate of the costs of appointing a building surveyor to issue a building permit in relation to non-compliant safety barrier rectification work.

Feedback from stakeholders on the likely cost is sought through a question for stakeholders at the end of this section. However, DELWP suspects there is likely to be a clear discrepancy between the direct costs of the rectification work versus those incurred under the associated building permit process.

### **Option 2—Insert new item into Schedule 3 to exempt building work involving the replacement of part of barrier from the building permit requirements**

This option would result in the insertion of a new exemption under Schedule 3 relating to the replacement of any part of a safety barrier. Subject to certain conditions outlined below, this exemption would mean that owners would not incur the costs and time delays associated with the building permit process if they are required to remedy barrier non-compliance following an inspection under the new scheme.

The policy intent is that this exemption applies to rectification works involving minor cases of replacement of barrier components. The application of this new exemption would be narrowed by conditions intended to ensure that more significant rectification work would remain subject to the building permit process. The exemption would be limited on the following grounds:

- The work is being carried out to address existing non-compliance identified in an inspection carried out by a swimming pool and spa inspector; and
- The work does not involve—
  - replacement of sections, parts or components that when combined, comprise more than 50 per cent of the existing length of the barrier; or
  - replacement of posts or footings of the barrier; or
  - the use of materials that are not commonly used for the same purpose as the material being replaced; or
  - an increase or decrease in the length of the barrier, or the size of the area enclosed by the barrier; or
  - replacement of any part of a retaining wall that forms part of the barrier.

The above limitations on the exemption have been selected on the basis that they involve more complexity and/or work on a greater proportion of the barrier. Accordingly, there is more risk that such work will not be carried out in a manner that leads to a compliant outcome. It is more appropriate that this work remains



subject to the building permit process. If the non-compliance poses a higher, more immediate risk to safety, councils have broad powers under the emergency order process to compel owners to take steps to lessen/remove the danger, e.g. padlock gate, erect temporary fencing etc. Examples of rectification work that would potentially be subject to the proposed exemption include:

- Replacement of a shattered glass panel that had formed part of non-boundary barrier (which does not require any replacement of posts or footings).
- Replacement of worn-out barrier gate or latch.
- Alteration to window forming part of the barrier to ensure it does not open wider than the permitted amount.

The proposed new item would exempt this work from the application of Parts 3 to 8 and Parts 10 to 19 of the Building Regulations. Accordingly, even if the work is exempt from the building permit requirements, the work must still comply with the technical requirements of the BCA, relevant existing swimming requirements under Part 9 of the Building Regulations and the requirements of the new scheme.

### *Benefits*

Compared to the base case, it is anticipated that this option will significantly reduce costs for some owners as they will not be required to pay the costs of appointing a building surveyor and obtaining a building permit. The potential cost saving was unable to be estimated due to a lack of data regarding the cost of engaging a surveyor for this purpose as well as a clear understanding of the non-compliance profile and how many instances of non-compliance would likely be subject to the proposed exemption.

DELWP views the requirement of owners obtaining a building permit for all work involving the replacement of a part or parts to make a barrier compliant as too onerous. For example, based on feedback from MBSs it is likely that a common area of non-compliance will be gate hinges or latches that have deteriorated through use over time and lack of maintenance.<sup>102</sup> Pool gate latches typically cost between \$45 and \$70<sup>103</sup> and are relatively straightforward to install. Many owners needing to replace a latch would be competent to undertake this work themselves and be able to complete it within a short period of time. If they needed to engage assistance with this task (e.g. a handyman), it would be a relatively quick and inexpensive job.

There are also time costs for the owner that are associated with the process of appointing a building surveyor. These include the time the owner takes in finding a building surveyor(s), obtaining quotations and preparing the paperwork necessary for the building permit application. These time costs may be greater for owners seeking a surveyor for a building permit relating to barrier rectification as some building surveyors may not wish to offer services for this work due its nature potentially being perceived as insignificant. Option 2 will remove the time costs incurred by owners under the base case that arise from the need to seek out a building surveyor.

In addition, there is the inherent time delay involved in the process of finding a building surveyor, applying for a building permit and waiting for the permit to be issued before the rectification work can be carried out. This is a disproportionate burden for simple tasks involving the minor repair or replacement of a barrier. It also unnecessarily delays bringing a barrier into compliance and therefore making the swimming pool or spa safe. Non-compliant matters that might otherwise have been addressed in a day may remain unaddressed for a week or even longer if the owner is required to have a building permit in force before they take rectification action.

This option will also allow the rectification of the non-compliance to be addressed expeditiously as there will be no need to wait for a building permit to be in force before the work is carried out. This will contribute to the underlying policy aim of reducing drowning incidents of young children by allowing for quicker remedying of situations that pose relevant risks.

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<sup>102</sup> The WA Ombudsman also reported that the most common reason for safety barriers failing council inspections across WA was problems with gate latches. See: Ombudsman WA, *Investigation into ways to prevent or reduce deaths of children by drowning*, Perth, 2017, p.21.

<sup>103</sup> <https://www.bunnings.com.au/search/products?q=pool%20gate%20latch&redirectFrom=Any>.

## Costs

There are no additional costs associated with this option compared to the base case.

## Preferred option

DELWP's preferred option is Option 2—Insert new item into Schedule 3 to exempt building work involving the replacement of part of a barrier from the building permit requirements. This option is viewed as ensuring that certain matters of non-compliance can be addressed in a cost-effective and timely manner while still ensuring that appropriate oversight by a suitably qualified registered building practitioner remains in place.

It is important to note that the application of the exemption is limited to building work occurring after a determination of non-compliance by an inspector under the new scheme. This means that any building work that is carried out under this exemption will always be subject to an inspection following completion to obtain a certificate of barrier compliance. Since inspectors will always be registered building practitioners suitably qualified to assess the compliance of the completed works, the oversight function provided by the building surveyor under the permit process is largely addressed by the operation of the new scheme.

However, DELWP acknowledges that this exemption would step away from the existing requirement for a building permit to be in place for much of this work. Notwithstanding the fact that the inspector will check the compliance of the completed work, it is recognised that stakeholders will hold differing opinions on the appropriateness of the proposed exemption and the circumstances under which it applies. Feedback is sought on this design option in the questions for stakeholders below.

### Question for stakeholders:

33. Do you believe the existing exemptions in items 3 and 4 of Schedule 3 to the Building Regulations cover repair, renewal, maintenance, or alterations work on a swimming pool or spa barrier? Please explain your response.
34. Do you agree with the proposal to insert a new item into Schedule 3 that would exempt certain work involving replacement of parts of a swimming pool or spa barrier from the building permit requirements? Please explain your response.
35. Are the limitations on the proposed exemption relating to the replacement of safety barrier parts appropriate? Is it necessary to broaden or lessen the application of the proposed exemption in some manner? Please explain your response.
36. How much is it likely to cost owners to appoint a building surveyor to oversee building work to rectify a non-compliant safety barrier? Please explain your response.

## 6. Relocatable pools

### 6.1 Purpose

This chapter sets out different options for the regulation of relocatable pools and spas. These present a range of unique policy and regulatory challenges that are not easily accommodated within the proposed framework covering permanent pools and spas.

### 6.2 Background

In the broadest sense a relocatable pool is any pool that is designed to be moved from one place to another. They sit on top of the ground and come in a range of sizes from small paddling pools to large pools that can be up to 10 meters long and 1.4 meters deep. They first became available in the 1920s as a cheaper alternative to permanent pools and since then they have grown in both popularity and sophistication. For example, many relocatable pools now come with filtration systems which allow them to remain erected and filled for a prolonged period without the need to empty and change the water.

Only some of these pools, those that can hold a depth of 300mm of water or greater, are subject to the requirements in the Building Act and Regulations. DELWP has been advised by industry that in their estimation approximately 30,000 relocatable pools of all kinds are sold in Victoria annually.<sup>104</sup> It is not known how many of these 30,000 pools are capable of holding 300mm or more of water, but industry estimates that it is likely to be several thousand a year.<sup>105</sup>

It has long been recognised that a relocatable pool capable of holding 300mm of water presents just as much of a potential risk as a permanent pool holding the same amount of water. Efforts to address this issue date back to 1993 when specific requirements in relation to “above ground pools”, including relocatable pools were published by Standards Australia in AS 1926.1 and incorporated into the BCA and the Victorian Building Regulations. Although this requirement may not always have been widely understood or complied with, the obligation to fence a relocatable pool has been in place since 1994.

Under the existing requirements all relocatable pools in Victoria must comply with the Building Regulations, specifically they:

- require a building permit to be issued by a building surveyor before they are erected and filled; and,
- require a barrier that complies with the NCC. Relocatable pools must comply with the Australian standard that is in place at the time they are erected. The current standard is AS 1926.1—2012.

The Building Regulations also contain an exemption permitting relocatable pools to be erected for a without a building permit if they are erected within an approved pool barrier and are only in place temporarily.

In addition to the Building Regulations all relocatable pools must comply with the Commonwealth Consumer Goods (Portable Swimming Pools) Safety Standard 2013 (the Safety Standard). The Safety Standard sets out the mandatory labelling that all relocatable pools sold in Australia must display. The label must be a certain size and display a specific warning. For pools greater than 300mm in depth the label is:

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<sup>104</sup> This figure is an estimate based off the sales data from various retailers but does not include pools purchased online.

<sup>105</sup> Most relocatable pools have warranties ranging from six to 12 months. Therefore, DELWP anticipates that the total number of relocatable pools in use at any one time is lower than the large number of pools sold annually might suggest.

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

There are also relocatable spas used in Victoria. However, DELWP understands that these are more commonly hired from specialist companies for events rather than purchased by property owners for their ongoing enjoyment. The different nature of spas, particularly the need for mechanical components such as the spa pump, means that they often do not lend themselves to being easily relocatable in the same manner as swimming pools. Relocatable spas are much less widely available for purchase with many stores choosing to only stock relocatable pools. Despite being far less prolific in Victoria, the drowning risks associated with a relocatable spa are the same as a relocatable pool. Accordingly, the proposed options discussed in this chapter apply to both relocatable pools and relocatable spas. However, for ease of reading, and in acknowledgement of DELWP's expectation that far more relocatable pools will be subject to these requirements, this language used in this chapter only refers to relocatable pools.

### 6.3 Nature of the problem

Fatal drownings in relocatable pools represent a minority of drownings in Victoria with only one occurring since 2000, or 3.7 per cent of the total. This relatively low percentage appears to be broadly mirrored in other states. In NSW, fatal drownings in portable pools accounted for 13 per cent of the total:

Table 19: Drownings by type of pools in NSW<sup>106</sup>

Type of pool	Number of pools
In ground	35 (67%)
Above ground—portable	7(13%)
Above ground—inflatable/wading	4 (8%)
Above ground—permanent installation	2 (4%)
Partially in ground	2 (4%)
<b>Total</b>	<b>53 (100%)</b>

Source: Office of Local Government, *Independent Review of Swimming Pool Regulation—Final Report*, NSW Government, November 2015, page 28

Although data covering non-fatal drownings in swimming pools of all kinds is available and discussed in Chapter 1, the available data doesn't distinguish between incidents that occurred in relocatable pools as distinct from permanent pools. However, it seems reasonable to assume that the trends for non-fatal drownings broadly mirror that of fatal drownings, with incidents involving relocatable pools making up a minority of the cases. The data suggests that although tragedies do occur, they do not occur with the same frequency.

DELWP believes that this discrepancy is consistent with the 'swiss cheese model of accident causation' analytical model used by the Western Australian Ombudsman to assess swimming pool drownings. In this model, multiple slices of swiss cheese, stacked side by side, are analogous to different types of preventative factors—such as parental supervision and pool fencing—layered behind one another. Although these

<sup>106</sup> DELWP is unaware of a similar break down of incidents involving different types of pools in Victoria and is seeking further information from stakeholders in relation to this issue.

preventative factors have weaknesses, like the holes in a slice of swiss cheese, when operating together they are usually enough to prevent an accident occurring.<sup>107</sup>

Unfortunately, every now and again a set of circumstances arises where the 'holes' in the various preventative factors align, and a tragedy occurs.

This model suggests that the reason that more deaths occur in permanent pools compared to relocatable pools is that permanent pools are generally in place for an extended period, decades in some cases, and therefore there is more opportunity for the 'holes' in the preventative measures to align and for an accident to occur. For example:

- Over time, even conscientious pool owners can become complacent about the need to take necessary precautions to ensure pool safety. For example, propping open the gate to allow easy access to the pool area, or failing to provide continuous adult supervision to children around the pool.
- Children themselves become used to the presence of the pool and can become less cautious.
- Parents and care givers are likely to be more alert and vigilant to the dangers of drowning when they know and expect the pool to be in use. For example, young children are most likely to be supervised when the dangers of the pool are front of mind. When they don't expect the pool to be in use, parents and caregivers are understandably less conscious of the dangers, even if the pool is still in place and filled.

Based on this analysis DELWP believes that a key risk factor in the regulation of pools is the length of time the pool is in place and filled. Therefore, it seems reasonable to conclude that in general terms a relocatable pool that is erected for a short time represents a lower risk than a pool that is in place for a prolonged period.

## 6.4 Compliance with the existing requirements

As part of the policy development process DELWP conducted a survey of MBSs from a range of councils to understand how the existing requirements discussed in section 6.2 work in practice. The majority reported widespread non-compliance amongst owners of relocatable pools and frequent challenges in carrying out enforcement action.

The exact amount of non-compliance varies between different council areas and many councils do not keep specific data. However, in general terms the survey found that:

- Although every council reported that illegally constructed relocatable pools are an issue, the degree of the non-compliance seemed to vary. One MBS estimated up to 90 per cent of above ground pools are installed illegally, others have suggested one third to one half of above ground pools are illegal.<sup>108</sup>
- The most prevalent type of illegal pool are also the types that are the easiest to erect.
- The numbers of illegal pools increase over the warmer months, particularly during times that coincide with public holidays, such as Christmas.
- Councils often only become aware of an illegal pool through complaints or reports from neighbours.

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<sup>107</sup> Ombudsman Western Australia, *Investigation into ways to prevent or reduce deaths of children by drowning*, accessed at: <http://www.ombudsman.wa.gov.au/Publications/Documents/reports/Drownings/Ombudsman-WA-Investigation-Report-Drownings-23-November-2017.pdf>.

<sup>108</sup> In this context 'illegal' does not just mean without a safety barrier. It also means pools that have been erected without a building permit issued by a building surveyor. This is supported by the number of building permits issued. The VBA reported that in 2017-2018, 114,803 building permits were issued. Given that 30,000 relocatable pools are sold a year it seems likely that at best only a fraction of these pools are represented in that figure. Victorian Building Authority Annual Report, 2017-2018, page 23, accessed at [https://www.vba.vic.gov.au/data/assets/pdf\\_file/0006/86757/VBA-Annual-Report-2017-18.pdf](https://www.vba.vic.gov.au/data/assets/pdf_file/0006/86757/VBA-Annual-Report-2017-18.pdf)

- When attending a site where an illegal pool has been constructed many MBSs will offer the pool owner a choice: either to take the pool down, or to install a compliant barrier. Most pool owners take their pools down.

Based on the available information DELWP believes that there are several factors contributing to the non-compliance:

- The nature of these pools makes it difficult to enforce the requirements. Relocatable pools are very widely available, easy to assemble and disassemble and are often only in use for a short time.
- Pools can be purchased without the need to also purchase compliant fencing. Although Commonwealth legislation requires all relocatable pools to display a warning label, it gives no specific details except to recommend that the owner contact their local council. This means that compliance can often depend on the willingness of pool owners to follow up with council and inform themselves of the requirements. This appears to be rare as MBSs have reported a very low level of consumer awareness of this requirement.
- There are only a small number of compliant temporary barriers on the market.<sup>109</sup> Until 2012 the Standard required all barriers, including those around a relocatable pool to be “permanent”.<sup>110</sup> In addition, the uneven levels of compliance mean there is limited consumer demand for compliant relocatable barriers. DELWP has been advised by industry that this is a significant contributing factor to the lack of relocatable barriers on the market.
- Consumers intuitively struggle to appreciate the need for an expensive barrier around a relocatable pool that could have cost them as little as \$30 and which may only be used for a few weekends a year. It’s also possible that because most relocatable pools are above ground there is an assumption that the sides of the pool will be enough to prevent a young child from entering.
- The Building Regulations apply the same requirements to all pools. For example, relocatable pool owners are currently required to apply for a building permit for every safety barrier, regardless of whether the barrier is temporary or permanent. This requires a building surveyor to be appointed to issue the permit which can cost anywhere from several hundred to over one thousand dollars. However, DELWP understands that compliance with this requirement is inconsistent.

## 6.5 The proposed approach

### *Retaining the requirement for relocatable pools to install barriers*

DELWP is not proposing to remove or amend the existing requirement for a relocatable pool to have a safety barrier installed that complies with AS 1926.1. This policy decision is based on the following considerations:

- The drowning that took place in Victoria involved a relocatable pool that was not fenced. The child gained access to the pool while they were temporarily unsupervised and the pool was not expected to be in use. Swimming pool barriers are intended to act as a second line of defence in precisely these circumstances.
- The level of risk posed by a pool that contains at least 300mm of water is the same, regardless of whether that pool is relocatable or not. DELWP acknowledges that enforcing the requirement presents challenges and that relocatable pool owners may not appreciate the need for a potentially expensive barrier around a cheap pool. But these issues can be ameliorated in the Building Regulations and do not change the fact that from a risk perspective a relocatable pool is indistinguishable from a permanent pool.

