

# NSW Government Response to the Independent Review of Swimming Pool Regulation

Office of Local Government

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November 2016

## Executive Summary

The NSW Government is committed to the safety of young children in and around backyard swimming pools in NSW.

In 2015, the NSW Government commissioned an independent review by Mr Michael Lambert into the effectiveness of the swimming pool barrier regulatory framework.

The Better Regulation Statement on the recommendations of the Independent Review of Swimming Pool Regulation Final Report highlights significant cost and the fact that the full extent of recent regulatory reform benefits is still being realised. Following consideration of this, the NSW Government supports 46 of the Report's 62 recommendations in full (15), part (17) or in principle (14).

The NSW Government Response seeks to minimise drowning risks for children around backyard pools on two fronts:

1. Vigilant and responsible adult supervision of young children in and around backyard pools at all times is the first line of defence. This will be supported by increased targeted education.
2. A stronger regulatory framework for swimming pool barriers that minimises the risk of child drownings while not imposing a significant net cost on the community.

### Better Regulation Statement

The Cost Benefit Analysis (CBA) was undertaken by the Centre for International Economics to support the Better Regulation Statement (BRS) of the recommendations in the Final Report. It said many recommendations would not be an effective or proportionate means of improving child safety compared to the significant costs placed on pool owners (\$1,092 million), with limited value in improved community safety (\$272 million). Increased public education will be more effective in improving safety.

***Although the recommendations could be expected to deliver some safety benefits, these benefits are far outweighed by the significant associated costs. These costs would be mostly borne by pool owners.***

## The Way Forward

The NSW Government recognises the challenges for pool owners to comply with a complex swimming pool barrier standards framework and for councils to enforce it. The Government is committed to providing easy-to-understand guidance for swimming pool owners that will assist them in meeting their obligation to make their pool compliant. The Government will also provide guidance material for private and council certifiers on their legislative and regulatory responsibilities.

The Government will continue to explore options for a simplified framework consistent with the Better Regulation Principles.

The Government will continue to partner with water safety stakeholders to promote water and swimming pool safety awareness to the community.

Key measures to be delivered by the NSW Government include:

- An enhanced public communications safety campaign to support responsible and vigilant adult supervision of children in and around backyard pools. This campaign would emphasise that supervision is the first barrier and pool fences are a secondary barrier for when supervision inadvertently lapses.
- Development of options to simplify the standards framework that minimise net costs on the community.
- An easy-to-understand user guide for swimming pool owners, and guidance material on legislative and regulatory responsibilities for private and council certifiers.
- Support for a review of the swimming pool barrier certification framework arising from the recommendations of the statutory review of the *Building Professionals Act 2005*.
- Implementation of minor regulatory changes to support previous Government reform initiatives.

## Government Response - Summary

### 1. POOL SAFETY STANDARDS

A key issue informing the NSW Government's decision to commission the independent review was to examine the complexity of the regulatory framework, including different barrier standards applying to different pools and issues with access to, and interpretation of, the various standards.

**The Final Report made a number of recommendations to support transition to the latest Australian Standard for swimming pool barriers as a single standard and to make pool barrier standards more accessible.**

The CBA clearly indicated that any safety improvement arising from transitioning to the latest Australian Standard for swimming pool barriers as a single standard is likely to be marginal, while the upgrade cost for some pool owners is potentially significant (estimated at \$2,000 - \$5,000 depending on the applicable standard).

*The estimated impact on NSW pool owners of moving to a single standard would be \$201 million*

**The NSW Government will explore options to improve and simplify pool safety standards within the regulatory framework for swimming pool barriers and make them more accessible. However, further consultation and analysis is required to ensure the appropriate balance is achieved.**

### 2 EXEMPTIONS FROM POOL BARRIER STANDARDS

Automatic barrier exemptions from the four-sided barrier requirement (applying to pools on large properties of two hectares or more, small properties less than 230 square metres and waterfront properties) were removed for pools constructed from 1 July 2010 as part of the 2009 review of the *Swimming Pools Act 1992*. Pools on these types of properties built prior to this have an automatic exemption, allowing use of lockable doors and windows as part of the barrier.

Pool owners can apply to their local council for a site-specific exemption to the applicable pool barrier standard under section 22 of the Act if they believe that the barrier requirements are impractical or unreasonable and the alternative barrier proposed is no less effective in restricting access to the swimming pool.

**The Final Report made recommendations to remove automatic exemptions for pools on large, very small and waterfront properties constructed prior to 1 July 2010 and to provide greater guidance on pool-specific exemptions.**

The CBA estimates the average cost of removing exemptions for pools on these properties constructed prior to 1 July 2010 to the applicable standard is \$2,500. This cost would increase significantly when combined with a move to a single standard for pool barriers.

