

# **Submission to the *Swimming Pools Act 1992* Review February 2012**

**NSW Child Death Review Team  
NSW Ombudsman**

## **1. The role of the CDRT and Ombudsman**

The NSW Child Death Review Team (the Team / CDRT) is established under Part 5A of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. The purpose of the Team is to prevent and reduce the deaths of children in NSW. The functions of the Team include maintaining a register of child deaths and identifying trends in relation to those deaths; undertaking research that aims to help prevent or reduce the likelihood of child deaths; and making recommendations as to legislation, policies, practices and services to prevent or reduce the likelihood of child deaths. The NSW Ombudsman is the Team's Convenor, and Ombudsman staff support the Team in its work.

Separately, the Ombudsman has responsibility for reviewing 'reviewable' deaths. Reviewable deaths of children are those that occur as a result of abuse or neglect, or in suspicious circumstances, and the deaths of children in care. The purpose of the work largely mirrors that of the CDRT: to monitor and review reviewable deaths and maintain a register of these deaths; to undertake research; and to make recommendations aimed at reducing or removing risk factors associated with reviewable deaths that are preventable.

Between 1996 and 2010, the CDRT registered the drowning deaths of 114 children in swimming pools in NSW. Thirty eight of these deaths were reviewable deaths, on the basis that they were neglect related or suspicious of neglect.<sup>1</sup> The Ombudsman defines a death as neglect related if the actions of a parent or carer demonstrate an intentional or significantly careless failure to adequately supervise a child, or constitute a significantly careless act.

## **2. Analysis of private swimming pool drowning deaths of children 2007 - 2011**

In order to inform this submission, and to provide relevant information to the *Swimming Pools Act* review, we have analysed CDRT and reviewable death information relating to children who drowned in private swimming pools in the past five years (2007 – 2011). The rate of swimming pool drowning deaths has remained constant over the past 15 years.

### **2.1 The children who drowned**

Between 2007 and 2011 (5 years), 40 children drowned in 39 private swimming pools in NSW.

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<sup>1</sup> From 2003 to 2010. The Ombudsman gained responsibility for reviewable deaths in December 2002.

## Gender

The majority of children (24) were male; 16 were female.

## Age

The large majority of the children (34 of 40) were under five years of age: Most of the under fives (30) were aged three years or less, and more than half of the under fives (18) were aged two years or less.

Six children were aged between five and nine years. Three of the six older children had a disability, injury or impediment that was a contributing factor in their drowning.

## 2.2 The swimming pools

### Type of pool

Most of the 39 pools (24) were in ground; 11 were above ground.

Number (pools)	Type
24	In ground
8	Above ground (metal structured)
3	Above ground inflatable (note all met the Act definition of swimming pool)
3	'In ground/semi above ground'
1	Unknown

### Location of the pool

Most of the 40 children (27) drowned in a swimming pool at their own home.

Number children	Location
27	Child's family home
10	Relatives: (7) grandparent (3) aunt/uncle
3	Family friends

Thirteen children drowned in a pool that was not at their own home. In at least four cases, young children lived at the residence.<sup>2</sup> In some others, particularly the homes of grandparents, the children were regular visitors.

<sup>2</sup> Records did not consistently record whether children were resident at the home.

## Geographic distribution

Just over half the pools were located in areas designated as ‘Major cities’ (21), followed by inner regional areas (11)<sup>3</sup>:

Number pools	Accessibility / Remoteness Index
21	Major cities
11	Inner regional areas
4	Outer regional
3	Remote

## Ownership of the property

Records identified the ownership of the property for 20 of the 27 pools that were located at the child’s own home:

- In most cases (14) the property was owned by the family.
- Six properties were rented. Four were rented from Housing NSW or other social housing providers, and two from private rental agencies.