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<sup>109</sup> In 2017 a relocatable pool fence that had been specifically designed to meet AS 1926.1 was recalled because it was demonstrated that the gate mechanism was non-compliant. DELWP reviewed the available standards to test the possibility of prescribing a different technical standard. However, no appropriate alternative standard was identified.

<sup>110</sup> This requirement was clarified 2012 to define ‘permanent’, as a barrier that “cannot be removed without the use of tools.”

- DELWP is unaware of any substitute safety measure that is as effective at preventing unsupervised access to the pool area as a physical barrier designed to be child resistant<sup>111</sup>. DELWP acknowledges that because relocatable pools sit above the ground it's possible that the sides of the pool can provide some alternative obstacle to entry. But the sides of a relocatable pool are designed to hold water, not to be child resistant, and are not a reliable or adequate substitute for a fence. In addition, many larger pools come with additional structural bracing or uprights that can serve as hand and footholds.<sup>112</sup> DELWP is not prepared to weaken or remove the requirement for a relocatable pool to be fenced when there is no alternative safety mechanism.
- Exempting relocatable pools from the requirement to be fenced would represent a significant and unjustified variation from the requirements of the NCC. Victoria is committed by the Intergovernmental Agreement between the Commonwealth and States and Territories to minimise jurisdictional variations from the NCC. It would also be a major departure from the treatment of relocatable pools in other jurisdictions. DELWP believes that any moves to exempt relocatable pools from the requirement to be fenced would need to be addressed at the national level through a change to the NCC. Until that time DELWP is committed to developing a regulatory framework that effectively enforces the requirements in the most efficient and cost-effective way possible.

The following analysis will assess how that will maintain the existing requirement for a relocatable pool to be fenced but do so in a manner that reduces the burden on relocatable pool owners and assists councils in their enforcement activities.

#### *Factors that shape the identification and analysis of feasible options*

As discussed in Chapter 1, the options available are shaped by various factors, not all of which are within the control of DELWP:

- Based on the advice received from MBSs there are a significant number of relocatable pools that are erected illegally. This appears to be a combination of pool owners being genuinely unaware of the requirements, and some who are prepared to risk non-compliance. Regardless of the reason, councils have reported that when the regulatory requirements are explained pool owners are often surprised and invariably choose to take their pool down rather than comply.<sup>113</sup>
- DELWP acknowledges that it is unrealistic to expect 100 per cent compliance with the requirements across Victoria. There will always be a group of pool owners who will refuse to comply. In addition, councils do not have the capacity to compel every pool owner to comply given the numerous competing demands on their time and resources.
- However, as discussed in section 6.4 the available data shows that non-compliance varies significantly between council areas. DELWP believes that this variability demonstrates that with the appropriate regulatory framework a high level of compliance can be achieved. The proposed regulations are intended to promote compliance by reducing the burden of compliance on pool owners and assisting councils to carry out their enforcement functions.
- Nevertheless, to be effective the proposed Regulations must be sensitive to the significant differences between relocatable and permanent pools. Currently, relocatable pools are regulated in almost the same way as a permanent pool. This imposes a significant burden on relocatable pool owners which may be a contributing factor to the scale of reported non-compliance.
- However, the degree of difference between the requirements proposed for relocatable pools and permanent pools will be limited by the available heads of power under the Building Act. For example, it is not within the power of the Building Act to require retailers to only sell relocatable pools to owners with a compliant barrier. Similarly, the requirements imposed by the proposed Regulations

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<sup>111</sup> Thompson, D.C., Rivara, F. Pool fencing for preventing drowning of children. Cochrane Database of Systematic Reviews 1998, Issue 1.

<sup>112</sup> Nevertheless, the Standard does permit the sides of a pool to function as a barrier provided they meet the minimum requirements for height and climbability.

<sup>113</sup> As one MBS reported: "I get them saying 'mate the only cost me \$400. I'm not going to pay \$1,000 for a permit and \$2,000 for a fence."

must conform with the Building Act. The proposed Regulations cannot, for example, exempt relocatable pools from being included on the swimming pool register established by council, or require them to be registered with another body.

## 6.6 Limitations of the Building Act in relation to relocatable pools

### *A relocatable pool must be a 'building'*

When preparing the proposed Regulations and this RIS, DELWP analysed the existing requirements to understand how they applied to the various types of pools. As mentioned in Chapter 1 the proposed Regulations are made under the Building Act and therefore cannot be applied to pools that are not within the scope of the Act.

Understanding which pools and spas are captured under the Building Act is critical because the requirement to provide a safety barrier around any pool or spa capable of holding 300mm of water is given force through the Act. Therefore, pools which do not fit the definition of 'building' are not captured by the requirements of the Building Act and consequently are not required to have a safety barrier.

Under the Building Act, 'building' is defined as including a "structure, temporary building, temporary structure and any part of a building or structure".<sup>114</sup> To clarify how this definition applies to relocatable pools DELWP examined the meaning of 'structure' in the context of the Building Act and considers that something is more likely to be a 'structure' for the purpose of the Act if it meets some or all of the following broad characteristics identified by Gillard J in *O'Brien v Shire of Rosedale* [1969] VR 112 at 116-7:

1. it is constructed from a number of component parts to produce something which is different from those parts and which is of practical value; and,
2. it is usually attached to the land on which it is erected, but this is not a necessary characteristic; and,
3. it has a degree of permanence.

It should be noted that these are general characteristics and a definitive judgement in relation to an individual relocatable pool would depend on the specific facts and circumstances in question.

However, DELWP considers most of the different types of relocatable pools currently available substantially fulfil all three of these conditions and are therefore considered 'structures' within the meaning of the Building Act. Most pools require some assembly before they can be used, most pools are immovable for as long as they are assembled and filled, and most can remain up for a reasonably prolonged period.

The definition is broad enough to capture pools that may not intuitively meet these requirements. For example, some inflatable pools could be considered 'structures' if they come with additional components, such as a filter. Despite the pool itself being a single component requiring no further assembly, the filter unit is a separate and distinct component that must be connected before use. In addition, pools of this nature are not easily moved when filled and can be left in place for a prolonged period.

However, there are some relocatable pools that don't meet these conditions. For example, an inflatable pool that is entirely self-contained and requires no assembly or construction is unlikely to be considered a 'structure' and therefore the owner is not required to install a safety barrier. This would be the case even if such a pool had a depth of 300mm.

DELWP is aware that the intent of the Australian Standard and the NCC is that all pools capable of holding 300mm have a suitable safety barrier<sup>115</sup>. Therefore, the availability of pools that are 300mm deep but nevertheless escape that requirement is problematic.<sup>116</sup> At the time of writing DELWP does not know how

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<sup>114</sup> Building Act 1993, s 3.

<sup>115</sup> For example, the Standard makes specific mention of requirements for inflatable pools in Clause 2.9 Above-Ground Pools.

<sup>116</sup> DELWP is aware that this is not a problem shared by other jurisdictions. For example, in New South Wales the requirement for a safety barrier is given force through the *Swimming Pool Act 1992* which defines a 'swimming pool' as any "excavation, structure or vessel" capable of being filled with 300mm of water.



prevalent such pools may be but given the tens of thousands of relocatable pools estimated to be sold every year the figure could be substantial.<sup>117</sup>

However, as indicated in Chapter 1, the proposed Regulations are made under the Building Act and therefore they cannot alter or broaden the language contained in the parent Act. As a result, it is not within the scope of the Building Regulations to, for example, simply include a broader definition of ‘swimming pool’ in the proposed Regulations. Such a change would require amending the Building Act via legislation passed by the Victorian Parliament.

All references to ‘relocatable pools’ in this chapter refer to pools that fall within the scope of the Building Act.

*The requirements apply to the ‘owner of the land’*

DELWP is aware that unlike a permanent pool, a relocatable pool may be purchased and erected by the occupier of a house, who may not be the owner. This creates an issue for the applicability of the proposed Regulations.

Section 15A(3)(a)(i) of the Building Act contains a head of power that allows regulations to be made in regards to:

- (a) the registration of swimming pools and spas by councils for the purposes of a swimming pool and spa register including—
  - (i) the requirement for owners of land on which swimming pools and spas are located to register those swimming pools and spas with the relevant council.

The wording in the Building Act limits the making of regulations regarding registration of swimming pools and spas to ‘owners of land’, which excludes people who are not owners of land from these requirements. Similar limitations exist with regards to the ability to make regulations in relation to requiring owners of land to arrange for mandatory inspections of their swimming pool or spa. The obvious example of persons who are not captured within the scope of the regulation-making powers under the Building Act are tenants who may own a relocatable pool but would not be required to either:

- register their relocatable pool; or,
- have the barrier independently inspected and certified.<sup>118</sup>

It is critical to note that the limitation only applies to the proposed requirements under the new scheme. The Building Act and Building Regulations apply to any “person” carrying out building work, and therefore a tenant who erects a relocatable pool must ensure their relocatable pool has a compliant safety barrier in place. Any tenant who fails to comply with this requirement may be subject to a penalty under the Building Act and Building Regulations.

Under the proposed Regulations the obligation to register and arrange the inspection and certification of a relocatable pool lies with the owner of the land, which in the case of a tenanted property would be the landlord. The practical effect of this obligation to make the landlord responsible for the registration of the relocatable pool, even if the relocatable pool is owned, erected and used by the tenant.

DELWP acknowledges that landlords may have concerns regarding this requirement, however the policy intent is to ensure that all relocatable pools are subject to the new requirements. As discussed above, the limitations of the language in the Building Act means that the obligations cannot be placed directly on the tenant. Therefore, any exemption in relation to relocatable pools owned by a tenant would mean those relocatable pools would not be subject to the new requirements. DELWP does not support a potentially significant number of relocatable pools being left outside the requirements as it would be contrary to the underlying policy intent.

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<sup>117</sup> DELWP’s review of such pools currently available for sale suggests that they can be purchased for as little as \$30 or as much as \$8,000 from many major retailers or online.

<sup>118</sup> How registration, inspection and certification requirements of the new scheme will apply to relocatable pools are discussed further in the sections below.

Nevertheless, DELWP is aware that placing the responsibility for the registration, inspection and certification of a relocatable pool owned by a tenant on the landlord is undesirable in the long term. Although this cannot be addressed as part of this review for the reasons discussed above, DELWP intends to work with Consumer Affairs Victoria (CAV) in their ongoing review of the residential tenancies framework to prioritise further consideration of this issue.

This future work is discussed further in Chapter 10.

**Question for stakeholders:**

37. Do you have any data or information regarding the number of relocatable pools sold that have a depth of at least 300mm, but which do not constitute a 'structure' as discussed in section 6.6?
38. Do you have a view as to whether an amendment to Building Act should be made to ensure that its requirements apply to all relocatable pools with a depth of at least 300mm? Please explain your response.
39. Are there alternative means for ensuring that landlords are not unfairly burdened by the actions of their tenants in relation to the erection of a relocatable pool? Please explain your response.

## 6.7 Building permits and relocatable pools

In general terms any activity that falls within the definition of 'building work' requires a building permit unless specifically exempted by the Building Regulations. Currently, work erecting a relocatable pool is generally subject to the requirement to obtain a building permit. The purpose of requiring a building permit is to ensure that every relocatable pool is surrounded by a barrier that has been inspected and approved by a building surveyor. Erecting a relocatable pool without a building permit constitutes illegal building work which can attract significant penalties under the Act.<sup>119</sup>

The only exemption to this requirement is if the pool is being erected within an approved pool barrier—i.e. one that was constructed under a building permit—and the pool is only in place temporarily. Although 'temporarily' is not defined, it seems reasonable to assume that it does not mean that a relocatable pool can be left up indefinitely. DELWP understands that the exemption is intended to avoid the need to apply for a new building permit every time the relocatable pool was subsequently erected.

Although the obligation to obtain a building permit for relocatable pools has been in place since the 1990s DELWP believes that public awareness of this obligation remains low. DELWP understands from the results of the survey of MBSs that the level of non-compliance with this requirement varies between different council areas from an estimated high of 90 per cent of relocatable pools being erected without permits to as low as 25 per cent being non-compliant. Some MBSs have suggested that there may be as few as five or six pools erected without permits per year.<sup>120</sup>

### Option 1—Base case

The base case would be to maintain the existing requirement that erecting a relocatable pool for the first time requires a building permit. In theory this would continue to provide the assurance of every relocatable pool being enclosed with a barrier and inspected and approved by a building surveyor. In addition to ensuring a barrier is in place, determining whether the barrier is compliant requires an understanding of the technical

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<sup>119</sup> 500 penalty units (\$80,595) in the case of a natural person, or 2,500 penalty units (\$402,975) in the case of a body corporate. Nevertheless, DELWP understands that councils' principal concern is the safety of the community, and therefore DELWP has concentrated on ensuring the pool is made safe rather than penalising the pool owner for carrying out illegal work.

<sup>120</sup> It is important to note that these estimates are often based on the best guess of MBSs regarding the level of illegality.

and regulatory requirements of the building system. It should be noted that a building permit is required even if the pool barrier is relocatable.

However, the data provided by MBSs indicates that in many municipalities, large numbers of relocatable pools are erected without a building permit.

Non-regulatory measures, such as an information campaign to increase public awareness and understanding of the requirement to obtain a building permit and the potential consequences for failing to comply could also be undertaken. It's unclear how effective such a campaign would be in reducing the level of non-compliance.

## **Option 2—Amend the exemption for a building permit in relation to relocatable pools**

The alternative to maintaining the existing requirements is to exempt some or all relocatable pools from the requirement to apply for a building permit. This option seeks to reduce the costs of compliance and by so doing encourages a greater number of pool owners to install a safety barrier. DELWP proposes to exempt the following instances from requiring a building permit:

- assembling, erecting or installing a relocatable swimming pool or relocatable spa; and,
- assembling, erecting or installing a relocatable barrier.

The requirement to install a compliant safety barrier would be maintained, as would be the requirement to apply for a building permit for the construction of a permanent barrier.

The purpose of exempting relocatable fences from the requirement to obtain a permit is to provide an additional incentive for consumers to seek out compliant relocatable barriers by significantly reducing their cost. As discussed in section 6.4 the absence of consumer demand is a major disincentive for industry to invest in developing and manufacturing compliant relocatable barriers.

### ***Benefits***

The principal benefit of this approach would be to reduce the cost of meeting the requirements and as a result encourage more pool owners to comply. Because of the increase in the rate of compliance, DELWP anticipates a drop in the degree of reported non-compliance with a positive impact on the number of drownings.

Aside from the cost of the barrier itself, the cost of acquiring a building permit is the largest existing cost to the relocatable pool owner. The cost of a permit varies depending on the nature and complexity of the work, but DELWP understands that most are likely to cost more than \$500, and potentially much more<sup>121</sup>. In addition is the time taken for the application to be received and approved. This can vary substantially but is unlikely to take less than a week. Given that most relocatable pools can be erected in a matter of hours, and that pools are often put up in response to fine weather, most pool owners are unlikely to wait that long.

Taken together, not only does the cost of the permit exceed the price of many types of relocatable pools, but the time taken to acquire one is likely to deter many relocatable pool owners from complying with the requirement. Although the direct cost savings will only accrue to pool owners who have applied for a building permit, the data provided by MBSs demonstrates that in some municipal areas this can be a sizeable group ranging from as much as 75 per cent of relocatable pool owners to as few as 10 per cent.

Aside from the cost savings, the exemption will have a positive impact on the willingness of pool owners to comply with the regulatory requirements more broadly. The extent of increased compliance is difficult to quantify, but DELWP will be monitoring rates of compliance as part of its Implementation and Evaluation strategy discussed in Chapter 10.

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<sup>121</sup> One MBS observed that: “Unfortunately councils that do not offer a building permit process, to an extent, cause this issue as building permit costs for those who can only afford a cheaper pool are often considered unreasonable in which case a breach may be encouraged.”

## Costs

The principal cost would be the absence of any independent inspections at the point of erection, and therefore confirmation regarding the levels of compliance of relocatable pools and potentially reducing the ability of councils to identify relocatable pools in their area. However, this needs to be weighed against the existing levels of non-compliance which suggests that large number of pools are not being independently assessed. Importantly, as is discussed later in this chapter, relocatable pools will be required to be inspected and have their barriers certified following registration. Accordingly, there will be an independent inspection of the barrier albeit not at the time the relocatable pool was erected.

As has been discussed in section 6.1, relocatable pools come in a wide variety of types and sizes, including pools that are as large as some permanent installations. Because this exemption would apply to all relocatable pools, a person could erect a pool up to 10 meters long and four meters wide without a building permit.

DELWP does not believe that the building permit process is the most appropriate enforcement tool in relation to these pools. DELWP has been advised by councils that their principal concern in relation to relocatable pools is to ensure that they are either appropriately fenced or taken down. Pursuing relocatable pool owners for failing to apply for a building permit is often not a priority.

For this reason, its questionable whether the threat of heavy penalties for carrying out illegal building work is effective. Furthermore, because of the estimated scale of non-compliance maintaining this requirement has the potential to undermine the perceived seriousness of carrying out illegal building work.

Under the Building Act a building surveyor is required to provide copies of building permits to councils within seven days of them being issued. The details on the permit should identify if it relates to a relocatable pool. Councils can then use this information to identify the presence of relocatable pools in their area<sup>122</sup>. However, DELWP believes there are more efficient and more cost-effective ways for councils to inform themselves, for example through a mandatory registration requirement which is discussed in section 7.5 below.