**The estimated average cost to upgrade an exempt pool to the current standard is \$5,000 for properties smaller than 230sqm and larger than 2ha. Owners of waterfront properties would incur on average \$20,000 to upgrade their pool. The estimated net cost to remove current exemptions and move to one applicable standard is \$460 million.**

**The NSW Government recognises that the number of pools with automatic exemptions will decrease over time as pools deteriorate and are removed, or undergo major renovations, triggering an upgrade to the latest standard. Guidance to pool owners on specific exemptions will be considered in the context of examining options for simplifying the standards framework.**

### **3. TREATMENT OF PORTABLE POOLS**

According to the NSW Child Death Review Team, around 20 per cent of all drowning deaths of children under five between 2007 and 2014 occurred in portable pools. All of these pools were unfenced.

In NSW, portable pools are captured by the definition for a swimming pool in the *Swimming Pools Act 1992* if they are capable of being filled to more than 300mm and are used for swimming or other human aquatic activity. They are subject to the same requirements for a compliant pool barrier and registration on the NSW Swimming Pool Register.

**The Final Report has recommended inspection and certification of barriers for portable pools, retail outlet staffing education, signage and other community education and awareness measures.**

**Given the impracticalities associated with portable pools, the NSW Government considers that the best approach to addressing this issue remains community and consumer education.**

### **4. SWIMMING POOL REGISTER**

The NSW Government introduced the Swimming Pool Register as part of the 2012 swimming pool amendments. The primary purpose is to record information on

existing backyard pools in NSW, and to assist councils to carry out their inspection and enforcement responsibilities.

**The Final Report has recommended that resources be committed to substantially upgrading the register, removing self-assessment and expanding its compliance capabilities.**

**The NSW Government will look at ways to improve the Swimming Pools Register's data capture to assist with informing future policy decisions.**

**In particular, the Government supports the continued use of the Register to encourage owners to self-assess their pools to emphasise their responsibility to maintain a compliant pool barrier.**

## **5. THE ROLE, FUNCTIONS, TRAINING, ACCREDITATION, ACCOUNTABILITY AND FEES FOR POOL CERTIFICATION**

**The Final Report has made recommendations concerning certifiers, accreditation and training.**

A number of recommendations have already been addressed through recent changes to the regulatory framework for building professionals, which introduced continuing professional development for E1 certifiers and allowed certain qualified E1 certifiers to make minor repairs up to the value of \$1,000.

Further, a new 'Building and Development Certifiers Bill' will be released for public and industry consultation in early 2017, with reforms focussing on:

- clarifying a certifier's role and responsibilities;
- enabling better oversight of certifiers through improved complaints handling procedures and mechanisms to facilitate pro-active risk-based audits;
- introducing new requirements around the independence of certifiers;
- providing powers to recognise industry accreditation schemes for certifiers;
- introducing new requirements around data collection and reporting to improve ongoing oversight of system performance and improvement over time; and
- supporting the integrated planning and building approvals framework currently in place in NSW.

The re-write of the *Building Professionals Act 2005* (the BP Act) will review the training and accreditation requirements for certifiers, including continuing professional development requirements. It will not include any changes to existing mutual recognition arrangements, which are national and trans-Tasman frameworks that are established under Commonwealth law, not the BP Act.

**The NSW Government will continue to address recommendations relating to private certifiers as part of a wider commitment to enhance certifier accreditation by re-writing the *Building Professionals Act 2005*.**

## **6. INSPECTION AND CERTIFICATION REQUIREMENTS**

**The Final Report made recommendations in relation to properties for sale or lease as well as for four-yearly mandatory inspections of all pools.**

**The Government implemented the sale and lease recommendations on 29 April 2016, with further amendments enabling the vendor to pass on to the purchaser the obligation to make the pool barrier compliant 90 days of the settlement date.**

**The Government does not support a four yearly mandatory inspection regime, noting that the CBA does not support this. Mandatory inspections for high-risk properties, such as tourist and visitor accommodation and multi-occupancy dwellings, as well as properties subject to sale or lease, were introduced as part of the 2012 amendments.**

**There is not a strong case for mandatory four-year inspections for all private swimming pools when comparing the likely safety benefits to the increased cost to the community.**

## **7. COMPLIANCE AND ENFORCEMENT**

**The Final Report recommended improved compliance and enforcement processes, including a review of penalties.**

Local councils have a mandatory inspection program. They also have the opportunity, after consulting with their community, to introduce an inspection program over and above their mandatory obligation. Local councils also have an enforcement role and have the authority to impose fines on pool owners who fail to comply with the requirement to make their pool barrier compliant.

**The Government will further examine an increase in penalties as a way of positively influencing behaviour and attitudes towards compliance.**

## **8. INFORMATION, RESEARCH AND EDUCATION**

**The Final Report has made recommendations in relation to information, research and education.**

The Government recognises that responsible and vigilant adult supervision of young children around swimming pools is the primary defence against child drownings and

near-drownings. This is supported by data showing that drowning incidents occur when there are momentary lapses in supervision.