Number (pools)	Property ownership
14	Child’s family owner/occupier
4	Rental property – Social housing (2 Housing NSW; 2 other social housing providers)
2	Rental property - Private rental

### 2.3 Status of the pools under the *Swimming Pools Act*

The status of the swimming pool in relation to exemption from the child safety barrier provisions of the *Swimming Pools Act* was documented for 31 of the 39 pools. Of these, around one quarter (9) were exempt. Seven were exempt because they were built prior to 1990, and two were on a large property.

Of the exempt pools, eight of the nine were fenced. All eight were non-compliant and had access points either through defective gates / latch mechanisms, or defects to the pool fence. In most cases, the defect(s) were long standing. Seven of the eight barriers did not have a self-locking gate mechanism, and four failed to meet fence height requirements, resulting in gaps and too-high ground clearance.

Records indicate it was most likely that the gate or fence defect was the point at which seven of the eight children who drowned accessed the pool.

The ninth pool was unfenced. It was also non-compliant with the Act, as there were no child proofing measures to restrict access to the swimming pool from the house.

### 2.4 Existence and condition of child safety barriers

Information about the standard of safety barriers was available for 37 of the 39 pools. In most cases this included pool and child safety barrier assessments carried out by police crime scene investigators and/or local council inspectors after the drowning incident. The large majority of

<sup>3</sup> Categories of remoteness as defined by the Australian Bureau of Statistics

pools (33 of the 37), had either no barrier installed, or the existing barrier was defective /non-compliant.

### **Unfenced pools**

Nine of the 39 pools were unfenced.

Eight of the nine unfenced pools were above ground:

- Three were large inflatable pools capable of holding more than 300mm of water, and
- Five were portable structured pools (ie metal frame with vinyl/rubber).

Under the provisions of the *Swimming Pools Act*, all eight above-ground pools required a compliant child safety barrier. Four of the eight pools were installed at rental properties (three were social housing properties), and three were owner-occupied. Ownership status was unclear for two properties.

The ninth pool was an in ground pool on a large property and was exempt.

Seven of the nine children who drowned in unfenced pools accessed the pool from the house without the knowledge of supervising adults. Six of the children were under three years of age. Of the two children who were known to be in or around the pool, one child was left in the yard unsupervised, and another – an older child – was intermittently supervised.

### **Defective child safety barriers**

Records indicate that twenty eight pools were fenced. The majority were perimeter or four-sided fencing. Three pools had three-sided fencing. Of the 28 pools:

- Twenty-four of the pool barriers had one or more defects that potentially enabled a child to gain access to the pool area.
- There was no indication of any defects for four pools.

In relation to the 24 pools with noted defects, Coronial or police investigations found that 20 children were likely to have accessed the pool via the barrier defect(s). Although there were defects in the child safety barrier for another four pools, the defect did not contribute directly to the child gaining access to the pool area. This was mainly because the pool gate was propped open, or the child had been let into the pool area by an adult.

All 24 pool barriers had reported issues with the gate or latch mechanism, which in most cases, meant that the pool gate did not self close (either no, or damaged, latch mechanism), or jammed open.

Fifteen of the 24 pools had additional defect(s), mostly related to the fencing. Fourteen fences were defective either due to broken palings or damage, or the fences did not meet the minimum height requirements under the Act. Another five had climbable zones that were permanent structures.

At least nine of the pools and barriers were poorly maintained and in a state of general disrepair, with Police or Council inspection noting numerous points of potential access.

Four pools had compliant child safety barriers. The children were either let into the pool area by an adult, or accessed the pool through gates that were propped open.

## Adult supervision

Royal Life Saving promotes ‘active supervision’ of children around water. Active supervision is *‘focusing all of your attention on your children all of the time, when they are in, on, or around the water. You must be within arms reach of your child and be ready to enter the water in case of emergency.’*<sup>4</sup>

All children who drowned did so in the absence of adult supervision. In some cases, this was a momentary lapse in direct supervision by parent(s) or carers, and in others there was evidence of significantly inadequate supervision given the age, developmental status and circumstances of the child.