## Preferred option

After considering these options DELWP prefers Option 2. The benefits of requiring a relocatable pool owner to apply for a building permit—ensuring that every relocatable pool is surrounded by a barrier that has been inspected and approved by a qualified building practitioner—can be achieved through other more efficient and cost-effective means.

### Question for stakeholders:

40. What is the current rate of compliance amongst relocatable pool owners applying for building permits to erect their pools?
41. Do you support exempting the erection of all relocatable pools from the requirement to apply for a building permit? Please explain your response.

## 6.8 Registration

The registration of pools and spas is one of the key features of the Victorian Government's new approach to pool safety. The purpose of the registration requirements is to assist councils by giving them a comprehensive understanding of the pools in their municipal area.

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<sup>122</sup> Building Act 1993, s 30.

DELWP believes that because relocatable pools are so widely available, easy to assemble and disassemble and are often in use for only a short period of time, they present a different set of challenges to permanent pools and therefore the registration requirements need to be considered separately.

The requirement on councils to establish and maintain a register of all pools is already legislated under the Act. This limits the discretion available to the proposed Regulations. For example, it is not within the scope of the Building Regulations to exempt relocatable pools from the requirement to be added to the register. In addition, it is not within the scope of the Building Regulations to require registration at point-of-sale, any registration requirement will have to take effect at the time the pool is erected.

The requirement to register a pool has no effect on the requirement to install a barrier. Whether or not a pool is on the register does not alter the obligation of an owner to ensure that the relocatable pool is surrounded by a safety barrier.

The primary goal of introducing a registration requirement is to create a more effective mechanism to ensure that more owners of relocatable pools complied with their existing obligations under the Building Act and Regulations, and as result reduce the risk of drowning amongst young children.

### **Option 1—Base case**

The base case for analysing the desirability of a registration requirement could be based on two different contexts:

- where relocatable pools are exempted from the requirement to apply for a building permit; or
- where relocatable pools are still required to apply for a building permit.

The base case for this section will assume that relocatable pools are exempted from the requirement to apply for a building permit. As discussed in the previous section this is DELWP's preferred option and if that were not adopted DELWP would not seek to introduce a separate registration requirement.

If no further regulations were made from the 1 December 2019 councils would still be obliged to add any relocatable pools they became aware of to the register, but owners of relocatable pools would have no obligation to apply.

This places the administrative and resource burden solely on councils and prevents them from receiving funding for this function through the payment of a registration fee by the pool owner. This means that councils would have to fund the administration of this function either from the fees paid by permanent pool owners, or from funds raised from the general community. This is discussed in detail in Chapter 2, but generally DELWP believes that the comparatively small minority of Victorians who have chosen to own private pools should be responsible for funding the new requirements rather than the cost falling on the broader community.

### **Option 2—Require registration of a prescribed set of relocatable pools**

This option would limit the registration requirement to only those relocatable pools that present a heightened risk, and therefore are of greater concern to local councils. The requirement would take effect from when the pool was first installed.

Defining which pools pose a heightened risk can be difficult, but the data suggests that the length of time the pool is in place is an important factor. A young child can drown in a matter of minutes, but the longer a pool is in place the greater the opportunity for a tragedy to occur.

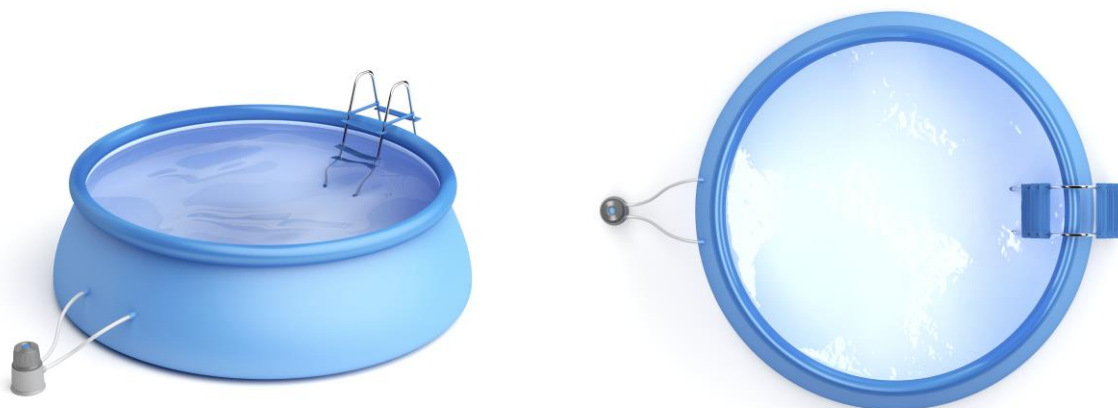
If the risk associated with a pool increases the longer it is left in place then any device that allows or encourages the pool to remain up is potentially a contributing factor to that risk. One such device is a filter pump. A filter pump works by pumping the water from the pool through a filtration system to clean it before returning the clean water to the pool. The process is automatic as long the filter pump is switched on and functioning. This device allows the pool to be left up for months at a time without need to empty and refill the pool with fresh water.

In DELWP's view the presence of a filter pump is likely to lead to the pool being left in place for longer periods. Even comparatively small pools require thousands of litres of water to fill, and without a pump the pool water will stagnate in as little as two to three days depending on the position of the pool and the weather. Given the expense and time required to empty and refill the pool DELWP believes that a pool without a pump is far less likely to be left up and filled than a pool with a filter pump.

In addition, because all relocatable pools of a moderate size (usually 2 – 3 meters wide) or larger come equipped with a filter this requirement will capture a very large percentage of the relocatable pools that are currently available. It seems both reasonable and in accordance with the policy intent to require pools with a width of 3 meters or greater to be registered.

DELWP believes it is reasonable to assume that consumers who are choosing a relocatable pool that comes with a filter, even smaller ones, are doing so because they at least want the option of using the pool for a prolonged period. This is because despite improvements in technology lowering the price of filtered relocatable pools to as little as \$60, they are still more expensive than pools without filters<sup>123</sup>. This suggests that even where they have the option of a pool of a similar size available, they are consciously choosing the more expensive option because of its ability to be left erected for a prolonged period. If the intent was only to use it for a weekend and then discard the pool, there are cheaper options available.

For this reason, if longevity increases risk then imposing special conditions on relocatable pools with filter devices seems reasonable. An example of a relocatable pool that would be required to be registered under this option has been illustrated below:



#### Examples of relocatable pools with filters

##### *Benefits*

Compared to the base case this option would require the registration of pools that pose a higher risk based on their potential to be left up for a prolonged period. This registration requirement is a more targeted and proportionate regulatory response. This would increase council awareness of these types of relocatable pools and help councils enforce barrier requirements, which would reduce the risk of drownings. In addition, pools with filters are also easy to identify, both by the consumer at the point of sale and by the council upon inspection which minimise confusion over whether registration is required.

In addition, as discussed in section 6.3, one of the challenges of effectively regulating relocatable pools is the intuitive assumption of many consumers that these requirements don't apply to cheap products. Consumers who are prepared to pay a higher price are potentially more likely to recognise the risk and be receptive to the requirement to register their pools.

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<sup>123</sup> For example, one major retailer was offering a relocatable pool without a pump for approximately \$30, while the pool that came with a pump retailed for approximately \$60.

Pools that are left in place for a prolonged period are more likely to be picked up through the usual methods used by councils, such as complaints from neighbours. The advantage of the registration requirement is that council doesn't need to rely on those methods because they already know where the pools are. For this reason, registration is a more effective tool when applied to pools that are likely to only be in use for a short amount of time and therefore are less likely to be detected.

### Costs

It's difficult to determine the overall cost of this requirement because the cost varies depending on the number of relocatable pools with filters, and the frequency of their usage:

- DELWP has been advised that approximately 30,000 relocatable pools are sold in Victoria annually. However, this includes relocatable pools of all types and sizes, including those which are less than 300mm deep and therefore not subject to the Building Regulations. DELWP has no data regarding how many of these come equipped with filter systems and would therefore be required to register under this option.
- Although DELWP anticipates that the cost to pool owner per registration would be comparable to the cost to a permanent pool owner—\$44.40 per registration<sup>124</sup>—a relocatable pool may be registered multiple times. As discussed in the following section, a relocatable pool that remains on the register would be subject to the same inspection and certification requirements and therefore DELWP anticipates that many pool owners will apply to have pool removed from the register once they finished using it.
- Under this option they would be required to apply to register the pool each time it was erected. The total cost of the registration requirement would depend on how frequently they chose to use the pool, and how long the pool remains useable.<sup>125</sup> For example, a pool owner might erect a relocatable pool only once a year for three years before it ceased to be useable. Under this option this would mean they would be required to pay the registration fee three times whereas a pool owner who only registered once would only pay the registration application fee once.

DELWP acknowledges that in addition to the direct cost imposed by the registration requirement is the cost to previously non-compliant pool owners of installing a safety barrier. Although this is already a legal requirement, if the proposed regulations are effective the result will be new costs for pool owners who were previously non-compliant. Quantifying the extent of those additional costs either overall, or to individual pool owners is difficult because:

- The overall cost will depend on how many owners of previously non-compliant pools choose to install a barrier. However, the lack of definitive data regarding the current number of relocatable pools in use in Victoria and the significant differences in the reported rate of non-compliance between different council areas makes it difficult to anticipate how many pool owners this might be.
- The cost to individual owners will depend on how large the pool is and what type of barrier they choose to install. Some above ground relocatable pools have sufficiently tall sides that they can function as a compliant barrier removing the need to install a separate structure. Under DELWP's preferred option temporary pool barriers will be exempted from the requirement to apply for a building permit, and therefore the only cost to the pool owner would be the barrier itself and the time taken to put it in place. A permanent barrier would require a building permit issued by a building surveyor and involve higher construction costs.

Although these costs can't be accurately quantified DELWP acknowledges that are real and would likely not be imposed in the absence of the new regulations. DELWP also acknowledges that those costs are likely to

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<sup>124</sup> The basis of this figure is discussed in Chapter 3. This figure also includes the time taken by the pool owner to complete the application.

<sup>125</sup> DELWP has reviewed a selection of relocatable pools currently available for sale in Australia and none have a warranty of longer than 12 months. Based on this, it seems unlikely that many relocatable pools are likely to last more than a few years.

become more significant the more effective the new regulations are in encouraging pool owners to install compliant safety barriers.

### **Option 3—Require registration of all relocatable portable pools after three days**

All relocatable pools would be required to be registered—but would not have to do so until after the pool had been erected and remained in place for the prescribed period. Unlike Option 2 this option would not attempt to draw distinctions between different types of relocatable pool based on the belief that one type of relocatable pool is inherently riskier than another. Rather it would require all relocatable pools to register, but not until after they had been in place for three consecutive days. The requirement to register would only fall due on the fourth day after the pool was erected.

For example, if a relocatable pool owner erected a pool on Saturday and it remained up on Tuesday, they must apply for registration. If the pool was no longer in place after three days, then the registration requirement would not apply. The period of three days was chosen for the following reasons:

- Councils have advised DELWP that relocatable pools are most commonly erected on days when council offices are not open, such as weekends and public holidays. A period of three days should ensure that pool owners have an opportunity to access an open council office.
- The three-day period is long enough that those relocatable pool owners who genuinely only want to use a pool for a short period or for a particular event are not impacted by the registration requirement.
- Delaying the requirement for three days should serve as a prompt for pool owners to consider whether they want to keep their pools up for longer, which will require applying for registration and alerting council to the presence of the pool on the property or taking it down and removing the risk altogether. In either case the risk is reduced.

This option does not affect the obligation a pool owner under the Building Act and Building Regulations to install a safety barrier at the time they install the pool. A barrier must be in place when the relocatable pool is first erected. If a council were to become aware of the fact that a pool was in use without a safety barrier they would be able to take enforcement action against the owner, regardless of how long the pool had been up.

#### *Benefits*

The biggest benefit that comes from this option is that exempts pool owners who only wish to use their pools for a short period from the additional cost of applying for registration. DELWP believes that is a realistic policy response to the significant challenges inherent in regulating relocatable pools, specifically the challenges of enforcing requirements on pools that can be erected and taken down in a matter of hours.

DELWP understands from responses provided by MBS's that identifying pools that are in place for only a matter of hours or days is often difficult. Therefore, allowing pool owners a short period of three days a during which pool owners can use their relocatable pool along with a deadline during which they must either take it down or register provides a more practical enforcement task for councils than a blanket requirement to register their pool at the outset which would be extremely difficult and costly to enforce. It also removes burden from councils of processing registration applications for pools that may only be intended to be up for a limited time.

DELWP acknowledges that the level of compliance with the registration requirement will likely vary from council to council depending on the number of relocatable pools and the time and resources available. As discussed above, DELWP accepts that 100 per cent compliance is unrealistic. Nevertheless, DELWP believes that this option is likely to be the most effective of the available options because:

- It avoids imposing any additional burden on casual pool owners who may only wish to use their pool for a weekend. DELWP believes that this group of pool owners represents the biggest enforcement challenge for councils because they are least likely to appreciate the need for pool registration.
- The registration requirement is based on how long the pool has been in place. Not only does this reflect the risk profile suggested by the available data, it also encourages pool owners to take their pools down as quickly as possible once they've finished using them.



There is nothing in the proposed regulations preventing a pool owner, for example, taking the pool down before the three days has elapsed and then put it back up as a means of 'restarting the clock'. However, DELWP doesn't anticipate that this is necessarily problematic for the following reasons:

- It doesn't change their obligation to ensure that their relocatable pool is surrounded by a compliant safety barrier.
- Councils are obliged under the amendments to the Building Act due to commence on 1 December 2019 to add pools they become aware of to the register. A pool owner who was behaving in this way would likely have their pool added to the register by the council even if they were deliberately taking the pool down and then reassembling it to avoid the obligation on them to apply after three days.

Requiring all relocatable pools to be registered also avoids creating an artificial distinction between pools with filters and those without. They are all required by existing legislation to comply with the same safety barrier requirements and DELWP is unaware of any differences in the risk of noncompliance from the owner of one type of pool, compared to the risk of non-compliance from another type of pool.

This option also reduces the potential cost burden on councils putting in place systems and processes for accepting registrations throughout the year.

### **Costs**

DELWP acknowledges that such only requiring registration after the three-day period comes with its own risks. The available coronial data indicates that in the cases where a relocatable pool was known to be involved the drowning occurred less than three days after the pool was put up.

Similar, to Option 2, the most immediate cost of this requirement would be to pool owners having to pay the registration fee. However, it is difficult to assess how the cost of Option 3 compares to the costs of Option 2 because both options only apply to a subset of relocatable pools. Under Option 2 only relocatable pools that have a filter are required to register, under Option 3 the registration requirement only applies once the pool has been in place for three days or more. Just as there is a lack of data to indicate how many relocatable pools are sold with filters, DELWP is also unaware of any definitive data regarding how long pool owners habitually leave their pools in place for longer than three days.

The cost to individual pool owners of each registration will be the same as registering a permanent pool: \$44.40 per registration.

The primary concern with setting a three-day period before registration is required is that it will be misinterpreted as an exemption from the requirement to install a safety barrier. Although this impression can be countered through public awareness and education campaigns it remains a risk as it is also easy to see how this option could be conflated and confused.

In addition, it's unclear how much more willing relocatable pool owners are likely to be to register their pools after three days compared to registering their pools immediately. Arguably, busy pool owners may be less likely to remember the registration requirement after the pool has been in use for some time, even a matter of days, than when the pool is first erected and is still in the forefront of their mind.

As discussed in Option 2, if the requirement in Option 3 were to function as intended this would lead to larger numbers of safety barriers being installed and therefore impose additional costs on pool owners who were previously non-compliant.

### **Preferred option**

After reviewing the various options DELWP prefers Option 3 as it treats all relocatable pools as representing the same degree of risk and seeks to address that risk in the most efficient and cost-effective means possible.

The base case is not preferred because it places the administrative burden solely on councils and prevents them from receiving funding for this function through the payment of a registration fee by the pool owner. This means that councils would have to fund the administration of this function either from the fees paid by permanent pool owners, or from funds raised from the general community. This is discussed in detail in

Chapter 2, but generally DELWP believes that the comparatively small minority of Victorians who have chosen to own private pools should be responsible for funding the new requirements rather than the cost falling on the broader community.

The principal disadvantage of Option 2 is that it attempts to create a distinction between different types of relocatable pool based on an assumption about the degree of risk they pose that is not supported by the available data. The data shows that permanent pools are involved in significantly more fatal, and most probably non-fatal, drownings than relocatable pools. As discussed above, DELWP believes that a significant contributing factor is the length of time that the pool is in place.

Option 2 uses the presence of a filter as a proxy indicator of risk to focus on the relocatable pools that may be expected to be left in place for an extended period. However, this is only valid if these kinds of relocatable pools can be expected to be left in place for a similar period as a permanent pool, and this seems unlikely.

DELWP has reviewed the relocatable pools currently available for sale in Australia and none have a warranty longer than 12 months. If the warranty is taken as indicative of the approximate expected service life of a product, then no relocatable pool, including those with filters, is going to be kept in place for even a fraction of the time of a permanent pool. Therefore, allocating varied levels of risk to different types of relocatable pools is not wholly persuasive nor well-supported by the available data. In addition, DELWP's analysis indicates that the absence of a device such as a filter does not necessarily prevent someone from using a relocatable pool over a prolonged period.<sup>126</sup>

DELWP anticipates that the total cost to individual pool owners of the preferred Option is likely to be less than under Option 2 because of an expected reduction in the frequency of registrations. Unlike under Option 2 where a relocatable pool with a filter would have to be registered every time it was used, Option 3 allows a relocatable pool to be used without requiring registration provided it is taken down before the three days has elapsed.