**The Government will resource increased and targeted education, focusing on vigilant and responsible adult supervision of young children in and around backyard pools at all times. This material will reinforce key safety messages and positively influence behaviour.**

**The Government will continue to work with Royal Life Saving Society of NSW to provide public education awareness campaigns as it has done in the past, such as with the implementation of sale and lease provisions on 29 April 2016.**

#### **9. GOVERNANCE ARRANGEMENTS**

**The Final Report has made recommendations concerning portfolio responsibility for the *Swimming Pools Act 1992* and its revision.**

**The Government will ensure the Office of Local Government will actively work with other agencies as part of the ongoing commitment to ensure an appropriate pool barrier regulatory framework. Any changes in responsibility for the *Swimming Pools Act 1992* will be considered during this process.**

#### **10. RESOURCING AND FUNDING**

**The Final Report has made recommendations concerning resourcing and funding, including to provide more funding flexibility to councils.**

There is now a competitive market for swimming pool certification services and consumers may choose between council or private certifiers based on price or other factors.

**The NSW Government will modify the cap on fees to allow councils to charge \$100 for subsequent inspections, as required. This will assist councils with their regulatory responsibilities while ensuring pricing for pool owners remains competitive.**

**The NSW Government's Response to the Independent Review of Swimming Pool Regulation individual recommendations is outlined below:**

| Rec No.                        | Recommendation   | Response   |
|--------------------------------|--|--|
| <b>1. Pool Safety Standard</b> |  |  |
| a                              | Maintain use of the national swimming pool barrier standard, though reserving the right to make variations to it (where it is considered that these variations will enhance effective and efficient pool safety) and determine when to update to the latest version of the standard  | <b>Supported</b> – While the Government endeavours to maintain national uniformity wherever possible, the Government can already make NSW specific variations to the national standard through the BCA.  |
| b                              | NSW to take an active ongoing role in the setting and review of pool barrier standards and to actively engage in seeking to clarify the identified interpretation issues with the current barrier standard in NSW. Once clarified, phase the standard in over a suitable transition period as the single barrier standard, with common legislative and regulatory provisions to apply to all pools | <b>Supported in Principle</b> – The Government recognises that there are complexities associated with the pool barrier standards framework and is working to determine the most appropriate way of addressing these issues.<br><br>The Government will continue to explore options to reduce complexity while not impacting child safety nor imposing a significant increase in regulatory burden. |
| c                              | Engage with other jurisdictions and Standards Australia to establish an interpretation service for matters in the standard judged to require clarification   | <b>Supported in Principle</b> – see recommendation 1d below.   |
| d                              | Establish a suitable forum in NSW, drawing upon the input of relevant stakeholders, to identify and assess matters in the standard requiring interpretation and create a coordinated NSW approach to the reviews of the standard   | <b>Supported</b> – The Building Regulator Committee will examine the establishment of a suitable forum   |
| e                              | Replace the current NSW representatives (BPB and Fair Trading) with a representative of the swimming pool regulator, which will also create a direct link to the proposed Pool Safety Council  | <b>Not Supported</b> – the NSW Government has decided to merge the functions of NSW Fair Trading and the BPB into a single building regulator: the Building and Construction Services (BCS), which will continue to have input, given their regulatory responsibilities.   |
| f                              | Note that as a general principle, Australian Standards, which are a regulatory requirement, should be fully accessible at no cost. Noting the current copyright arrangements, negotiate with SAI Global and Standards Australia, involving other   | <b>Supported in Part</b> – the NSW Government will work on options to ensure home owners have better access information and guidance about how to meet their obligations without needing to buy the Standard.  |

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|  | jurisdictions, on an industry access arrangement for reasonable terms to the swimming pool standard   |   |
| g  | As a priority, develop an explanation of the pool safety requirements directed at pool owners and the general public  | <b>Supported</b> –1f, the NSW Government will work on options to ensure home owners have better access to information and guidance about how to meet their obligations.   |
| h  | In consultation with Fair Trading and the industry, seek to establish a requirement for pool barrier builders and installers to have the necessary training and knowledge to install pool barriers in conformity with the standard.   | <b>Supported in part</b> – Existing policy settings already achieve this. Pool barrier builders and installers are already regulated by the <i>Home Building Act 1989</i> , which includes licensing and qualification requirements, or by the Australian Consumer Law, which imposes obligations on traders that they must do work with due care and skill. Both laws provide remedies for consumers if the trader fails to provide suitable goods and services in accordance with statutory warranties or consumer guarantees under these laws. |
| i  | Clarity should be provided about the need for a suitable protective barrier during construction of a pool. Clarity should also be provided for a temporary pool barrier conforming to the pool barrier standards where a pool area is being renovated with the existing fence removed   | <b>Supported in part</b> – Under the Work Health and Safety Act 2011, a person conducting a business or undertaking must manage risks associated with the carrying out of construction work, including securing the site from unauthorised access. They are also subject to general obligations to identify and manage risks to health and safety. The NSW Government will consider options to ensure these obligations are understood by contractors working on pool installations and renovations.  |
| j  | Progress with the ABCB and the Building Ministers’ Forum establishing a process whereby pool barrier material that meets the fit for purpose requirements of the standard is certified and stamped to evidence this   | <b>For further consideration</b> – The ABCB’s building product certification scheme, ‘CodeMark’, has recently been reviewed. Changes to the scheme, as a result of the review, are currently being finalised. The NSW Government will consider opportunities to encourage industry take up of certification of product meeting pool barrier standards in the context of reform of the CodeMark scheme   |
| <b>2. Exemptions from pool barrier standards</b> |   |   |
| a  | All legislative exemptions should be removed and owners required to adopt the current standard within a suitable transition period of three to five years, or at the time of sale or lease, whichever occurs first; owners should otherwise obtain an exemption under section 22 of the | <b>Not Supported</b> – the Government has already addressed this issue as part of the 2009 review of the <i>Swimming Pools Act 1992</i> .   |