It would be expected that adequate supervision of small children where there are known defects in pool barrier fencing would equate closely to the concept of active supervision. As described above, many of the pools had clear and long-standing defects.

## Children under five years

The Queensland Commission for Children and Young People has developed a classification system for categorising the drowning deaths of children aged 0 – 4 years. The three categories attempt to provide more detailed assessment of the level of adult supervision at the time of the child’s death:

***Intermittent supervision*** – the child was being intermittently supervised in close proximity to appropriately responsive carers. This includes cases where a child is moving between carers and where the child is not in the direct line of sight, but carers are making concerted efforts to monitor the child in other ways (such as auditory supervision). This does not include cases where a child is known to be in or around a water hazard.

***Inadequate supervision: Category A*** – the child was known to be in or around water at the time of the incident and was not in the direct line of sight of an appropriately responsive adult supervisor.

***Inadequate supervision: Category B*** – the child was left unsupervised, at some distance from an adult carer, for a period of more than five minutes duration, and/or the carer was considered inappropriate because of their lack of capacity to respond (for example, they were affected by alcohol or other substances) and/or the environmental barriers to the water hazard were either non-existent or grossly defective. This includes cases where the pool gate had been propped open by supervisors.

Using this classification for the 34 children under five years of age who drowned:

Number of children	Category of supervision
14	Intermittent supervision*
6	Category A – Inadequate supervision
10	Category B – Inadequate supervision
4	Details of supervision level unknown

\*This included four instances where children had been placed for sleep and awoke early or unexpectedly, gaining access to the pool while carers were either sleeping or unaware the child had left their bed.

<sup>4</sup> Royal Life Saving *Fact Sheet 1 Supervise*, accessed [http://www.royallifesaving.com.au/resources/documents/Fact\\_Sheet\\_No.\\_1\\_Supervise.pdf](http://www.royallifesaving.com.au/resources/documents/Fact_Sheet_No._1_Supervise.pdf)

- In most cases, supervision lapsed because a carer's attention was diverted for a short period of time – doing household tasks, preparing dinner etc.
- As noted, in four instances, children arose from sleep unexpectedly without the carers' knowledge.
- In some cases, supervision for the child was unclear or shared between a number of adults at the time. This was particularly at gatherings of family or friends, and resulted in a situation where the child was assumed to be with another, but was in fact unsupervised.

### **Time unsupervised**

Details of the length of time children under five were reportedly left unsupervised was available for 26 of the 39 children.

- The majority (15) were reportedly unsupervised for 10 minutes or less, with some (six) reportedly out of sight for five minutes or less. Scenarios included parents changing another child's nappy, going to the toilet, cleaning or cooking. Where the child was in the pool area, the issue was lack of active arms-length supervision, with the child entering the water unseen.
- Eleven children had been unsupervised for longer than 15 minutes. This included children who had been placed for sleep and awoke and left the house unseen. Other circumstances including the responsible carer attending to other children, or the child leaving the house at a time when families were involved in a number of activities. Unclear responsibility for supervision was also an issue.

### **Children over five years**

Supervision was also an identified issue for four of the six children over five years of age.

- In two cases, adult supervision was inadequate, given the developmental age and ability of the child. Four children were intermittently supervised, two of whom experienced an injury or fall that contributed to their inability to manage themselves safely in the water.
- Three of the children were reportedly unsupervised for 10 minutes or less, and one for 20 minutes.<sup>5</sup>

## **3. Position on proposed amendments**

In the context of the above data, and the work of the Ombudsman and the CDRT in relation to prevention of child deaths, the CDRT and the Ombudsman support the efforts of the NSW Government to strengthen provisions within the *Swimming Pools Act 1992* and to continue promotion of community and industry understanding of swimming pool safety.