DELWP does not believe that it is possible for regulations to single out certain types of relocatable pools over others based on assumptions about how long they are likely to be left in place. Option 3 is preferable because it targets all relocatable pools, knowing that any individual pool could remain up for an extended period, rather than trying to anticipate those that might be erected for a significant period. DELWP acknowledges that there are challenges with this approach, most obviously whether relocatable pool owners will be any more likely to comply with the requirement to register their pools than they have previously been to apply for a building permit when required. However, DELWP considers that the challenge of encouraging compliance with the registration requirement can be substantially addressed through education and awareness campaigns.

The information provided by the VMBSG survey of MBSs indicates that relocatable pools tend to be the area where local councils have the least amount of oversight. This could worsen if, as discussed in section 6.7, the erection of relocatable pools was to become exempt from the requirement to obtain a building permit in the absence of an all-encompassing registration requirement.

DELWP also acknowledges that if the proposed regulations are effective, owners of previously non-compliant relocatable pools will face additional costs as a result of installing a safety barrier that they might not have otherwise installed. Exactly how many, and how great the additional cost will be is difficult to quantify because of insufficient data regarding the size, type and usage of relocatable pools. However, DELWP believes that regardless of the exact figure these additional costs are justified for the following reasons:

- the reduction in the risk of drowning to young children; and,
- this is a pre-existing requirement.

DELWP is also aware that under this option some pool owners could be faced with applying multiple times for registration and as a result be faced with multiple registration fees. Although the proposed regulations do

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<sup>126</sup> They may be more frequently emptied and refilled, but it can take some time before that becomes a serious disincentive to use, particularly since these pools are unlikely to require more than 1000 – 2000 litres to fill. DELWP's review of the 2018-19 pricing structure shows that a kilolitre (1,000 litres) costs between \$2.44 – \$3.11 depending on overall water usage.

not at this stage prescribe a different registration fee for relocatable pools, DELWP is seeking stakeholder feedback in relation to this question.

**Question for stakeholders:**

42. Do you agree that it is reasonable to only require the registration of a relocatable pool or spa once it has remained erected for three consecutive days? Please explain your response.
43. Do you believe that the registration requirement for relocatable pools and spas can be effectively enforced? Please explain your response.
44. Do you have any information regarding how many relocatable pools are likely to be left in place for longer than three days?
45. Do you think that the fee for the registration of a relocatable pool should be the same as for a permanent pool? If not, please indicate an appropriate fee and the reasons why the registration fees should be different.

## 6.9 Certification of safety barriers around relocatable pools

As discussed in Chapter 4, the certification of barriers is the second and most critical assurance that compliant safety barriers are in place. However, applying the proposed framework for the ongoing inspection and certification of barriers around permanent pools to relocatable pools is complex. Those that have permanent barriers installed can be regulated in the same way as a permanent barrier around a permanent pool. This means that they would be required to be inspected with the same frequency and according to the same procedures as a barrier around a permanent pool. Therefore, this section will focus on the certification of relocatable pool barriers.

Although DELWP understands that compliant relocatable barriers are not commonly used, the expectation is that once the proposed Regulations take effect in conjunction with a suitable public information and awareness campaign, there is likely to be a significant increase in interest amongst pool owners in relation to relocatable pool barriers. Measures such as the exemption of relocatable barriers from the requirement to obtain a building permit are designed to encourage this interest and to lower the costs for consumers.

Special provisions will need to be made for the certification of relocatable barriers to take account of their unique characteristics:

- The barrier is unlikely to be in place for the three years until the next certificate of compliance is due to be lodged.
- Once a temporary barrier has been taken down it renders the previous certificate meaningless.
- The erection of the barrier is never likely to require the involvement of a registered building practitioner.

### Option 1—Base case

The base case in this option would not require certification of temporary barriers. If DELWP's preferred options for building permits and registration were followed this would mean that:

- a relocatable pool and a relocatable safety barrier would be exempt from requiring a building permit;
- the relocatable pool would still require a safety barrier; and
- the pool would need to be registered with council within three days.

There would be no additional obligations.

## Option 2—Require a certificate for a relocatable pool to be provided within a prescribed period.

DELWP acknowledges that it would be extremely costly, and potentially unrealistic to expect that a relocatable pool owner could engage a swimming pool inspector to carry out an inspection at the time the pool is erected, or even by the time the pool is required to be registered. DELWP is also aware that because of the range of different types of relocatable pools councils require flexibility. Therefore, this option proposes allowing councils to decide when a certificate of pool and spa barrier compliance is due, provided that the period is no longer than 30 days after the relocatable pool was registered.<sup>127</sup>

Thirty days was chosen as the maximum time allowable because in DELWP's view that is the longest period that a relocatable pool barrier should go before it is inspected and certified by an independent building practitioner.<sup>128</sup> However, because there may be individual circumstances in relation to some pools or pool owners where 30 days before an inspection may not be appropriate, DELWP has proposed leaving council with the discretion to require the owner to provide a certificate of pool and spa barrier compliance sooner than that.

Failure to provide the certificate by the due date would be treated in the same way that the failure to lodge a certificate by the due date is treated in the case of a permanent pool. Similarly, if the pool owner could demonstrate that the pool was no longer capable of holding 300mm of water they could apply to council to have the pool removed from the register. If this occurred before the due date when the certificate was required, then the requirement would no longer apply.

### *Benefits*

This option is considered as forming the final requirement designed to improve compliance amongst relocatable pools and thus reduce the risk of drowning amongst young children. The intent of requirement—like that of the registration—is to impose a graduated series of requirements on relocatable pool owners that encourage them to do one of two things:

- either to take their pool down if they are not prepared to pay for inspection and certification; or
- to keep their pool up and have the barrier inspected and certified.

The longer the relocatable pool is in place, the more compliance checks the pool owner is obliged to undertake.

This approach also ensures that councils have the discretion to impose different requirements on pools depending on their assessment of the specific situation. For example, a pool owner may apply to council to register a large relocatable pool with a filter pump. Council could reasonably determine that given its size the pool is likely to be up for a prolonged period and that as a large pool it's likely to be higher risk due to its visibility and therefore attractive to young children. As a result, they may require the pool owner to provide a certificate of compliance within seven days instead of 30.

Because certification can only be provided by a registered building practitioner the period of 30 days is designed to allow relocatable pool owners a reasonable opportunity to arrange an inspection.

### *Costs*

Requiring an inspection of a barrier will impose the cost of engaging an inspector on the owner. Given that DELWP's cost-benefit analysis has estimated the cost of engaging an inspector at approximately \$200 for a single inspection this potentially exceeds the cost of the original purchase of the pool.

However, it is possible that the cost of the inspection will not be as high for the inspection of a relocatable barrier as for a permanent barrier. DELWP understands that due to the simpler nature of relocatable barriers, which will be designed to be easily erected in compliance with the current barrier standard, it is likely to be a simpler task for inspectors to determine their compliance.

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<sup>127</sup> This 30-day requirement only applies to temporary barriers, and is not relevant for a permanent barrier, because it requires a building permit issued by a building surveyor. Please see Chapter 4.

<sup>128</sup> The 30-day period differs from the requirement for a new permanent pool where the barrier is inspected by the relevant building surveyor as part of their inspection and certification obligations under the existing Regulations.

Even with a window of up to 30 days the ability of a relocatable pool owner to provide a certificate to council is dependent on the availability and willingness of an inspector to visit their property within the given timeframe. The availability of inspectors could become an issue during periods of high demand, such as during summer when more people are using relocatable pools.

However, while acknowledging this issue, DELWP believes that the discretion provided to councils to grant extensions to owners for their provision of a certificate of pool and spa barrier compliance (described in Chapter 4) should also be used to deal with this issue.

### **Preferred option**

Based on DELWP's assessment of the available data Option 2 is recommended. The requirement to arrange for certification of relocatable barriers within a period up to 30 days ensures that those pools that are up for a prolonged period are properly inspected and certified.

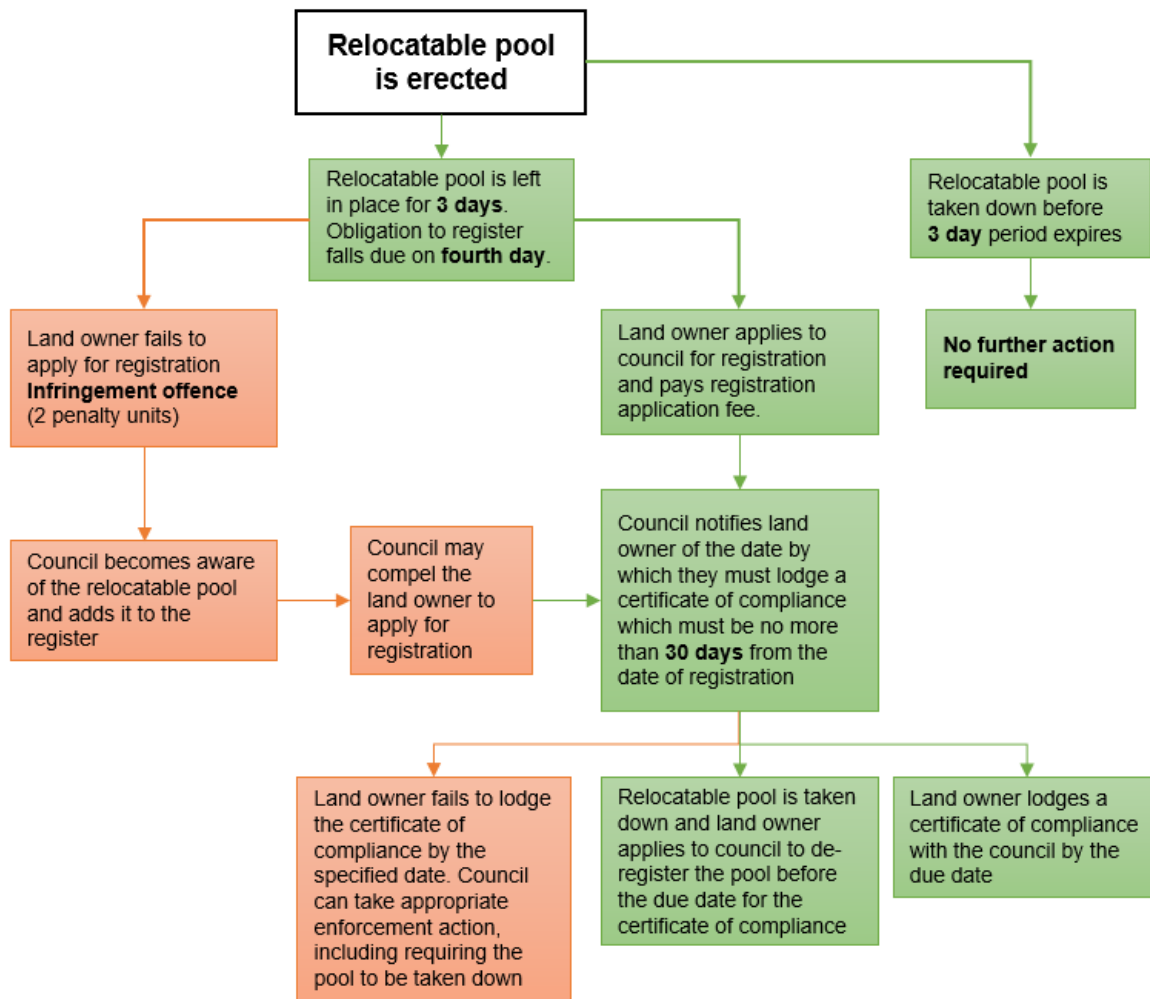
Because the requirement is triggered following the registration of the relocatable pool, DELWP anticipates that there will be a high percentage of compliance with this requirement. Councils will already know where the relocatable pool is because it has been registered. DELWP anticipates that many pool owners may choose to avoid the expense of inspection and certification by taking the pool down and applying to have their relocatable pool deregistered before the certificate due date.

DELWP regards this as an equally positive outcome to the inspection and certification of the barrier, even if they choose to put the pool up again the next day. If the pool is re-erected then the requirements of the Building Regulations commence all over again from the registration stage.

DELWP recognises that some pool owners may seek to avoid the requirements by repeatedly erecting and then taking down their pool, but this is not considered a major problem for the following reasons:

- It is the intent of these requirements to encourage pool owners to only erect their pool when they intend to use it and to take it down as quickly as possible once they have finished.
- The obligation to install a pool barrier applies from the moment the relocatable pool is installed. Any relocatable pool that is installed without a barrier can be the subject of enforcement action no matter when it is detected.

DELWP acknowledges that enforcing these requirements and improving rates of compliance in this area where historically there has been uneven levels of compliance, is likely to take time to become effective. Continuing non-compliance is anticipated in the short term. However, DELWP that when implemented as a package of measures DELWP's preferred options will result in much higher levels of compliance and much safer pools over the life of the Building Regulations.



Flow chart: Processes when relocatable pool erected

**Question for stakeholders:**

46. Do you agree with the proposed requirement that councils will nominate when the first certificate of pool and spa barrier compliance is required to be provided for a relocatable pool or spa, not being more than 30 days after it was registered? Please explain your response.

## 7. Additional regulatory options considered

### 7.1 Purpose

This chapter discusses two additional regulatory options considered by DELWP. The first option is mandatory CPR signage which is within the heads of power under the Building Act. The second option is lockable spa lids as an alternative to safety barriers. The Act does not contain a head of power that allows regulations to be made as to lockable spa lids however DELWP invites stakeholders' input as to whether should be included in the future work program. This chapter assumes that the preferred options identified in Chapters 3, 4 and 5 are implemented.

### 7.2 Mandatory CPR Signage

#### 7.2.1 Background / Nature of the problem

Cardio pulmonary resuscitation (CPR) has been shown to save people from drownings and non-fatal drownings. Early high-quality CPR can save lives<sup>129</sup> and if CPR is administered in the first few minutes it can preserve brain function until specialised treatment is available.<sup>130</sup>

#### CPR

Application of CPR is the technique of chest compressions combined with rescue breathing recommended for someone who is unresponsive and not breathing normally. It should be administered for people presumed to be in cardiac arrest. When someone calls triple zero after rescuing someone from drowning, they are stepped through CPR and how to administer it. Since 2016, Victoria has observed the Australian and New Zealand Committee on Resuscitation (ANZCOR) Guidelines for CPR which encourages bystanders to perform CPR. There is a lack of data on the number of Australians who are trained and knowledgeable in CPR but studies in New Zealand demonstrate that parents lack training and overall knowledge in CPR.<sup>131</sup>

#### Mandatory CPR signage in NSW and Qld

NSW requires an owner to have a CPR sign displayed near their pool, and it must be maintained in good condition and be able to be read easily from 3 meters.<sup>132</sup> In Qld owners must also have a CPR sign displayed near their pool.<sup>133</sup>

Table 20: States and territories that mandate CPR signage

State	Mandatory CPR signage
NSW	Yes
Qld	Yes
WA	No

<sup>129</sup> Perkins GD, Travers AH, Berg RA, Castren M, Considine J, Escalante R et al. Part 3: Adult basic life support and automated external defibrillation. 2015 International Consensus on Cardiopulmonary Resuscitation and Emergency Cardiovascular Care Science with Treatment Recommendations. Resuscitation 2015; 95: e43-e69.

<sup>130</sup> ANZCOR Guideline 8—Cardiopulmonary Resuscitation—January 2016

<sup>131</sup> Bugeja and R.C citing Moran, K. & Stanley, T. (2011). Toddler parent training, understanding, and perceptions of CPR. Resuscitation, 82, 572–576.

<sup>132</sup> <https://www.fairtrading.nsw.gov.au/housing-and-property/building-and-renovating/pools-and-pool-safety/pool-fencing-requirements>

<sup>133</sup> <http://www.hpw.qld.gov.au/construction/buildingplumbing/poolsafety/pages/requirementscprwarningsigns.aspx>

State	Mandatory CPR signage
SA	No
ACT	No
Tas	No
NT	No
Vic	No

DELWP also notes that NSW has an additional requirement for a warning notice to be erected in a prominent position in the immediate vicinity of the swimming pool.<sup>134</sup> This warning notice must contain the following words as set out in NSW regulations:

- “Young children should be actively supervised when using this swimming pool”, and
- “Pool gates must be kept closed at all times”, and
- “Keep articles, objects and structures clear of the pool fence at all times”<sup>135</sup>

DELWP acknowledges that there is a lack of data on how effective the mandatory signage has been in both NSW and Qld. In both states, this requirement coincided with other pool safety requirements and it is not possible to ascertain how effective mandatory CPR signs have been in reducing drownings.

### 7.2.2 Options Considered

The options will be assessed against the criteria of avoided drownings of young children and compliance costs.

#### Option 1—Base case

No CPR signage is mandated. In some cases, owners may voluntarily erect a CPR sign near their pool. DELWP has consulted with industry and it is believed that less than 10 per cent of pool owners in Victoria currently have CPR signage next to their pool or spa. The outcome of this option is that most owners only have the knowledge of how to administer CPR from the triple zero call in an emergency situation or having completed previous training.

DELWP supports that there should be further awareness and training of CPR and that parents, grandparents and anyone else supervising young children near water should ensure their CPR skills are up to date, since these are the people called upon to respond in an emergency involving a young child.<sup>136</sup> DELWP acknowledges that the requirements for infant CPR are different to that of adult CPR.