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|  | <i>Swimming Pools Act 1992</i>   |   |
| b  | Greater guidance should be given to councils in the application of the Section 22 exemption provision under the Swimming Pools Act, based on the principle that where an exemption is assessed to apply, an alternative solution should be developed that provides an appropriate level of pool safety   | <b>Supported – The NSW Government will consider guidance in the context of examining options for simplifying the standard framework</b>   |
| <b>3. Treatment of portable pools and spas</b> |  |   |
| a  | The SEPP (Exempt and Complying Development Codes) 2008 should be amended such that portable pools handled under the SEPP should be a requirement that portable pool fencing is inspected and certified and the pool is registered before use   | <b>Not Supported – portable pools are captured by the <i>Swimming Pools Act 1992</i> and therefore are already required to be fenced and registered.</b>  |
| b  | Require retail outlets for portable pools to have staff available to advise customers wishing to purchase a portable pool to sign an acknowledgement of their understanding and commitment to the requirements of pool safety and have the pool registered on the swimming pool register at the time of sale, so facilitating inspection by the relevant council | <b>Not Supported – the obligation to register the pool and install a compliant barrier rests with the pool owner. There are also practical issues around enforcement and concerns regarding the cost placed on retailers to train staff on the regulatory requirements..</b>                        |
| c  | Explore with eBay and other on line retailers requiring online sales of portable pools to provide information to purchasers on their obligations and register the pool on the swimming pool register   | <b>Support in Principle – It is important consumers understand the safety risks associated with portable pools and young children. The NSW Government will further explore ways to ensure consumers receive appropriate information about these risks and their obligations when owning a pool.</b> |
| d  | Include programs specific reference to the obligations associated with portable pools in community education   | <b>Supported – the risks of portable pools are already included in community education.</b>   |
| e  | Address the gap in the requirement in the Australian Consumer Law for a large warning sign on the bottom of each portable swimming pool that sets out the legal requirements clearly, covering rigid sided pools holding more than 300mm   | <b>Support in Principle – as the relevant standard was developed by the Australian Competition and Consumer Commission and has national application, this issue would need to be considered concurrently with other state and territory jurisdictions.</b>  |
| f  | Seek to clarify with BCA and Standards Australia the definition of   | <b>Supported – noted.</b>   |

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|  | a spa, to ensure there is a clear distinction between a spa and a pool to justify the different barrier requirements  |   |
| <b>4. Swimming pool register</b>   |   |   |
| a  | The NSW Government should commit resources to substantially upgrade the swimming pool register, working closely with councils and the Pool Safety Council (see recommendation 9.c) on its design and development, ensuring that all relevant information is recorded on the register; removal of self-assessment provision; limiting the parties that can input to the register to maintain its integrity; substantially expanding its reporting capability; and making it a mechanism for communicating with pool owners | <b>Supported in Part</b> – the Government has begun exploring opportunities to improve the recording of information to assist in policy decisions. The NSW Government will also continue to explore how the Swimming Pools Register can be utilised to provide information of swimming pool safety to swimming pool owners. |
| b  | Require that all new pools must be issued with a compliance certificate rather than occupation certificate to facilitate recording of compliance information on the register  | <b>Supported in principle</b> –An occupation certificate serves the same purpose as a certificate of compliance under the Act. The Swimming Pool Register will be updated to include the recording of the Occupation Certificate.   |
| c  | Change the compliance certificate to clearly distinguish it from the registration certificate and record on it the standard against which the pool was assessed   | <b>Supported in Part</b> – recording of the relevant standard will be added to the certificate.   |
| <b>5. The role, functions, training, accreditation, accountability and fees for pool certification</b> |   |   |
| a  | Allow council and accredited private certifiers with the necessary skills to undertake minor repairs to pools that have elements of non-compliance and are capable of relatively easy rectification. What constitutes minor repairs should be clearly set out in regulation and be subject to the certifier having the prerequisite skills and experience to undertake the work   | <b>Supported</b> – this measure has been implemented.   |