### **Swimming pools register**

- 1. Should the NSW Government develop and maintain an on-line, State-wide register of swimming pools containing certain prescribed information about the pool including (but not limited to) address, type of pool, date of construction/installation as well as date of any inspection and result?**

Yes ✓

No

Unsure

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<sup>5</sup> This is not recorded for two children.

Our review identified that the large majority of children drowned in pools at their own home, and in some cases in pools at homes where children resided. In order to understand the level of risk to children and to target prevention efforts effectively, we propose that the prescribed information to be provided in the registration of a pool include details about:

- whether children are resident at the property, and if so, the age of those children at the time of registration;
- if children are not resident at the property, whether children are regular visitors.

## Certification

2. **Should each private swimming pool owner be required to directly register their swimming pool, via the on-line, State-based register at no cost to themselves with the option for pool owners to request councils to register their pools on the pool owner's behalf for a fee of no more than \$10?**

Yes ✓

No

Unsure

3. **Should the swimming pool registration process include a 'self-certification' process that requires the pool owner to complete a swimming pool safety checklist and certify that, to the best of their knowledge, their swimming pool barrier complies with the requirements of the *Swimming Pools Act 1992* with the option for pool owners to request councils or private certifiers to certify their pool as compliant with the Act on the pool owner's behalf for a fee?**

Yes ✓

No

Unsure

While there are some concerns about levels of compliance if a certification is undertaken by pools owners, we support the proposed self-certification process, provided that:

- The NSW Government meets its stated commitment to '*continue to develop additional strategies to highlight the importance of pool safety, including the responsibility to ensure supervision of young children around swimming pools and reinforcement of pool owners' responsibility to maintain pool barriers to legislated standards*'<sup>6</sup> and
- The changes are supported by a campaign to raise public awareness of the new requirements, as noted in the discussion paper,<sup>7</sup> and
- The proposed evaluation within three years following implementation specifically includes consideration of the need for more frequent self-certification, as noted in the discussion paper,<sup>8</sup> and
- The above evaluation specifically consider the adequacy of self-certification as opposed to external certification.

We strongly support registration at no cost to the owner, in addition to a comprehensive education campaign to promote the importance of registration.

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<sup>6</sup> Division of Local Government 2012 Swimming Pools Act 1992 Review Discussion Paper, p 1

<sup>7</sup> Ibid, p 3

<sup>8</sup> Ibid, p 3

We would also suggest that consideration be given to the inclusion of sanctions in the Act for placing false or misleading information on the register.

4. **Should a new offence be established for failing to register a swimming pool attracting a penalty notice amount of \$220, with a maximum penalty of \$2,200, with a transitional period of at least twelve months so that there is sufficient time for pool owners to be notified of the requirement to register their pool?**

Yes ✓

No

Unsure

### **Swimming pool barrier inspection program**

5. **Should councils be required to, in consultation with their communities, develop and publish on their websites a swimming pool barrier inspection policy and program that is acceptable and affordable to their community?**

Yes ✓ (see below for comments)

No

Unsure

6. **Should councils be required to undertake mandatory, periodic inspections of pools associated with tourist and visitor accommodation and other multi-occupancy developments at least every 3 years?**

Yes ✓ (see below for comments)

No

Unsure

7. **Should any property with a swimming pool be inspected, and have a valid compliance certificate issued under the Swimming Pools Regulation 2008, before the property is leased or sold (with appropriate parallel amendments made to conveyancing, residential tenancy and land use planning legislation made), with compliance certificates for pools on leased properties being valid for a period of 2 years, even if the pool is leased in the interim?**

Yes ✓ (see below for comments)

No

Unsure

In relation to points 5, 6 and 7 above, we make the following comments.

The discussion paper rejects an approach of mandatory periodic inspection of private swimming pools for adoption of 'some level of inspection'. In this context, the effectiveness of any program will depend upon careful targeting of inspections. Our data clearly shows that the pools most likely to present a risk to young children are those located at their own home. It is also notable that in some cases we reviewed, the defects identified in the pool barriers were long standing, with the nature of defects in some being such that they had never been compliant with the current Act.