#### Option 2—Mandatory CPR signage

This section considers the option of mandatory CPR signage next to the swimming pool or spa. Stakeholders such as LSV and Kidsafe support mandatory CPR signage, asserting that any reminder of CPR is positive as it can save lives, and even those who have undertaken a CPR course would benefit from it. It has been suggested by stakeholders that the sign could be provided with the initial inspection or distributed as part of an education campaign. The specifics of the signage would be determined based on consultation with stakeholders. It will likely contain the information below as recommended in the ANZCOR Guideline 8 – CPR detailing the DRSABCD first aid method.<sup>137</sup>

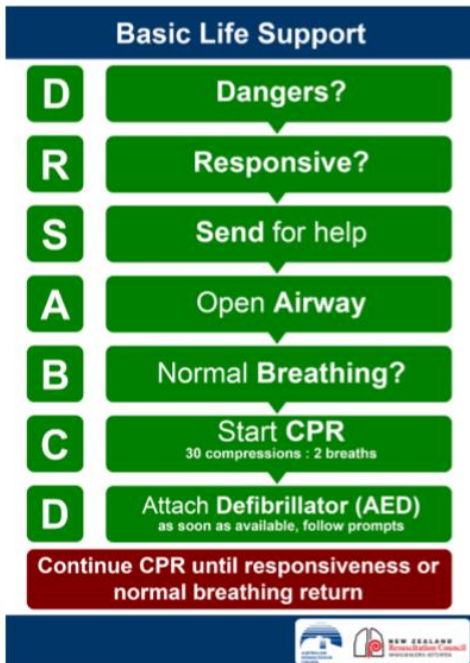
<sup>134</sup> Swimming Pools Act 1992 (NSW), s 17.

<sup>135</sup> Swimming Pools Regulations 2018 (NSW), regulation 10.

<sup>136</sup> [https://www.royallifesaving.com.au/data/assets/pdf\\_file/0005/16448/RLNSW\\_ChildDrowningReportLR.pdf](https://www.royallifesaving.com.au/data/assets/pdf_file/0005/16448/RLNSW_ChildDrowningReportLR.pdf)

<sup>137</sup> ANZCOR Guideline 8—Cardiopulmonary Resuscitation—January 2016, page 5.





The CPR sign would be required to be displayed near the pool, maintained in good condition and easily read within 3 metres.

*Benefits*

Compared with the base case, mandating a CPR sign would provide a reminder for people of what to do in an emergency. People calling triple zero, such as parents who have found their child unresponsive in a pool, are generally highly distressed and may be unable to clearly follow the instructions on the telephone so a visual reminder, such as a CPR sign, could aid in that stressful situation. The third requirement “Send for help” on the sign is a reminder to call triple zero. If a CPR sign is mandated, every time an owner sees the CPR sign when they are using the pool they would be exposed to a reminder that pools can be unsafe and to take as many precautions as possible.

*Costs*

The current cost of a CPR sign is around \$20 from places like LSV or St John Ambulance. In implementing this option, DELWP’s consultant has estimated \$30 for the cost of the sign (and any equipment to securely fasten this to the fence). If mandated, there would be minimum size, durability and content requirements so a higher cost was allowed. This would likely be a one-off purchase (for the life of the Regulations) as the sign would likely last for at least 10 years.

The total costs of attaching specified CPR signs to all existing and new pools is estimated to be around \$23.3 million (NPV over 10 years—or around \$300,000 per year after an initial \$22 million in relation to existing pools). This is based on a cost of \$100 per pool, which includes the cost of the sign and allowance for the time it takes the owner to buy and attach the sign.

The break-even point (if relying only on prevented deaths) for the CPR option is 0.5 avoided deaths per year (i.e., about five avoided deaths over the life of the Regulations). The benefits would arise from a greater awareness and familiarity with the correct methods for CPR, and consequently improving the chances of CPR being effective.), but there is little evidence that any recorded deaths from drowning can be directly attributable to the absence of a sign.

**Preferred Option**

The preferred option of DELWP is not to impose any additional regulatory requirements relating to CPR signage. Assessed against the criteria of reducing drownings, it is not recommended by DELWP because

although it is evident that CPR can save lives, there is no evidence that mandatory CPR signage would mean more people administer CPR or do it more effectively and therefore reduce the risk of drownings. Assessed against the criteria of compliance costs, the costs of mandating CPR signage are significant with no data to indicate its effectiveness in reducing drownings. DELWP believes the importance of CPR training could be addressed via guidance material and communications.

**Question for stakeholders:**

47. To what extent do you believe mandatory CPR signage would contribute to a reduction in fatal drownings and lessen the impacts of non-fatal drownings of young children in private swimming pools and spas across Victoria? Please explain your response.
48. To what extent do you believe a mandatory warning notice like that required in NSW would promote the safe use of private swimming pools and spas across Victoria? Please explain your response.

### 7.3 Lockable spa lids as alternative to safety barriers



**Example of a lockable spa lid**

#### 7.3.1 Background / Nature of the problem

The Act allows regulations to be made requiring the registration of swimming pools and spas by councils for the purposes of a swimming pool and spa register.<sup>138</sup> This does not include scope for allowing lockable spa lids and inspections of spa lids as an alternative to safety barriers.

In reviewing other jurisdictions, DELWP investigated lockable spa lids, which is accepted as an alternative to lockable spa lids some Australian states and territories and New Zealand. Since it is not within the scope of the Regulations to prescribe spa lids as an alternative to safety barriers for spas, DELWP is seeking feedback from stakeholders on whether Victoria should allow lockable spa lids, and create corresponding requirements such as inspections, as an alternative to a safety barrier. This would require an amendment to the Act.

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<sup>138</sup> The Building Act, regulation 15A(3)(a)(i).

### *Safety barriers for spas under the Regulations*

All spas in Victoria are required to have a compliant safety barrier in the same manner as swimming pools. Under the Regulations, spas would remain subject to the same technical standard and be treated no differently from swimming pools. This is because the same barrier requirements apply to spas as to swimming pools under AS 1926.1.

There is no reliable data on the number of spas, and in particular the number of spas that could feasibly use a spa cover rather than a pool barrier. Some types of spa construction would not be able to use a cover, and many spas would be adjacent to or part of swimming pools that already require a barrier, making a separate cover redundant.

Although there is the current requirement for all spas to have barriers, the rate of compliance is low. DELWP has consulted with industry and been advised that it is likely less than 10 per cent of spas have barriers around them and less than 5 per cent have lockable lids.

### *Lower risks of spas compared to pools*

Spas have been shown to be less of a risk than swimming pools in drownings of young children. Since 2000, around 14.8 per cent of the drownings of young children in private pools and spas in Victoria have taken place in a spa. Although this is not an insignificant number, it is much smaller than the remaining 86.2 per cent that have taken place in swimming pools. At least three out of the four spas did not have barriers and it cannot be determined from the data whether any of these spas have lockable lids.

### *Interjurisdictional Analysis*

Two jurisdictions in Australia have elected to vary the application of the requirement of a safety barrier for spas by allowing the use of a lockable spa lid as an alternative means of compliance: NSW and the NT in certain circumstances. New Zealand also has an option of lockable spa lids instead of safety barriers for small heated pools (hot tubs and spas).

**Table 21: States and territories that allow lockable spa lids**

State	Allows lockable spa lids
NSW	Yes
Qld	No
WA	No
SA	No
ACT	No
Tas	No
NT	Only for spas on balconies
Vic	No

### *NSW requirements for lockable spa lids*

NSW has an exemption from the NCC allowing a lockable lid on the spa as an alternative to a barrier.<sup>139</sup> The spa must have a securely fastened child resistant structure that prevents access to the spa when it is not in use. This can take the form of a door, lid, grille or mesh of substantial construction having no opening through which it is possible to pass a testing apparatus and fastened to the spa pool by a device of substantial construction.

<sup>139</sup> Swimming Pools Act 1992 (NSW), section 20.

Spas in NSW must be on the register but there are no inspections in NSW for lockable spa lids. Instead, NSW has a “pool self-assessment checklist” specifically for spas. Owners self-assess whether the spa meets the safety standards according to the checklist and must state in the register that it complies with the standard, or they must contact their local council if it does not comply.<sup>140</sup>

#### *Northern Territory requirements for lockable spa lids on balconies*

NT has an exemption to the NCC in specific circumstances. A lockable spa lid is acceptable when the residential property is < 1.8 hectares and it is not possible to fence the spa or the spa is on the balcony of an apartment without self-closing and self-latching doors and windows.

The lockable purpose-built spa lid must be certified under the Non-Standard safety provision.<sup>141</sup> Spa owners must have a pool safety inspector inspect the spa and issue a compliance certificate.

#### *New Zealand requirements for lockable spa lids*

In 2013 the New Zealand Government, based on information gathered from industry for a RIS, estimated there were around 100,000 spas in New Zealand compared to 60,000 pools.<sup>142</sup> The New Zealand government roughly estimated that the risk of drowning in a spa pool in New Zealand was around 1 per cent of the risk of drowning in unfenced swimming pools. In New Zealand, spas had accounted for 11 per cent of drownings in the past 20 years but there had been almost no fatal drownings in the last 10 years. This estimate of 1 per cent was made based on almost no fatal drownings in the last 10 years in the estimated 100,000 compared to 10 fatal drownings per year in an estimated 50,000 swimming pools prior to 1987. This estimate is different to Victoria as the number of spas is difficult to estimate.

In early 2017, the *Building (Pools) Amendment Act* repealed the *Fencing of Swimming Pools Act* and inserted new provisions into the *Building Act 2004*. Previously, councils had granted exemptions on a case-by-case basis for 80 per cent of known spas in New Zealand so spa covers were the industry norm. The New Zealand RIS determined the reduction in risk of a fence compared to a child resistant cover was close to zero. They also estimated that only 4 per cent of the spas in New Zealand, at the time of the RIS, were fenced. For spas and hot tubs in New Zealand, covers must be lockable and be able to be readily returned to the closed position by an adult.

New Zealand requires compliance with Standard NZS 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs<sup>143</sup> which must be read in conjunction with Acceptable Solution F9/AS2 Covers for small heated pools.<sup>144</sup> The acceptable solution applies to spas and hot tubs with a water surface of 5 square metres or less, and side walls of the spa at least 760 mm high above the adjacent floor which cannot be easily climbed. A safety cover must have signage indicating child safety features and must be able to restrict entry to children of under five years age when closed, withstand 20 kilograms at the centre and be constructed with a slope from the centre. The cover must be held in place with straps fitted with lockable snap fasteners of a minimum width, fastenings using metal padlocks or hold down straps and fasteners capable of maintaining the cover in place.

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<sup>140</sup> <http://www.swimmingpoolregister.nsw.gov.au/checklists/A321753.pdf/view>

<sup>141</sup> <https://nt.gov.au/property/swimming-pools-and-spas/fencing-and-barrier-requirements/spa-pool-lids-and-covers>

<sup>142</sup> Regulatory Impact Statement – Fencing of Swimming Pools Act 1987 accessed at <https://treasury.govt.nz/sites/default/files/2009-02/ris-mbie-fos-nov13.pdf>

<sup>143</sup> For further information on Standard NZS 8500:2006 see <https://www.building.govt.nz/building-code-compliance/f-safety-of-users/pool-safety/>

<sup>144</sup> For further information on Acceptable Solution F9/AS2 see <https://www.building.govt.nz/assets/Uploads/building-code-compliance/f-safety-of-users/f9-restricting-access-residential-pools/asvm/f9-restricting-access-to-residential-pools.pdf#page=17>

Councils in New Zealand are not required to locate or inspect spa pools but have the power to inspect properties they suspect they have non-complaint spa pools.



**Example of a lockable spa lid**

#### **DELWP's consideration of lockable spa lids as an alternative to safety barriers**

DELWP would like stakeholder's views on whether the future work program should include permitting spas to have a lockable spa lid as an alternative to a safety barrier in the same manner as NSW and New Zealand.

This amendment would need to be convincing enough to justify a change to the NCC and clause 19 of the Inter-governmental Agreement<sup>145</sup> would have to be considered. Implementing a requirement that lockable spa lids were an acceptable alternative method of compliance to a barrier would constitute a new variation to Victoria's adoption of the NCC.

The Australian Standards developed for swimming pools have been developed through a committee with several industry representatives and are reviewed regularly to maintain their currency. There is no equivalent standard for lockable spa lids. DELWP would require expert guidance on the safety of lockable spa lids and secondly, the necessary measurements and requirements of spa lids to ensure safety.

If spa lids were adopted as an alternative, appropriate inspection requirements would need to be prescribed for lockable spa lids. DELWP considers it important that the lockable spa lids be inspected by a swimming pool and spa inspector, similar to the model in the NT rather than the lack of inspections in NSW and NZ. This is because DELWP identified a big factor in the drownings of young children in Victoria is non-compliant barriers. DELWP considers that every precaution would have to be taken for lockable spa lids to be maintained in a good condition and conform to the standard that would need to be prescribed to fulfil their purpose of reducing the risk of young children drowning.

Depending on the size of the spa cover, lockable spa covers range from around \$250 to \$520, with an average cost of around \$400. The cost of installing a barrier depends on size and material but is in the order of \$300 per linear metre (e.g., 8 metres of fencing, sufficient to enclose a typical spa, would cost around \$2,400).

Spa lids degrade over time based on whether they are outside in the sun and rain or alternatively undercover. A lockable spa lid relies on the owner to have the spa lid in place and locked whenever it is not in use. There is the additional compliance cost of having to develop a new standard for spa lids including specifications (i.e. on measurements across, locks, weight that could be maintained on the top) and inspectors would require training about these specifications.

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<sup>145</sup> <https://www.abcb.gov.au/Resources/Publications/Corporate/2017-Inter-Governmental-Agreement>

### Preferred Option

DELWP does not consider that there should be an amendment to the Act to allow for lockable spa lids as an alternative to safety barriers as well as inspections for these spa lids. Based on the information available, there is currently a lack of certainty about the safety of lockable spa lids.

Between 1 July 2002 and 30 June 2017, 148 children aged under 5 years fatally drowned in NSW across all aquatic locations. Of these, three occurred in outdoor spas. These numbers make it difficult to draw firm conclusions concerning whether lockable spa covers have reduced the number of drownings and non-fatal drownings. Therefore, on safety grounds spa covers are regarded as complementary to, rather than a replacement of, spa barriers. Ultimately, that lack of effectiveness in achieving the government's objectives means the preference is not to have lockable spa lids.

#### Question for stakeholders:

49. Do you believe the Building Regulations should allow for lockable spa lids to be used as an alternative means of complying with the requirement for spas to be enclosed by a compliant safety barrier in Victoria? Please explain your response.
50. If you agree that lockable spa lids are an acceptable alternative to a safety barrier, are there any limitations on the types of lids that should be accepted? Please explain your response.
51. If lockable spa lids are accepted as an alternative to a safety barrier, what is an appropriate method of ensuring that they are effective in preventing access to the spa by young children? For example, is it necessary that they be inspected by an independent third party; or, should owners be required to use a self-assessment checklist; or is there another mechanism?

## 8. Cost-benefit analysis

### 8.1 Purpose of cost-benefit analysis

The purpose is to prepare a cost-benefit analysis that will:

- comply with the requirements to assess the costs and benefits of options, as assessed against the VGR, by the Office of the Commissioner for Better Regulation (OCBR)
- provide robust, evidence-based analysis to support government decisions on amending the Building Regulations
- facilitate transparently communicating the analysis to stakeholders and other interested parties, and provide a sound basis to facilitate public consultation
- have regard to relevant government policies.

### 8.2 Approach

The CBA was prepared in accordance with the Subordinate Legislation Act and Guidelines for Statutory Rules. It was also prepared in accordance with the relevant parts of the VGR. In addition, the proposed fees have been assessed in accordance with the Victorian Cost Recovery Guidelines.

Our method established a baseline for the current arrangements and examines the *incremental* costs of the proposal. We costed a number of options under the proposal. Costs include:

- Substantive compliance costs—cost to the pool owner of the barrier, corrective repairs and maintenance, signage, inspections
- Financial costs—cost to the pool owner of registration and renewals
- Administrative costs—time taken to apply for registration, etc
- Government costs—inspection and compliance costs (but note cost-recovery arrangements).

We have based our analysis on data provided by DELWP and obtained from local government and the Municipal Association of Victoria (MAV) (face-to-face interviews and/or surveys), the VBA, industry and other published sources.

### 8.3 The costs of the proposed Regulations

The following table sets out the estimated costs of the proposed Regulations. Figures are based on costs over a conventional 10 year costing period and expressed as a net present value (NPV) in 2019 dollars. A real discount rate of 4 per cent was used. Modelling assumptions are set out in Appendix B.

Table 22: Estimated costs of the proposed Regulations

Activity	Cost to pool owners (\$ million)	Cost to councils (\$ million)
<b>Registration</b>		
Cost of establishing registers across all councils		1.13
Informing residents about need to register		0.46
Owners apply to register pools (includes locating information on date of construction) (does not include registration fee <sup>146</sup> )	1.28	
Councils register pools		0.47

<sup>146</sup> Fees are used to recover the costs to council. Fees are discussed in Chapter 9.

Activity	Cost to pool owners (\$ million)	Cost to councils (\$ million)
Councils determine date of construction		0.70
Councils send notices confirming registration details and date of next inspection		0.70
Some owners appeal councils' determination of date of construction	0.35	0.70
<b>Inspections</b>		
Cost of inspections (includes assumption that 50% of barriers will require a second inspection)	186.50	
Cost of rectification	155.42	
Cost of lodging certificates with council (time cost, not including lodgement fee)	1.18	
Councils update register for lodgement of certificates		1.24
Council actions in responses to non-compliance		48.06
<b>Sale/lease of property</b>		
Update register for change in ownership		0.18
Councils write to new owners confirming registration and inspection details		0.27
<b>TOTAL COSTS</b>	<b>344.72</b>	<b>53.91</b>

Note: costs associated with removal of a pool from the register have not been included as there are likely to be too few to model.