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| b    | Require council and accredited private certifiers to document each of their inspections and assessments with timed and dated photographs and supporting notes. These must be permanently maintained and fit for review as part of an audit program                              | <b>Supported in Principle</b> – inspection and record keeping obligations of certifiers will be considered as part of the re-write of the <i>Building Professionals Act 2005</i> . This work will be led by the Department of Finance, Services and Innovation (DFSI), and will be overseen by the Building Regulators Committee. |
| c    | Subject to consultation with the Crown Solicitor, develop a process that requires that those applying for E1 accreditation demonstrate the necessary knowledge and understanding of the NSW swimming pool standards and regulatory approach or undertake the necessary training | <b>Supported</b> –<br>The NSW Government has put in place continuous professional development requirements for E1 accredited certifiers to undertake training from their second year onwards.   |
| d    | Require as a condition of accreditation that E1 pool certifiers undertake a required number of hours each year of relevant Continuing Professional Development  | <b>Supported</b> – Already implemented. CPD requirements for certifiers may be further considered as part of the re-write of the <i>Building Professionals Act 2005</i> . This work will be led by DFSI, and will be overseen by the Building Regulators Committee.   |
| e    | Require all council pool inspectors and A1 to A3 certifiers who wish to undertake pool certification work to demonstrate the required knowledge or undertake the E1 course and be accredited as E1 certifiers   | <b>For further consideration</b> – qualification requirements for certifiers will be considered as part of the re-write of the <i>Building Professionals Act 2005</i> . This work will be led by DFSI, and will be overseen by the Building Regulators Committee.   |
| f    | Broaden the entry requirements for the E1 course along the lines of the approach undertaken in Queensland, but with the specification of possible pre-requisite training or knowledge to address any additional skills and knowledge that are considered essential              | <b>For further consideration</b> – qualification requirements for certifiers will be considered as part of the re-write of the <i>Building Professionals Act 2005</i> . This work will be led by DFSI, and will be overseen by the Building Regulators Committee.   |
| g    | Have the E1 course submitted for national recognition and oversight by the ASQA, after a full review of the course criteria in light of the experience of the course over the last year   | <b>Not Supported</b> – Swimming pool regulation is specific to NSW context.   |
| h    | A program of support and advice should be developed and implemented for E1 certifiers involving the following elements:   | <b>Support in Principle</b> – further support and guidance will be developed in the context of examining options for simplifying the standard framework.  |
| h.i. | A hot line to provide over the phone advice   |   |
| h.ii | Peer review service where a complex   |   |

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|       | issue requires expert input  |   |
| h.iii | Practice guide (see 5.i below)   |   |
| h.iv  | Linkage of the Continuing Professional Development and practice guide to the learnings generated from the audit program (the audit program is addressed in the following section)  |   |
| i     | The development and active maintenance of a practice guide for certifiers. The guide will have the force of law in terms of the approach undertaken by certifiers, setting out the approach to be followed and clearly identifying the requirements with respect to standards, legislation and regulation that applies to each pool vintage category | <b>Supported in part</b> – DFSI will finalise and issue a Practice Guide for certifiers consistent with the outcomes of the review of the <i>Building Professionals Act 2005</i> . The Practice Guide will be issued as administrative guidance.  |
| j     | The development of a guide on pool safety requirements and the obligations (including role and responsibilities) of pool owners and users  | <b>Supported</b> – as per recommendation 1f, the NSW Government will work on options to ensure home owners have better access information and guidance about how to meet their obligations  |
| k     | Regular communication with pool owners (through a revamped swimming pool register) regarding their role and responsibilities, pool safety requirements and the role of pool certifiers   | <b>Supported in Principle</b> –the Government supports improved communication but the swimming pool register is not the appropriate mechanism.  |
| l     | The development of a standard letter of engagement to be entered into between pool owners and pool certifiers which clearly sets out the roles and responsibilities of pool owners and certifiers. It should also include the measures to ensure that certifiers execute their responsibilities for every project they work on                       | <b>For further consideration</b> - requirements that apply to contracts with certifiers will be considered as part of the re-write of the <i>Building Professionals Act 2005</i> . This work will be led by DFSI, and will be overseen by the Building Regulators Committee.              |
| m     | The establishment of an active audit program of pool certifiers to monitor and assess certifier performance. This will have linkage to certifier training, the practice guide and, if necessary, certifier disciplining  | <b>Supported in part</b> – arrangements for pro-active audits of certifiers will be considered as part of the re-write of the <i>Building Professionals Act 2005</i> . This work will be led by DFSI, and will be overseen by the Building Regulators Committee.                          |
| n     | Noting that a program of developing a culture and approach of professionalism for the certification industry in conjunction with the Professional Standards Authority and the two certifier associations,  | <b>Supported in part</b> – it is already open to the two certifier associations to apply to establish a Professional Standards Scheme. The re-write of the <i>Building Professionals Act 2005</i> will also include provision to recognise industry accreditation schemes. This work will |