We propose that inspection programs be targeted to swimming pools at premises where children, particularly those under five years of age, reside or regularly visit. This should be a consistent approach across all of NSW.

We also consider that the proposed process of establishing pool barrier inspection programs should be supported by the preparation by Government of model policies and programs that must be complied with by councils, and that provide for a broadly consistent approach to inspections across NSW and effective targeting of such programs, while providing for differences in Council size and local demographics. These model provisions would detail the basic requirements for a program of inspection, and would include but not necessarily be limited to, requirements for inspection of:

- tourist, visitor and multi-occupancy developments;
- properties that are being newly leased or sold;
- properties at which young children are recorded on the register as residing.

**8. Should councils be able to set an inspection fee, in consultation with their communities, and charge that fee for each inspection undertaken to reflect the actual cost of the inspection to a maximum of \$150 for the initial inspection and to a maximum of \$100 for one additional re-inspection, should it be necessary but with no additional inspection fees charged for any subsequent re-inspections?**

Yes ✓  
No  
Unsure

## Reporting

**9. Should councils be required to report annually on the number of swimming pool inspections undertaken and the level of compliance with the requirements of the Swimming Pools Act?**

Yes ✓  
No  
Unsure

We strongly support the requirement that Councils report annually on the inspection program. We would also suggest that this reporting include information about orders issued by councils to rectify non-compliance, and whether or not owners have rectified defects within a reasonable period of time. Without this information, it remains possible that inspection programs will identify but not resolve pool barrier non-compliance.

## Exempt pools

**10. Should the Swimming Pools Act be amended to include a provision to clarify that, where an existing swimming pool that is exempt from the Act's fencing requirements is fenced voluntarily, such fencing must meet the Act's requirements for a compliant, four-sided barrier (effectively 'disapplying' or removing the exemption)?**

Yes ✓  
No  
Unsure

We strongly support this proposal. As noted above, our review found that eight private swimming pools in which children drowned were exempt from the fencing provisions of the Act but were fenced. None of the pools were compliant, and the barrier defect was the most likely point of access to the pool in seven of the eight cases.

## Other issues

**11. Should the Swimming Pools Act be amended to clarify council powers of entry to inspect private swimming pool barriers and make these consistent with the *Local Government Act 1993*?**

Yes ✓

No

Unsure

**12. Should the definition of ‘swimming pool’ in the Swimming Pools Act be amended by replacing the words ‘300 mm or more’ with ‘greater than 300 mm’ to increase national uniformity?**

Yes ✓

No

Unsure

**13. Should the term ‘hotel or a motel’ be replaced with the term ‘tourist and visitor accommodation’, wherever occurring in the Swimming Pools Act, to make it consistent with instruments called up through the Environmental Planning and Assessment Act?**

Yes ✓

No

Unsure

**14. Should there be a delayed commencement of a period of 12 months for the introduction of a new offence for failing to register a swimming pool and a delayed commencement of 6 months for all other proposed amendments to the Swimming Pools Act?**

Yes ✓

No

Unsure

## Additional considerations

On a separate issue, our review identified that at least four of the nine pools on rental properties were unfenced portable above ground pools.

In this context, the current legislation appears to lack clarity regarding the respective responsibilities of the ‘occupier’ or tenant of a premises and the owner of the premises for fencing these pools: While an occupier can erect a portable above ground pool (for which the fencing obligation lies with the owner) (section 12), there is no obligation for the occupier to notify the owner that a pool has been erected.<sup>9</sup> Section 15 requires the occupier to maintain a child-resistant barrier that already exists, but there is no requirement to erect any fencing where it does not.

We believe consideration of an amendment to clarify this issue is warranted.

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<sup>9</sup> The *Residential Tenancies Act 2010* does not prohibit the erection of above ground pools on rental properties.