This gives a total cost of the proposed Regulations of **\$398,637,279** (NPV over 10 years) or an annualised annual cost of \$39.9 million per annum.

## 8.4 Costs of alternative options

Based on the same methodological approach, the following cost impacts were found for the alternative options.

**Table 23: Cost of proposed Regulations under different inspection options**

Option	Total cost (NPV over 10 years)	Difference
Every three years (proposed frequency)	\$398,637,279	-
Every two years	\$486,240,206	22% higher than the proposed Regulations.
Every four years	\$390,774,582	2% lower than the proposed Regulations.
Inspection upon sale/lease of property	\$197,420,810	50% lower than the proposed Regulations

The differences in costs reflect that, if inspections occur more/less frequently, the rate of non-compliance is also expected to be lower/higher and the average cost of rectification is also likely to be lower/higher.



## 8.5 Measurement of benefits

The benefits of the proposed Regulations are reflected by lives saved and injuries prevented. These may be considered as avoided costs. The types of benefits of the proposal have been identified as:

- Avoided deaths—these are predominantly toddlers. For statistical purposes the value of an avoided death is estimated in this report as \$5.9 million per life (see Appendix B).
- Avoided costs due to non-fatal injuries—on average, for every fatality, there are around six non-fatal drownings. Most of those have ongoing brain injury with permanent mental impairment. Hospital coding and data limitations make this ‘avoided cost’ difficult to estimate. However, an indication on the scale of problem may be gauged by an estimate from Royal Life Saving Australia that each non-fatal drowning incident cost the community \$690,000.<sup>147</sup> This estimate takes account of rates of complications in survivors, the degree of disability associated with each level of injury, and the costs from hospitalisation, loss of productivity and emergency response.
- Avoided community trauma—the emotional impact of the death of a loved one cannot be estimated. Such a death represents a tragedy that effects a large network of people—family, friends, and broader community. In many cases, such an event is impossible to get over and may lead to long-term neurosis.

Specific benefits of the proposal include:

- The register could be used to improve safety by better targeting education campaigns and disseminating information relevant to home pool owners.

## 8.6 Break-even point for the proposed Regulations

To assess the costs and benefits of the proposal break-even analysis was used. The break-even point expresses how many avoided deaths or injuries would be required to justify the cost of the proposal.

Based on the NPV of expected costs of the proposed Regulations, the Regulations would need be responsible for avoiding **at least four deaths and 24 non-fatal drownings** of children each year in order to break-even (on monetary values alone).

This appears reasonable given that avoided deaths and injury on this scale is achievable. Since the introduction of mandatory inspections in WA in 1992, there has been an 80 per cent reduction in the rate of toddler drownings. The likelihood that the benefits will outweigh the costs is increased when taking account of the trauma and grief avoided from death and injuries, which DELWP believes to be significant but cannot be assigned a monetary value.

## 8.7 Alternative options

Break-even points for other options are:

- two-year inspections: at least five avoided deaths and 30 avoided non-fatal drownings each year
- four-year inspections: at least four avoided deaths and 24 avoided non-fatal drownings each year
- inspection upon sale/lease: at least two avoided deaths and 12 avoided non-fatal drownings each year
- self-inspection: at least 1.25 avoided deaths and 7.5 avoided non-fatal drownings each year.

The options for four-yearly inspections and inspection only upon sale/lease are clearly inferior than the proposed Regulations.

- The four-yearly option has a similar break-even point as the preferred three-yearly option, however is less likely to achieve its break-even point given fewer inspections and rectification work would occur on pool barriers in the same period.

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<sup>147</sup> [https://www.royallifesaving.com.au/\\_data/assets/pdf\\_file/0013/22180/RLS\\_ResearchSummary\\_CostOfDrowning.pdf](https://www.royallifesaving.com.au/_data/assets/pdf_file/0013/22180/RLS_ResearchSummary_CostOfDrowning.pdf).

- Inspections only upon sale or lease of a property would require a break-even point about half as good as the preferred option. However, under this option, the number of actual inspections that occur is only around 27 per cent as under the preferred option. The sale of a property with a pool may lead to barriers not being inspected for decades in some instances. It is therefore considered less likely to achieve its break-even point compared to the preferred option.

Subjective judgment is required to consider the break-even points for the two-yearly inspection and self-inspection options.

- Self-inspection has a much lower break-even point than the proposed Regulations (which both have inspections occurring every three years). This option only needs to be around 30 per cent as effective in avoiding drownings as the proposed Regulations to break-even. However, it is uncertain if it will achieve this—mainly due to the fact that there is no feasible way to determine whether the self-inspections will result in meaningful change to barrier safety. The costs for this option only took account of the costs of the self-inspections themselves; given the uncertainty around whether this option would be effective, it is likely that additional costs would be needed to monitor effectiveness (e.g., audits), which reduces the apparent cost benefits of this option.
- The two-yearly inspection option has costs 22 per cent higher than the proposed Regulations and would need to be 22 per cent more effective in preventing drownings. It is unclear if this could be achieved, given the evidence that most deterioration to pool barriers tends to emerge between three to four years.

The break-even point (if relying only on prevented deaths) for the CPR option is 0.5 avoided deaths per year (i.e., about five avoided deaths over the life of the Building Regulations). The benefits would arise from a greater awareness and familiarity with the correct methods for CPR, and consequently improving the chances of CPR being effective.), but there is little evidence that any recorded deaths from drowning can be directly attributable to the absence of a sign.

## 8.8 Conclusion

The Subordinate Legislation Act requires “an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives”.<sup>148</sup>

The costs and benefits of the proposed Regulations were assessed. Ultimately, there is an element of judgement involved when considering costs and benefits associated with a person’s life. For example, if a very high value of a statistical life (VSL) were chosen (and high estimates are contained in the literature) then it would be relatively easy to demonstrate that the benefits outweigh the costs. This report, however, adopts an age-adjusted VSL commonly used in Australian public policy which is relatively conservative. The break-even point for the proposed Regulations appears to be achievable.

When non-monetarised benefits, such as avoidance of emotional trauma, are included, this adds further strength to the conclusion that the benefits of the proposal outweigh the costs. Evidence in other jurisdictions (i.e. NSW, Qld) suggests that schemes to register and inspect pools and spa barrier has worked well and achieved their objective—there is no call in these states to wind the reforms back.

The assumptions that underpin this cost/benefit analysis are set out in Appendix B.

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<sup>148</sup> Subordinate Legislation Act 1994, section 10(1)(d).

# 9. Fees for registration and lodgement of certificates

## 9.1 The cost to councils of regulatory activities

The proposed Regulations set maximum fees that councils can charge in relation to registering a pool, and lodgement of a barrier certificate (both compliant and non-compliant barrier certificates). The intention of setting fees for these activities is that this will be the way councils will be able to recover the additional costs associated with the registration and inspection regime.

The additional cost to councils of administering the proposed Regulations is as follows:

Table 24: Costs to councils per transaction (\$ million)

Activity	Cost to councils (total over 10 years—real amounts).	Number of registrations/certificates (over 10 years)	Average cost per transaction
Activities related to registration (includes change of ownership)	4,936,490	247,226	19.97
Activities related to barrier certificates	60,789,270	769,635	78.98

The figures in the final column in the above table represent the *average* cost across all councils. However, councils have different cost structures and, because of the likely uneven distribution of pools across councils, may adopt different approaches to their administration. As such, we would expect some councils to have costs that are lower than those indicated in the above table and some higher costs.

## 9.2 The power to set fees

Councils have the ability to charge fees under the *Local Government Act 1989* for any services they perform related to functions and powers carried out under any legislation.<sup>149</sup>

The Government's *Cost Recovery Guidelines* do not apply to local councils. However, it is expected that councils would only charge fees that reflect their actual costs, in order to avoid fees being seen as a form of taxation, and due to scrutiny from residents.

As such, it is expected that councils could recover their additional costs through setting their own fees for registration of pools, lodgement of certificates, or potentially other bases for charging fees (such as an annual fee for pool owners). Notionally, this would be in the order of \$65 million over 10 years.

However, it is unlikely that all councils would charge the same fees. Some councils have different cost structures or have different capacities to manage the costs of a new registration system (e.g., recovering fixed costs where there may be a smaller proportion of houses with pools, and/or pools spread out over a larger geographic area). Also, some councils may take more effort than others to keep their activities efficient. Lack of controls on the efficient cost of activities may see the total costs of the scheme to be higher than they need to be.

The amendments made to the Building Act in relation to swimming pool barriers anticipated that fees could be regulated by the Victorian Government through regulations. Section 26(3)(h) of the Building Act allows fees to be set for the registration of pools and lodgement of certificates.<sup>150</sup>

<sup>149</sup> Subject to making a local law in relation to the relevant functions.

<sup>150</sup> The Building Act also allows fees to be set for other related services, which are not presently proposed to be included in the Regulations.

### 9.3 Options for setting fees

Based on the above, the inclusion of fees in the proposed Regulations is not necessary to allow councils to recover their additional costs of administering the pool barrier scheme, but allows the Government to pursue other objectives, such as consistency across the state, and avoiding excessive fees.

In terms of the approach to setting fees, the feasible options are:

- Uniform fees—to reflect average costs across councils
- Maximum fee—to allow councils with higher costs to set higher fees.

Uniform fees can promote efficiency (councils with higher costs will look to find ways to reduce costs), and also provide equity across all pool owners in the state.

However, is it unlikely that all councils could realistically reduce costs to match the average, without decreasing the effectiveness of their activities. This is because some councils already have some functions in place while others do not, some will find it easier than others to attract new staff or train existing staff in new functions, some have different underlying cost structures, and some councils have very different proportion and distribution of pools within their council area.

It is therefore more pragmatic to allow councils to determine their own fees, according to their own costs, but with a maximum fee. The maximum fee provides a degree of protection and certainty for pool owners, and some (albeit less) incentive for councils to ensure its regulatory activities are efficient.

Based on our discussions with councils in the preparation of this report, we consider that setting a maximum fee of double the average cost is appropriate to allow most councils to recover their costs, while preventing any outliers from charging fees that appear unreasonable. There is a risk that in setting a maximum fee above the average fee that many councils will charge a fee above their actual costs. This could be managed by monitoring the fees charged, requesting councils to measure and report to DELWP on their actual costs, and reviewing the fees after two or three years.

### 9.4 Cost reflective fees and incentives

Around 90 per cent of the costs related to certificates is estimated to arise due to councils' actions necessary to respond to non-compliance. This suggests that a larger fee could be charged for lodgement of certificates of non-compliance as:

- It is these certificates that will contribute to a disproportional amount of council costs
- A higher fee for certificates of non-compliance may provide an incentive for pool owners to achieve a certificate of compliance.

Based on the cost estimates prepared for this report, differential fees suggests an average cost of \$10 for compliant barrier certificates and around \$385 for a non-compliant barrier certificate (based on a modelling assumption of 20 per cent of pools will be issued with non-compliant barrier certificates after first or second inspections).

However, it is difficult to estimate costs associated with people lodging non-compliant barrier certificates with councils. If all pool owners pursued actions that result in least cost to them, it could be assumed that all pool owners would take necessary rectification work to their pool barriers within the required time and non-compliant barrier certificates would never need to be issued (other than in extreme cases where there is imminent danger). However, realistically, it is likely that there will be a material number of non-compliant barrier certificates, as some pool owners may see little incentive to comply with the Building Regulations. This causes an additional workload for councils that should be reflected in the costs to be recovered through fees.

Setting a higher fee for non-compliant barrier certificates acts as a disincentive, which should help reduce actions councils need to take, but there is no basis to determine how effective an incentive it will be. A fee for a non-compliant barrier certificate in the order of \$385 is high compared to the likely costs of barrier rectification, and it could be argued that setting a fee at this level should eliminate a large number of non-compliant certificates.

Therefore, a fee for non-compliant barrier certificates would need to be set with some circumspection, and councils should report after two years on non-compliance rates to see if the higher fee is having an effect.

## 9.5 Summary of proposed fees

Table 25: Proposed fees

Fee purpose	Prescribed fee	Amount in 2018-19 dollars	Rationale
Fee for registration	Maximum fee of 3.46 fee units	Maximum fee of \$37	Double the estimated average cost, to allow some councils to recover higher actual costs
Fee for lodgement of compliant barrier certificate	Maximum fee of 2.07 fee units	Maximum fee of \$20	Double the estimated average cost, of costs related to compliant barriers
Fee for lodgement of non-compliant barrier certificate	Maximum fee of 26 fee units	Maximum fee of \$385	Based on the estimated average cost of non-compliance to councils

# 10. Implementation, evaluation and forward work program

## 10.1 Implementation

The Regulations will commence on 1 December 2019 to coincide with the commencement of the new provisions of the Building Act. The RIS and exposure draft of the proposed Regulations will be available for public consultation in late July through to early September. Once the public consultation process has concluded DELWP will review all feedback provided by stakeholders prior to finalising the Regulations.

DELWP recognises that the regulations in their preferred form will introduce significant changes for key stakeholders, in particular:

- Owners of land with private swimming pools and spas
- Councils
- Registered building practitioners carrying out functions as a swimming pool and spa inspector

During the preparation of the RIS and proposed Regulations DELWP sought to engage as collaboratively as possible with the impacted groups. DELWP has undertaken extensive consultation with councils, particularly seeking to understand how the new requirements will affect them and the likely cost impacts. This consultation has formed the basis of the cost/benefit analysis contained in this RIS. DELWP's stakeholder consultation processes are discussed in more detail in Chapter 11.

To ensure that the requirements of the new scheme are introduced in a timely manner and achieve the desired policy outcome DELWP will actively seek to assist each of these groups in understanding and implementing the proposed regulations.

### *Pool and spa owners*

The key messages for pool and spa owners will be focused on informing them of the nature and timing of their obligations, specifically in relation to registering their pools and spas with council, arranging for an inspection by a swimming pool and spa inspector and lodging certificates with councils by the due date.

DELWP will work closely with key stakeholder organisations to ensure that pool owners are not only aware of the new requirements but also understand the critical safety issues that are behind the changes. DELWP believes that non-government organisations such as Kidsafe, LSV and SPASA will play an important part in communicating this message. These organisations have worked with the Victorian Government in the past to ensure that similar safety messages are conveyed to as wide an audience as possible.<sup>151</sup>

DELWP expects most pool owners will be looking primarily to councils as the principal source of information about their new obligations. For that reason, DELWP will also work with councils to ensure that the information they provide is comprehensive, consistent and accessible to all pool owners.

DELWP also intends to cooperate with the swimming pool and spa industry to assist with communicating this message. DELWP worked closely with the industry's peak body, the Swimming Pool and Spa Association (SPASA) in developing this RIS. SPASA represents pool and spa suppliers as well as consumers. DELWP will seek to continue this cooperation in disseminating information about the new requirements to their members and customers.

### *Councils*

As the organisations responsible for the establishment and maintenance of the register, as well as the enforcement of the mandatory certification requirements, councils will play a critical role in the new scheme. This will require that DELWP work with individual councils and their representative organisations to ensure that they understand not only their role, but also the responsibilities of pool owners which councils will be responsible for enforcing.

The new requirement will require changes to administrative processes within many councils, and in some cases the creation of entirely new processes. DELWP believes that the new fees which will be introduced as

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<sup>151</sup> One example of this was the Victorian Government's 'Never Leave Kids in Cars' Campaign <https://www.kidsafevic.com.au/road-safety/hot-cars/victorian-government-never-leave-kids-in-cars-campaign>

part of the Regulations will cover increased costs for councils associated with this process however DELWP acknowledges that these will not start being received by council until after they have established their systems and processes to accept registration applications.

DELWP will work with councils directly and indirectly by engaging with their representatives, such as MAV to ensure that they are able to establish a register by the time compulsory registration commences.

*Building practitioners carrying out work as swimming pool inspectors*

DELWP is working with the VBA to put in place the necessary processes to specify the training and qualifications that will be required of the new class of building inspector (pool safety). The VBA has advised DELWP that the processes for establishing the qualifications and experience going forward will fall into two categories:

<b>Short term</b>	<p>The development of a non-accredited course approved by the VBA (based on specifications provided by the VBA) is developed by an approved training provider through consultation with key stakeholders.</p> <p>Providers approved to deliver this course must be able to provide a verifiable statement of satisfactory completion to persons who successfully undertake the course to present to the VBA with their application.</p>
<b>Medium term</b>	<p>The development of a Victorian accredited course in conjunction with a consortium on industry stakeholders.</p> <p>The endorsement of an accredited course typically takes between 12-18 months.</p> <p>Additional time after endorsement is required for RTOs to develop course material and approval to add the course to their accredited delivery scope.</p> <p>The VBA anticipates that the accredited course would ultimately replace the non-accredited course for initial registration purposes.</p> <p>The development of the non-accredited course would be 'lead in work' for the development and endorsement of the accredited course.</p> <p>The VBA would not seek to be the owner of the accredited course.</p>

DELWP will work with the VBA both in the lead up to and after the commencement of the new Regulations to develop communications and technical guidance materials to assist registered building practitioners in carrying out their new functions under the Regulations. DELWP is particularly focused on ensuring that there is sufficient guidance material available for practitioners that they can inspect and certify swimming pool barriers in a consistent and efficient manner.