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|   | Association of Accredited Certifiers and the Australian Institute of Building Surveyors, is proposed in the review of <i>Building Professionals Act 2005</i> , to apply across all certifier categories  | be led by DFSI, and will be overseen by the Building Regulators Committee.   |
| o   | Establish reasonable competitive neutrality between private certifiers and council pool inspectors by allowing councils to set their own pool inspection and certification charges, subject to the fees only being cost recovery and subject to normal practice of transparency by being set and published annually; they should be able to be reviewed by an external auditor to check that they are only cost recovery | <b>Supported in Part</b> – The NSW Government will modify the cap on Council fees to allow a charge of up to \$100 for each inspection after the second inspection. Consumers are free to choose between a council or private certifiers to inspect their backyard swimming pool..   |
| p   | The <i>Local Government Act 1993</i> should be amended to allow for charging of incurred unpaid fees, such as certification and inspection fees, as debts against the property and thus be able to recover the debt on sale of the property  | <b>Supported in Principle</b> – part of the broader Local Government Act review.   |
| <b>6. Inspection and certification requirements</b> |  |  |
| a   | Arrangements should be put in place in respect to residential sale transactions to enable, under certain conditions, the obligation to obtain a pool compliance certificate to transfer from the vendor to the purchaser, involving the following:   | <p><b>Support in Part</b> – Amended sale and lease provisions commenced 29 April 2016. Recommendation a.iv not supported, i supported in part.</p> <p>The NSW Government introduced changes to ensure that from 29 April 2016 properties sold with a pool must have either:</p> <ul style="list-style-type: none"> <li>•A certificate of compliance; or</li> <li>•A relevant occupation certificate and a certificate of registration; or</li> <li>•A certificate of non-compliance.</li> </ul> <p>When properties are purchased with a non-compliant pool, the new owner will have 90 days from settlement to fix any areas of non-compliance.</p> <p>From 29 April 2016, properties leased with a pool must have either:</p> <ul style="list-style-type: none"> <li>•A certificate of compliance; or</li> <li>•A relevant occupation certificate and a certificate of registration.</li> </ul> |

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|        |  | The NSW Government has been working with relevant stakeholders to ensure that these changes are actively adopted by all parties. |
| a.i.   | Vendor is required to obtain either a compliance certificate or a statement detailing the nature of the non-compliance and the options for how it can be made compliant, providing the purchaser with full information against which to assess the situation, including the likely cost involved in rectification, which can become part of the sale price and terms negotiation |  |
| a.ii.  | Vendor and purchaser to mutually agree on whether the vendor will make the pool compliant or the purchaser will take on the responsibility (in the case of an auction, all bidders would be provided with the non-compliance statement)  |  |
| a.iii. | If the purchaser takes on the responsibility, a copy of the non-compliance statement is provided to both the purchaser and the local council; the purchaser will provide to the council a statement of how long it will take to make the pool complaint and supporting details, with the period not to exceed three months   |  |
| a.iv.  | In the event council considers the time nominated by the purchaser excessive, it can seek to vary the period in discussion with the purchaser  |  |
| a.v.   | The council takes on a compliance role in ensuring the new owner achieves compliance within the designated time period   |  |
| b      | The sale and lease provisions commence, as planned on 29 April 2016, ideally with the arrangement set out in recommendation 6.a in place for sale transactions, with the decision to be announced as early as possible, ideally before Christmas 2015, and to be accompanied by a public awareness program   | Supported – sale and lease provisions commenced on 29 April 2016.  |
| c      | The following actions should be  | Supported in Part. c.1 & c.2 - supported in  |

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|                                      | taken in advance of the commencement of the sale and lease provisions:  | part, c.3 – not supported. C.4 - supported   |
| c.1.                                 | Amend the <i>Swimming Pools Act 1992</i> , the <i>Conveyancing Act 1919</i> and the <i>Property Stocks and Business Agents Act 2002</i> to allow, under defined conditions for vendors to transfer the obligation to the purchaser for achieving pool compliance within a defined period after sale and involving councils in a compliance function   | Amendments made to relevant Regulations only.  |
| c.2.                                 | Amendment to the <i>Conveyancing (Sale of Land) Regulation 2010</i> to provide an exemption in the Regulation with respect to providing a certificate of compliance in the case of off the plan marketing of residential developments involving a planned swimming pool and require a certificate of compliance and evidence of registration 14 days prior to the vendor being able to require completion | Regulation has been amended to exempt off-the-plan sales, but the occupation certificate already serves the same purpose as a certificate of compliance.   |
| c.3.                                 | Amendment to the <i>Swimming Pools Act 1992</i> to require owners' corporations to obtain and have available for owners wishing to sell a pool compliance certificate   | Properties with more than 2 lots (strata and community schemes) are exempt from sale and lease requirements as they are already subject to 3-yearly mandatory inspections.   |
| c.4.                                 | Activate a NSW Government and Local Government campaign informing the community and the property industry of the legislative requirements of the sale and lease provisions  | Complete.  |
| d                                    | Subject to a cost benefit assessment, a four yearly inspection program should be adopted, managed by councils and funded by a levy on the council rate of pool owners. Failing that, a more consistent, risk-based inspection program should be developed that applies across all councils and funded by a levy on pool owners (see recommendation 7.f)   | <p><b>Support in Part</b> – Government does not support the introduction of mandatory inspections. The 2012 review of the <i>Swimming Pools Act 1992</i> introduced 3-yearly inspections for high risk properties.</p> <p>Under the <i>Swimming Pools Act</i>, councils are required to establish a swimming pool inspection program, in consultation with their community. This allows councils to determine an appropriate inspection program that flexibly meets the needs and priorities of their community.</p> |
| <b>7. Compliance and enforcement</b> |   |  |