*Implementation risks*

DELWP is aware that there are implementation risks associated with the new regulations that are required to be managed. DELWP believes that the most significant risks are likely to be:

**Table 26: Immediate Implementation Risks**

Risk	Remedy
Lack of awareness or understanding amongst pool owners regarding the nature of the new requirements and the critical dates when they take effect. This could lead to inadvertent non-compliance.	DELWP intends to work with key stakeholder groups during the lead up to implementation to develop communication strategies to ensure pool owners are informed about the requirements.
Some pool owners may be unwilling or potentially unable to comply with the requirements requiring councils to take enforcement action.	The proposed regulations have been designed to be flexible enough to allow councils to provide pool owners

	<p>who are unable to comply by the prescribed date additional time to do so.</p> <p>Council also have numerous enforcement options of escalating severity for encouraging owners of pools and spas with non-compliant barriers to rectify the issue(s).</p> <p>DELWP will work with councils to ensure they understand the options available to them under the new regulations.</p>
Some councils may struggle to put in the place the necessary processes and infrastructure.	<p>DELWP has consulted with a range of councils during the preparation of the exposure regulations. The feedback received has informed not only the proposed fees, but also the proposed timelines for implementation. The RIS consultation period will provide councils with a further opportunity to provide feedback regarding the practicality of the timelines for implementation. DELWP believes that this should ensure that the final dates are achievable.</p>
Pool owners find themselves unable to obtain certificates of compliance by the required due dates because of a lack of available inspectors.	<p>The proposed regulations are proposing to delay the initial date by which the first certificates of compliance are due to allow sufficient time for the VBA to register new inspectors. In addition, the dates when pool owners are required to provide their first certificates are staggered to minimise the simultaneous demand on inspectors.</p> <p>DELWP will also work with organisations such as the Australian Institute of Building Surveyors (AIBS) to encourage existing building surveyors and building inspectors to consider undertaking this work.</p>

## 10.2 Evaluation

The proposals discussed in this RIS will be implemented through amending the Building Regulations 2018. The Building Regulations 2018 will sunset in 2028, so the swimming pool and spa barrier regulations will be comprehensively reviewed in 2028 as part of the remaking of the Building Regulations.

However, DELWP will also evaluate the operation of the new scheme at specific points during its operation prior to sunset. As discussed above DELWP will work closely with impacted stakeholders during the implementation of the proposed Regulations to monitor the success of the implementation and begin gathering data on how effective the regulations are in achieving their primary objective of reducing drownings of young children.

As part of this process, DELWP intends to undertake an informal review of the new regulations by the end of 2021. This timing is appropriate because it will be after the last tranche of certificates of pool and spa compliance for existing pools and spas are due to be received by councils (proposed deadline is 29 October 2021). As a result, DELWP will be able to review the operation of the complete scheme, from registration stage through to inspection and certification. Information collected during this review can assist in preparing for a more formal evaluation process.

In accordance with the requirements of the VGR, a formal midterm evaluation of the proposed Regulations will be conducted by the end of 2024. This midterm evaluation will broadly aim to:

- determine the extent to which the objectives of the proposed Regulations have been achieved; and
- identify changes that may be needed to better achieve those objectives or other objectives that emerge in the intervening period.

DELWP believes that five years is an appropriate period for the scheme to operate for before a midterm evaluation is conducted for the following reasons:

- The intent of the proposed Regulations is to reduce the number of drownings amongst young children, but it will be necessary to gather several years' worth of data to determine if the new



requirements are having a sustained and positive impact. DELWP acknowledges that it is likely to be impossible to eliminate cases of drowning entirely. However, DELWP hopes that the recorded cases of fatal and non-fatal drownings will show an overall trend downwards by the time the evaluation takes place.

- It provides enough time for an assessment to be made of the individual elements of the requirements once they are fully implemented and have been in place for some time. For example, it should be clear by that stage whether the mandatory registration requirement is successful in ensuring that all, or at least most, private pools and spas in Victoria are on a register. When assessed in conjunction with the recorded cases of fatal and non-fatal drowning DELWP will seek to identify any gaps in the requirements that potentially require amendment.
- It provides an opportunity to revisit DELWP's decision to not exercise certain heads of power available under the Act. For example, the proposed regulations do not prescribe the fees that pool inspectors can charge. This may require re-examination in the light of the scheme's operation.
- It will provide an opportunity to review the fees that are prescribed in the Regulations in the context of the practical operation of the new requirements to determine if they are still appropriate.
- It allows enough time to assess the performance of the new class of building inspector (pool safety) and in particular, the appropriateness of the prescribed qualifications and experience requirements.

The processes and schedule for undertaking this midterm evaluation will be finalised closer to the time it is proposed to commence. However, DELWP recognises that in order to carry out an effective review, engagement with the same key stakeholders discussed in the Implementation section will be essential both to access critical data and to seek feedback regarding the practical operation of the regulations. In particular:

#### *Swimming pool and spa owners*

DELWP will seek to engage with pool owners to receive feedback in relation to challenges they have experienced in fulfilling their obligations and their views on the effectiveness of the requirements. DELWP anticipates that there will be much more opportunity for direct engagement with pool owners during the evaluation process because DELWP may be able to draw on the information contained on council registers. In particular, DELWP will be seeking feedback regarding the cost burdens of complying with the scheme and their interactions with swimming pool inspectors.

#### *Councils*

Councils hold critical data in relation to the registration and certification of pools in their municipal area as well as performing essential enforcement functions. To inform the evaluation process DELWP will seek feedback from a wide range of councils to determine the levels of compliance of pools and the scale and nature of the enforcement action they have undertaken to address non-compliance.

#### *Building practitioners carrying out work as swimming pool and spa inspectors*

DELWP will seek input from swimming pool and spa inspectors in relation to their interactions with pool and spa owners and the effectiveness of the regulations in allowing them to assess the compliance or non-compliance of pool barriers.

#### *Victorian Building Authority*

As Victoria's building and construction regulator DELWP will be seeking advice from them regarding their experiences administering the registration of the new building inspector (pool safety) class and the nature and extent of any disciplinary action taken by the regulator in relation to these practitioners.

DELWP would also seek to engage with other relevant stakeholders that are identified closer to the time that the midterm evaluation is undertaken.

### **10.3 Forward Work Program**

In the preparation of these Regulations DELWP identified several issues and possible options for resolution that have been identified as outside the available powers legislated under the Building Act. As discussed in Chapter 1, the proposed Regulations are made under the Building Act and therefore are limited to the

powers contained in the Building Act. In some cases this may be addressed through future legislative amendments but others will require DELWP working with other Victorian Government Departments and Agencies to achieve the appropriate outcome.

#### *Tenants and relocatable pools*

The most immediate priority of the future work program is to re-examine the existing language in the Building Act that limits the application of the proposed Regulations to the owner of the land on which the swimming pool or spa is located.

As discussed in Chapter 6, DELWP was aware during the policy development phase of the proposed Regulations of the fact that, unlike a permanent pool, a relocatable pool may be purchased and erected by the occupier of a house who may not necessarily be the owner. This creates a significant issue for the applicability of the proposed Regulations.

Section 15A(3)(a)(i) of the Building Act contains a head of power that allows regulations to be made in requiring:

the registration of swimming pools and spas by councils for the purposes of a swimming pool and spa register including—

the requirement for owners of land on which swimming pools and spas are located to register those swimming pools and spas with the relevant council.

The wording in the Building Act limits the proposed Regulations to placing obligations upon 'owners of land' which excludes people who are not owners of land from some of the requirements. The obvious example is a tenant who may own a relocatable pool but cannot be subject to regulatory requirements obliging them to:

- register their relocatable pool; or,
- have the barrier independently inspected and certified.

It is critical to note that this limitation only applies to the registration, inspection and certification requirements. Tenants are still required to ensure their relocatable pools have a compliant safety barrier. However, under the current wording in the Building Act landlords will remain responsible for the registration, inspection and certification of relocatable pools owned by their tenants.

Addressing this issue requires changes to the language of the Building Act to amend the existing head of power. DELWP will prioritise cooperation with CAV in its ongoing work in relation to reforms to the residential tenancies sector to determine options to address this issue.

#### *Pools that are not considered buildings for the purposes of the Building Act*

As discussed in Chapter 6, there are some relocatable pools that, because of their form and method of construction, are not considered 'buildings' for the purposes of the Building Act. Because the requirement to fence a pool more than 300mm deep is given force through the Building Act and the Building Regulations, pools which do not fit the definition of 'building' and are not captured by the requirements of the Building Act and consequently are not required to have a safety barrier. This issue was discussed in section 6.6.

DELWP believes most of the different types of relocatable pools currently on the market would be considered 'buildings' within the meaning of the Building Act. Most pools require some assembly before they can be used, most pools are immovable for as long as they are assembled and filled, and most can be left up for a reasonably prolonged period.

However, there are some relocatable pools that do not meet these conditions. For example, an inflatable pool that is entirely self-contained and requires no assembly or construction is unlikely to be considered a 'structure' and therefore the owner is not required to install a safety barrier. This would be the case even if such a pool had a depth of 300mm or more.

It is not within the scope of the Regulations to, for example, simply include a broader definition of 'swimming pool'. Such a change would require amending the Building Act by legislation passed by the Victorian Parliament.

Before deciding whether to consider pursuing an amendment of this nature, DELWP will seek to engage with stakeholders to understand their views on the importance of the amendment, and what priority it should be given. DELWP will work with stakeholders during the consultation process and once the proposed Regulations have commenced to gather their views. It will allow DELWP to monitor the performance of the new Regulations in relation to the relocatable pools that are covered by the new requirements.

DELWP hopes to make a preliminary decision on whether to pursue this amendment in 2020.

#### *Requirements upon sale of property containing pool*

There is no obligation in the proposed Regulations for owners to arrange re-certification of a swimming pool or spa barrier upon the sale of a property.

Several stakeholders have raised queries with DELWP about what occurs when a property with a swimming pool is sold. The obligation to lodge a certificate of pool and spa barrier compliance will be passed on to the purchaser but there could be an intervening period where the safety barrier has not been inspected and may not be compliant.

In Qld, a vendor must give a purchaser a copy of the certificate of compliance or give notice that no pool safety certificate exists. If a pool safety certificate is not in effect at settlement under the contract of sale, the purchaser must ensure there is a pool safety certificate in effect for the pool within 90 days after the day of settlement. The Real Estate Institute of Queensland and the Queensland Law Society amended the standard sale contracts to include matters relating to pool safety. A key difference is that Qld does not have mandatory periodic independent inspections but only requires inspection at point of sale, lease or final inspection for new swimming pools.

In NSW, changes have been made to the *Conveyancing (Sale of Land) Regulation 2010* so that registration certificates issued from the swimming pool register, occupation certificates and a certificate of compliance or non-compliance are required in the contract of sale. If the certificates are not attached to a contract of sale, a purchaser can rescind within 14 days of exchange unless settlement has occurred.

WA does not require additional mandatory inspection/compliance requirements where land containing a pool is sold or leased.

Some stakeholders have suggested that similar requirements should be introduced in Victoria. However, this is beyond the power of the Building Act. The Building Act and Building Regulations do not have power to constrain the sale of land. This jurisdiction is covered by the *Sale of Land Act 1962*.

DELWP engaged with CAV to discuss a potential amendment to the *Sale of Land Act 1962* to include a requirement for a certificate of pool and spa barrier compliance at point of sale. However, there is no intention to introduce such an amendment in the immediate future. An alternative is to include information regarding certificates of pool and spa barrier compliance in the "due diligence checklist" required for sale of land. This checklist could be amended to alert potential purchasers of the regulatory requirements applicable to properties with swimming pools and spas, and particularly the obligation to arrange for certificates of pool and spa barrier compliance to be periodically lodged with council.

DELWP is also investigating expanding the scope of regulation 51(1) of the Building Regulations to include certificates of pool and spa barrier compliance. This regulation allows any person to request certain information from a relevant council in relation to land or a building, including details of permits or certificates of final inspections in the last 10 years, determinations or exemptions and details or notices or orders made by a relevant building surveyor. If compliance certificates were included in this list, it would give potential purchasers the opportunity to check if the land or building had a current certificate of pool or spa barrier compliance in place before the sale of the land.

DELWP also intends to produce information material specifically targeted at owners and purchasers to alert them to this issue as part of the broader communications campaign to accompany the implementation of the new Regulations.

**Question for stakeholders:**

52. Do you believe including information regarding certificates of pool and spa barrier compliance in the due diligence checklist under sale of land obligations would promote the safety of swimming pools and spas across Victoria? Please explain your response.
53. Do you think amending regulation 51(1) of the Building Regulations so potential purchasers can request information regarding the existence of a certificate of pool and spa barrier compliance from the relevant council is sufficient to allow them to fully inform themselves regarding the status of a pool or spa? Please explain your response.
54. Have you ever purchased a property with a swimming pool or spa? If so, what was the condition of the safety barrier?

*Requirements on residential rental properties containing a pool*

Not all drownings take place in pools located in owner-occupied properties: four of the 27 drownings in Victoria took place in a rental property. However, as with the sale of a property discussed above, DELWP is limited by the powers contained in the Act.

Steps have already been taken to improve the compliance of barriers at rented properties by obligations on all occupiers of the property, which includes tenants, to take all reasonable steps to ensure that a barrier restricting access to the swimming pool or spa is operating effectively.<sup>152</sup> Similarly, an occupier must ensure that the gate or door to the swimming pool or spa remains closed. Failure to comply with either of these requirements is punishable by up to 50 penalty units (\$8,059.50 for financial year 2018-19).<sup>153</sup>

DELWP is aware that other jurisdictions have gone further than this to integrate the requirements for certification into their legislation governing residential tenancies. In QLD, an owner must not enter into an accommodation agreement unless a pool safety certificate is in place. This same obligation exists in NSW and is governed by the *Residential Tenancies Act 2010* (NSW) which also has a section on their standard form relating to the swimming pool and a valid certificate of compliance being in place.

DELWP has been in discussions with CAV in relation to the *Residential Tenancies Act 1997* and the amendments made under the *Residential Tenancies Amendment Act 2018*. The intention is to include a compliance certificate as part of “any prescribed information in relation to the rented premises” that a residential rental provider must disclose before entering into a residential rental agreement.

DELWP also intends to include a compliance certificate on the condition report for residential properties. This is envisaged as being a checkbox including whether there is a compliance certificate and the date of that certificate was issued. Further discussions with CAV will take place regarding these proposals.

DELWP is aware of the importance of pool safety for tenants and their families but is seeking further information from stakeholders to guide future policy development in this area.

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<sup>152</sup> Building Regulations, regulation 142.

<sup>153</sup> Building Regulations, regulation 143.

**Question for stakeholders:**

55. Do you think including a compliance certificate as part of the prescribed information under the Residential Tenancies Act 1997 would promote the safety of swimming pools and spas across Victoria? Please explain your response.
56. Do you think including a certificate of compliance on the condition report for residential rental properties would promote the safety of swimming pools and spas across Victoria? Please explain your response.
57. Do you have any information regarding how many residential rental properties have swimming pools or spas?
58. Have you ever rented a property with a swimming pool or spa? What was the condition of the barrier? If the barrier was in a poor condition, did the owner repair the barrier?

# 11. Summary of stakeholder consultation

Consultation for the development of the new regulatory requirements commenced in the first half of 2018. The initial round of consultation took the form of one-on-one meetings and a round table discussion with key stakeholders, concentrating on those who provided feedback in response to the proposals contained in the Building Regulations 2006 sunset review.

More recently and throughout the preparation of the RIS and the proposed regulations, DELWP has sought to maintain an ongoing dialogue with stakeholders to ensure that they are aware of the direction of DELWP's policy thinking, and to enable DELWP to gather critical information and data to inform DELWP's policy and cost benefit analysis.

Consultation with each key stakeholder group is discussed in turn below.

## *Local Government*

Councils will hold significant responsibilities under the new scheme and DELWP viewed it as critical that these stakeholders were able to contribute to the policy development process.

To ensure that the proposed regulations balanced these new responsibilities with not placing unnecessary burden on local government, DELWP made significant efforts to engage directly with individual councils, as well as through their representative organisations, specifically MAV, Peri Urban Group of Rural Councils, Rural Councils Victoria and the VMBSG.

Most importantly for the development of the policy options discussed in the RIS, in late 2018 DELWP collaborated with the VMBSG to conduct a survey of MBSs throughout Victoria to understand the strengths and weaknesses of the existing regulatory framework, and how it is practically enforced by councils.

The survey generated over 35 responses from MBSs representing a significant proportion of Victoria's 79 municipal councils. The survey results provided invaluable data and insight allowing DELWP to identify critical issues that the proposed regulations aim to address.

The survey also highlighted that the resources and capabilities of councils can vary dramatically. For this reason, DELWP has also sought to engage directly with individual councils to understand their challenges and concerns. Consultants engaged by DELWP to prepare a cost-benefit analysis of the options discussed in the RIS held meetings with representatives from 10 different councils from across Victoria.

These councils were approached after discussions with the MAV to ensure that DELWP received input from councils across the state, including metro, peri-urban and rural and regional Victoria. Information from these meetings was significant in the development of the consultant's cost-benefit analysis. In addition to this formal engagement, several councils reached out regarding the proposed scheme and DELWP organised meetings to listen to their specific viewpoints.

The thorough engagement with local government stakeholders has yielded critical information that assisted policy development and the preparation of the RIS, specifically in relation to:

- Resourcing and time constraints are major challenges for the effective enforcement of the existing regulatory requirements;
- Components of safety barriers generally begin to wear out after three to four years;
- Most councils already have some form of register or database to record pools, but only a small minority believed that it was comprehensive; and
- That even for those councils with existing registers some upgrades to their existing systems would be required.

In general, local government stakeholders are broadly supportive of the intent behind the new requirements as they recognise that many aspects will directly address their concerns regarding the constraints and limitations of the current requirements. Some MBSs have raised concerns regarding the costs to councils of administering the new requirements and, to a lesser extent, the proposed timeframes applicable to registration and certification of existing swimming pools and spas. Consultation questions on these matters are set out in the RIS.

### *Water safety and child safety organisations*

DELWP have also undertaken significant consultation with stakeholders focused on child safety and safety around water. The two key stakeholders from this space that DELWP engaged with were LSV and Kidsafe Australia. Both organisations have strongly advocated for Government action to address incidences of young children drowning in private swimming pools. DELWP also presented to the Victorian Swimming Pool & Spa Safety Committee (chaired by LSV) whose membership is comprised of Government and non-Government stakeholders.

Several key requirements in the proposed Regulations, such as mandatory registration and the ongoing inspection and certification of barriers were informed by the feedback provided by these stakeholders. DELWP has also drawn repeatedly on the data compiled by LSV to inform the policy development process.

These stakeholders strongly support the introduction of more stringent regulatory requirements aimed at reducing drowning incidents of young children. They have expressed support for principal features of the scheme.

### *Building, property and swimming pool industries*

DELWP has also sought to engage with a broad range of stakeholders from the building, property and swimming pool industries to ascertain how the proposed Regulations might impact them, and to source valuable data and information. Although seemingly disparate with regards to their areas of interest these stakeholders all expressed a strong interest in swimming pool safety.

The Swimming Pools and Spas Association of Victoria (SPASA Vic) represents the swimming pool industry in Victoria. It represents building practitioners working on pools and spas as well as retailers and other members of the industry. SPASA Vic was consulted during the preparation of the RIS and the proposed Regulations. SPASA Vic has provided valuable insights into the nature, direction and make-up of the industry and gathered data on DELWP's behalf to assist in the policy development.

DELWP also held discussions with SPASA Australia, particularly in regard to the proposed introduction of the new building inspector (pool safety) class of registration. SPASA Australia were interested in hearing about the proposed training requirements for the new class and assisted DELWP in understanding the training requirements in NSW and QLD.

The Building Regulations Advisory Committee (BRAC) is a regularly convened committee of building industry representatives that provide advice to the Minister for Planning on draft building regulations. The membership of BRAC represents a wide range of different groups, including building surveyors, builders, architects, local government and the emergency services. The members were given verbal briefings along with opportunities to review draft versions of the proposed Regulations as they were developed. Advice and feedback from BRAC members have been integrated into the proposed Regulations and RIS.

DELWP also met with representatives from the Australian Institute of Building Surveyors (AIBS) to discuss specific issues in relation to the new class of pool inspector. AIBS is the peak professional body representing building surveyors in Australia and has provided valuable feedback in relation to the appropriate qualifications and experience for the new class.

DELWP met with the Real Estate Institute of Victoria (REIV). REIV is the peak representative body for real estate practitioners in Victoria. REIV and DELWP had insightful discussions, particularly around the obligations on renters in relation to the pool safety barriers.

DELWP also discussed the proposed requirements with Strata Community Association Vic (SCA). SCA is the peak industry representative body for corporate and community title management in Australia and New Zealand. SCA was interested in hearing about the new obligations on owners of pools and spas and asked to be kept informed regarding the release of the RIS.

DELWP sought to engage with individual private pool owners but was unable to identify any representative group or individual that could credibly speak on their behalf. For that reason, DELWP is considering various options to maximise engagement and feedback from this group once the RIS is released for comment.

### *Government*

DELWP also consulted with relevant areas of Victorian Government. This included consultation with the Infringement Management and Enforcement Services area of the Department of Justice and Community Safety in relation to proposed infringement offences, and with the Criminal Law Reform team in respect of the offence, penalty and investigation power provisions.

DELWP also consulted with the VBA on several matters, including their views on the appropriate eligibility requirements for the new building inspector (pool safety) class, technical advice in relation to the various barrier standards and other technical regulatory issues.

Discussions were held with CAV regarding potential opportunities to link requirements under the proposed Regulations with disclosure provisions at the point of sale or lease of a property; the results of these discussions is discussed further under the forward work program in Chapter 10. DELWP also sought advice from CAV to understand how the new scheme's requirements would affect tenants under a residential tenancy agreement.

DELWP also met with the Victorian Residential Tenancies Commissioner who was interested in understanding the broad requirements of the scheme as well as their potential impacts on tenants more specifically.

Relevant information and data were also sought from the Coroners Court of Victoria and the Victorian Injury Surveillance Unit (VISU) at the Monash University Accident Research Centre. Their assistance was critical in contributing to DELWP's understanding of the nature and extent of the problem being targeted.

DELWP liaised with relevant Government authorities from WA, QLD and NSW to better understand the nature of their requirements relating to private swimming pools and spas, and associated barriers. These discussions informed both the options development as well as the analysis in this RIS.

This RIS provides a further opportunity for stakeholders to provide feedback to DELWP on the proposed Regulations. Stakeholders may wish to comment generally on whether they support the proposed Regulations, or if (and how) they consider other approaches would provide a better outcome. In addition, there are a number of specific questions included throughout the RIS to encourage feedback on certain matters.



## Appendix A Impacts on Competition

Any regulatory proposal needs to be scrutinised carefully to assess whether it is having an adverse impact on the ability of firms or individuals to enter and participate in the market. As a matter of good public policy, it is a fundamental principle in Victoria that any new legislation (both primary and subordinate) will not restrict competition unless it can be demonstrated that:

- the benefits of the restriction, as a whole, outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

A measure is likely to have an impact on competition if any of the questions in the table below can be answered in the affirmative.

**Table 27: Competition questions**

Test question	Assessment
Is the proposed measure likely to affect the market structure of the affected sector(s)—i.e. will it reduce the number of participants in the market, or increase the size of incumbent firms?	No
Will it be more difficult for new firms or individuals to enter the industry after the imposition of the proposed measure?	No
Will the costs/benefits associated with the proposed measure affect some firms or individuals substantially more than others (e.g. small firms, part-time participants in occupations etc)?	No
Will the proposed measure restrict the ability of businesses to choose the price, quality, range or location of their products?	Yes/minor
Will the proposed measure lead to higher ongoing costs for new entrants that existing firms do not have to meet?	No
Is the ability or incentive to innovate or develop new products or services likely to be affected by the proposed measure?	No

The cost of a pool or spa barrier represents a relatively small part on the initial costs and ongoing running costs of a pool or spa. The proposal is unlikely to affect the overall market structure of the pool and spa sectors and will not provide any advantages to incumbent businesses. Nor will it be more difficult for new firms or individuals to enter the industry after the imposition of the proposed measure. In this respect, it is worth highlighting that the pool and spa barrier standards are not changing themselves; however, the proposed regulations will enhance compliance and inspections.

Prescriptive elements of the proposed measure may restrict the ability of businesses to choose the price, quality, range or location of their products. In part, this prescriptive element reflects the primacy of health and safety associated with the regulations. If any such restrictions exist, it is assessed that these are necessary to achieve the objectives of the proposed regulations.

## Appendix B Cost Assumptions

The following assumptions were used to estimate the costs and benefits of the proposed Regulations.

**Table 28: Modelling assumptions—costs**

Assumption	Assumed figure	Source/basis
Number of private swimming pools in 2019	220,000	Interpolation of ABS estimate <sup>154</sup> , Roy Morgan Research Institute survey <sup>155</sup> , and ABS data on number of households and population. <sup>156</sup> Updated for 2019 estimates. This includes both permanent pools and spas (e.g., 'in ground' pools) and relocatable pools that would be considered 'structures' under the Building Act.
Number of new swimming pools each year for next 10 years	3,025	Based on average trend growth from above estimates
Number of property sales with a swimming pool per annum	11,160	Based on assumed proportion of properties with pool from above, and DELWP data on number of residential property sales. <sup>157</sup>
Number of leases with a swimming pool per annum	10,000	Based on data on new leases from RTB, and the above proportions of properties with pools. Figure was then reduced by around 50% to account for rental properties more likely to be properties without a pool compared to overall average.
<b>Costs to pool owners</b>		
Time to apply for registration of a pool	12 minutes	RIS estimate based on desktop exercise of completing an online form
Time for owner to locate information on date of construction (undertaken by 20% of applicants)	30 minutes	RIS estimate
Time for owner to lodge a certificate	12 minutes	RIS estimate based on desktop exercise of uploading a document to a council portal
Time for owner to provide information to new buyer/tenant	5 minutes	RIS estimate based on desktop exercise of including a certificate with other sale documents, or with tenancy agreement.
Time for owner to notify council of purchase of property with pool	12 minutes	RIS estimate based on desktop exercise of submitting information to councils
Value of owners' time	\$18.93 per hour	This is the current National Minimum Wage and is used as a proxy for the marginal value of leisure time (owners' compliance activities displace leisure time, not work time)

<sup>154</sup> ABS <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4602.2Chapter400October%202011>

<sup>155</sup> Roy Morgan Research Institute, <http://www.roymorgan.com/findings/7811-australian-swimming-pool-ownership-september-2018-201811230555>

<sup>156</sup> ABS 2016 Census.

<sup>157</sup> A Guide to Property Values—Annual data and analysis from Valuer-General Victoria 2017 (published 2018).

Assumption	Assumed figure	Source/basis
Cost (price) of pool barrier inspections	\$200	This is an upper estimate. The average pay for a building surveyor in Melbourne in 2019 is around \$30 per hour (80% earn between \$18 per hour and \$57 per hour). <sup>158</sup> However, the price of inspections in other states has ranged between \$100 and \$200. <sup>159</sup> This likely also reflects business costs such as travel between inspections, insurances, etc. An upper estimate has been used to allow for the likelihood that the price of engaging a building surveyor may increase due to the increase in demand for these services, and/or to reflect the additional costs to industry of new people specifically authorised to undertake pool barrier inspections to enter the market.
Percentage of pool inspections that will be found to be non-compliant on first inspection	50%	This is an interpolation based on a recent survey of council views on compliance and the experience of other states which have implemented inspection programs, and additional consultation with a sample of councils in the preparation of this report.
Cost of rectification if found to be non-compliant	\$500	Average estimated cost, based on discussions with councils about existing cases of non-compliance. Costs may range from relatively minor repairs or changes that are relatively costless, through to entire replacement of barrier (with the latter being relatively rare). This includes the costs of relevant building permits if required to undertake the rectification work.
Cost to pool owner of appealing council's determination of date of construction	\$1,500	Includes time to appeal, potential legal advice.
<b>Costs to councils</b>		
Cost to establish new register	\$15,000 per council	This is an average figure based on feedback from a sample of councils consulted for this report. Estimates varied from \$2,000 up to \$800,000, depending on how easily a new register could be integrated into existing systems. It is likely that once the specific regulations are made, councils will have a clearer understanding of the changes required.
Informing residents about need to register	\$6,000 per council	This is an average figure based on discussions with a sample of councils for this report. One council indicated a cost of \$170,000 to write to all residents with detailed information, with most other councils indicated only a general information campaign would be undertaken (e.g., in regular council newsletters with further information on websites). Note that informing residents of the need to register is not a mandatory requirement of the Building Act or proposed Regulations, but it is likely that most councils will take some action.

<sup>158</sup> [https://www.payscale.com/research/AU/Job=Building\\_Surveyor/Salary/c2d81f2b/Melbourne](https://www.payscale.com/research/AU/Job=Building_Surveyor/Salary/c2d81f2b/Melbourne)

<sup>159</sup> Some of this price is profit, which is strictly not a cost to the community as a whole, but a transfer.

Assumption	Assumed figure	Source/basis
Cost of adding pools to the register	\$2 per pool	Based on discussions with a sample of councils. Most systems will allow for online registration applications, which will add the pool to the register automatically subject to some checking by council staff.
Cost of determining date of construction/determine applicable barrier standard	\$3 per pool	Based on discussions with a sample of councils. Average time within a broad range. For the majority of pools, councils expect to have records to determine the date of construction, and the registration application would allow this to be automatically linked to relevant permit information. For some others, additional searches for information may be required (e.g., cross-reference sales ads or historical aerial photographs)
Cost to councils of sending notice of registration information to owners (upon registration or change in ownership)	\$3 per pool	Based on discussions with a sample of councils for this report. This would be largely automated.
Cost to councils of responding to an appeal against the determination of date of construction	\$3,000	Based on discussions with a sample of councils for this report. While not known at this time, it is assumed that disputes would occur in less than 1% of cases.

## Benefits

The benefits of the proposed Regulations are essentially ‘avoided costs’, i.e., preventing death and injuries. We have applied accepted methodology to consider the benefits of reduced drownings of children in pools.

There is no way to place a monetary value on the loss of a loved one. Each person is a unique, precious individual and cannot be replaced. However, for public policy purposes the value of a ‘statistical life’ can serve a useful purpose to help in assessing government policies.

A ‘value of a statistical life’ (VSL) refers to the benefits derived from reducing risk of a death that is experienced by a population. The term ‘statistical’ is used to describe an ex-ante, anonymous individual, and the concept does not imply that an individual life is a market good.

Valuing a statistical life is a way of formalising and understanding implicit trade-offs. In a policy context, scarce resources must be allocated across a wide variety of issues, and a value for a statistical life is a useful tool for comparing different types of benefits and costs in order to produce better outcomes for society. Trade-offs may include a choice between two initiatives with varying safety implications; a project that saves a life versus a project that produces environmental benefits; or a regulation that saves lives versus improving travel times.

OCBR provides guidance about the VSL for RIS purposes. To the extent that providing a default VSL promotes use of a consistent value across all regulatory proposals, it allows:

- regulatory proposals to be dealt with consistently across a range of issues
- the total costs and benefits of different proposals to be compared
- more time to be devoted in RIS/LIA analysis on the expected *number of lives saved*, rather than the value of a life.

The Commonwealth Office of Best Practice Regulation has published guidance on the VSL.<sup>160</sup> The guidance is based on work done by Abelson in 2007.<sup>161</sup>

<sup>160</sup> [https://www.pmc.gov.au/sites/default/files/publications/Value\\_of\\_Statistical\\_Life\\_guidance\\_note.pdf](https://www.pmc.gov.au/sites/default/files/publications/Value_of_Statistical_Life_guidance_note.pdf)

<sup>161</sup> [https://www.dpmc.gov.au/sites/default/files/publications/Working\\_paper\\_2\\_Peter\\_Abelson.pdf](https://www.dpmc.gov.au/sites/default/files/publications/Working_paper_2_Peter_Abelson.pdf).

The estimated value of a statistical life year is \$199,892—based on Abelson’s work, indexed to 2019 dollars.

For this CBA, it is noted that the lives intended to be saved are not an ‘average’ person (typically modelled with a missed life expectancy of a further 40 years), but children aged zero to five years. Hence, the number of additional years a child might be expected to enjoy would be a further 77 years (on average, based on life expectancy of a child born in 2019 of 82.5 years). Using a discount rate of 3%, this give a net present VSL of \$5.98 million.

It is stressed that this estimate is a statistical tool only, and does not reflect many other impacts associated with loss of life, particularly for the individuals most directly affected. The literature acknowledges that avoiding particularly painful or traumatic deaths would be expected to have a higher value. The estimate gives no weight to how a death may affect the emotional wellbeing of others—the death of a child is likely to be devastating for parents and family and also impact on emergency and medical workers involved.

## Appendix C Applicable barrier standards

DELWP has made a policy decision not to require pool owners to retrospectively upgrade their safety barriers. For that reason, there is a range of different barrier standards that apply to Victoria pools depending on the date of construction. These are listed below. As can be seen, although there are several dates that may apply, the Australian Standard remains the same.

As part of the implementation of the proposed Regulations DELWP will work with key stakeholders to develop guidance material to assist councils and pool owners in determining the date of construction and as a result, the applicable barrier standard.

In addition, DELWP will work with the VBA to develop technical guidance material to assist inspectors in carrying out their technical assessments in accordance with the applicable barrier standard.

**Table 29: List of possible barrier standards depending on the date of construction**

Date of swimming pool or spa construction	Applicable barrier standard
Before 8 April 1991	Part 2, Division 1 of the Building Regulations 2018
8 April 1991 to 30 June 1994	AS1926.1-1986 Amendment 1—March 1987
1 July 1994 to 31 June 1997	AS1926.1-1993
1 July 1997 to 30 June 1999	AS1926.1-1993 or If a Performance Solution, Performance Requirement P2.5.3 of BCA Volume Two
1 July 1999 to 30 June 2000	AS1926.1-1993 or If a Performance Solution, Performance Requirement P2.5.3 of BCA Volume Two Amendment 5
1 July 2000 to 30 April 2004	AS1926.1-1993 Amendment 1 – June 2000 or If a Performance Solution, Performance Requirement P2.5.3 of BCA Volume Two, Amendment 7
1 May 2004 to 30 April 2010	AS1926.1-1993 Amendment 1 or If a Performance Solution, Performance Requirement P2.5.3 of BCA Volume Two
1 May 2010 to 30 April 2013	AS1926.1-2007 Amendment 1 or if a Performance Solution section P2.5.3 Swimming Pool access of BCA Volume 2
After 1 May 2013	AS1926.1-2012 or if a Performance Solution P2.5.3 Swimming pool access as issued, published or remade from time to time;