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| a | Private certifiers should be reminded of their obligations under Section 22E to provide both details of any non-compliance and options for how this can be rectified. Council pool inspectors should be directed to provide such information as part of any pool inspection that identifies non-compliance  | <b>Supported</b> – DFSI’s Building and Construction Service will ensure communications and guidance for accredited certifiers remind them of relevant obligations under the Swimming Pools Act, including section 22E.   |
| b | Require that a pool owner cannot remove a certifier where a pool has been found to be non-compliant for the three months non-compliance rectification period (see recommendation 7.3) without the approval of the BPB and require all certifiers to document on the pool registry their inspections, and if a pool is non-compliant and why   | <b>Support in Principle</b> – All certifiers are required to document every inspection on the swimming pool register and are encouraged to review the pool history on the register prior to attending a pool inspection as best practise.                        |
| c | Expand the period within which a private certifier seeks to achieve compliance from a maximum of six weeks to a maximum of three months, with the ability to extend further if the certifier attests that substantial progress is being made  | <b>Not Supported</b> – six weeks is sufficient.  |
| d | Require a certifier to follow up with the pool owner after assessing non-compliance to develop an action program to address this  | <b>Not supported</b> – Section 22E already requires that a notice of non-compliance include the reasons why the accredited certifier would not issue of a certificate of compliance and the steps that need to be taken in order to address the relevant issues. |
| e | Only involve the council once it is reasonably determined that the pool owner is not willing to address the non-compliance in a reasonable time frame   | <b>Supported</b> – DFSI and OLG will consider options to clarify when a certifier is obliged to immediately notify councils about “significant risk to public safety” in order to reduce unnecessary notifications.  |
| f | In the event that it is not decided to have a periodic inspection of all private swimming pools, then a more consistent, risk based inspection program be developed and undertaken by councils based on guidelines developed by the regulator in order to achieve a more consistent approach across all councils and provide greater coverage overtime of pools, noting that councils have the flexibility to have greater coverage of pools then set out in the base program | <b>Supported</b> – councils are already required to implement a mandatory 3-yearly inspection program of high risk properties.   |

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| g  | <p>A review should be undertaken of the current financial penalties, with a view to increase those penalties to reflect the serious nature of the offence and potential consequences that flow from such offences in terms of drownings and near drownings. Furthermore, it should explore imposing a penalty on non-compliant landlords and having a penalty structure that penalises for as long as the pool remains non-compliant</p> | <p><b>Supported in Principle</b> – the last review was in 2012..</p> <p>Penalties already exist for a range of offences under the Swimming Pools Act 1992, including:</p> <ul style="list-style-type: none"> <li>• Failure to have a child resistant barrier;</li> <li>• Failure to erect a warning sign;</li> <li>• Failure to register a swimming pool; and</li> <li>• Failure to comply with an order.</li> </ul> <p>Under the Swimming Pools Act, councils are required to establish a swimming pool inspection program, in consultation with their community. This allows councils to determine an appropriate inspection program that flexibly meets the needs and priorities of their community.</p>                             |
| h  | <p>The NSW Government should give consideration to the Coroner’s report recommendation to institute a criminal offence where a person dies as a result of negligence of a third party with respect to maintenance and safety features of a swimming pool</p>   | <p><b>Not Supported</b> - The enactment of a new criminal offence would criminalise a range of acts and omissions that are not currently an offence (including acts or omissions of parents whose momentary inattention results in the death or serious injury of a child). Heavy imprisonment sanctions imposed in such tragic (and currently non-criminal) situations would be punitive and add very little in the way of general or specific deterrence. Existing criminal offences are sufficient and appropriate in a range of circumstances where it is considered a criminal standard of negligence is present. The Office of Local Government will work with Department of Justice to review the civil penalties framework.</p> |
| i  | <p>A simple, affordable and timely appeal mechanism should be established for pool owners to appeal against decisions of councils and private certifiers in regard to pool certification, compliance and enforcement</p>   | <p><b>Support in part</b> – Where a pool owner disagrees with the professional conduct of a private certifier they have the ability to lodge a formal complaint to the Building Professionals Board (BPB). Decisions made by a council certifier on compliance and/or enforcement can be appealed through the council’s internal complaints procedure. Only Councils have enforcement responsibilities.</p>   |
| <p><b>8. Information, research and education</b></p> |  |   |
| a  | <p>It should be a requirement that all public and private hospitals and the</p>  | <p><b>Support in Principle</b> - NSW Health will work with the Office of Local Government to</p>  |

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|                                   | ambulance service are required to report to a central unit in the NSW Health Ministry; this information should be provided to the relevant local council as soon as it is received for the council to follow up and check for pool compliance and safety  | consider how the recommendations can be progressed.  |
| b                                 | The CTCPER/Kids Health annual review of non-fatal drownings of children should be extended to include information drawn from all public and private hospitals and the ambulance service   | <b>Support in Principle</b> –NSW Health will work with the Office of Local Government to consider how the recommendations can be progressed.   |
| c                                 | The swimming pool regulator should be required to produce an annual report on swimming pool compliance. It should detail, amongst other things, the number of pools registered; the number of pools that have been inspected within a defined period; the results in terms of compliance and the main defects identified; the number of pools with compliance certificates. IT should also assess the effectiveness of the compliance program and in what ways it could be improved | <b>Support in Part</b> – this requirement was part of the 2014 Child Death Review Team Annual Report recommendations and will be provided in the Office of Local Government’s Annual Report for 2016-2017. |
| d                                 | RLSS should be engaged as early as possible to develop (in conjunction with councils, health and safety organisations and the property industry) a program targeted to alert the public of the forthcoming commencement of the sale and lease provisions and what they mean for property owners with swimming pools. It should also serve to reinforce the key pool safety messages in the period leading into summer   | <b>Supported – complete.</b>   |
| e                                 | A program should be developed to engage with the pool industry, including pool builders, suppliers, retailers and service providers, with a particular focus on engaging with retailers of portable pools   | <b>Supported in Principle – noted.</b>   |
| <b>9. Governance arrangements</b> |   |  |
| a                                 | The <i>Swimming Pools Act 1992</i> should be re-written, taking into  | <b>Supported in Principle</b> – The NSW Government will continue to actively work  |

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|                                   | account the matters identified in Table 9.4   | with other agencies as part of the ongoing commitment to ensure an appropriate pool barrier regulatory framework. Any changes to the <i>Swimming Pools Act 1992</i> will be considered during this process.   |
| b                                 | Responsibility for the Swimming Pools Act 1992 should transfer to the Minister with responsibility for building regulation, in accordance with the practice that applies in all other Australian jurisdictions  | <b>For further consideration</b> The Government will continue to explore opportunity for greater alignment between Swimming Pools regulation with other Building Regulation activity.   |
| c                                 | A Pool Safety Council is established to advise the relevant Minister on pool safety matters. Its membership should be drawn from government and non-government organisations involved in relevant health and safety issues, the swimming pool industry, pool certification and property owners, with an independent chair. Any decision on expanding the role of the council to include executive functions should be considered at a later stage | <b>Not Supported</b> – this is not an efficient use of resources, based on the QLD experience with their Pool Safety Council which has subsequently been abolished.   |
| d                                 | In light of a decision on the establishment and role of the Pool Safety Council, consideration should be given as to whether there continues to be a need for the Cross Agency Advisory Group   | <b>Not Supported</b> – a Pool Safety Council is not being established.  |
| <b>10. Resourcing and funding</b> |   |   |
| a                                 | Resourcing of the NSW Government’s role in swimming pool regulation should be considered as part of the resourcing of the Office of Building Regulation and the BPB, if the function is transferred to these bodies. Consideration should be given to an annual charge on pools on the swimming pool register as a means to partly fund the swimming pool regulatory function of the NSW Government   | <b>For further consideration</b> - The NSW Government will continue to actively work with other agencies as part of the ongoing commitment to ensure an appropriate pool barrier regulatory framework.. Any changes in resourcing the NSW Government’s role in swimming pool regulation will be considered during this process. |
| b                                 | Councils be given the funding flexibility to be able to self-fund their functions in respect to swimming pool safety regulation and education through a combination of cost recovery pool inspection fees, fines and a levy on council rates for pool   | <b>Supported in Part</b> – The NSW Government will allow councils to modify the cap on fees to allow councils to charge up to \$100 for each inspection after the second inspection. A levy on pool owners is not supported. This will add to the cost of compliance and not improve safety outcomes.                           |

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| c | Councils should be encouraged to contract out the pool inspection function to accredited certifiers | <b>Supported in part</b> – this is a matter for each individual council to consider. |