

2014

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PUBLIC POOLS BILL 2014

EXPLANATORY STATEMENT

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PUBLIC POOLS BILL 2014

INTRODUCTION

This Explanatory Statement relates to the Public Pools Bill 2014 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The Statement must to be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.¹

The *Public Baths and Public Bathing Act 1956* (the previous Act) regulated the management, administration and conduct of persons involved in, and participating with, ‘public baths’ (Territory owned pools) but also ‘public bathing areas’ (for example Casuarina Sands) in the Territory.

Public pools in Canberra are either owned by the Territory or privately owned. The majority of Territory owned pools are managed under an ACT Facility Management Agreement (Agreement) by private operators. The Agreements reflect current practice and operational requirements.

The previous Act did not regulate privately owned public pools in the Territory. The fact that these pools have fallen outside the scope of the legislation is an anomaly that has occurred over time due to changes in ownership of infrastructure, asset management arrangements and new privately owned pools coming into the market. Due to the Act’s age, the terminology used in the Act had the unintended consequence of excluding pools that were not Territory owned assets.

The Bill flows from a review of the adequacy of the previous Act and consideration of the findings of Chief Coroner Cahill, in *Inquest into the Death of Kaled Kanj*, 29 October 2009, ACT Coroner’s Court (the Inquest).

The Agreements under which Territory owned public pools are managed are not well supported by the previous Act which is dated, inflexible and can result in complicated administrative arrangements. The review found that current management practices, while efficient and effective, could not comply with the requirements of the outdated legislation.

¹ http://www.parliament.act.gov.au/data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf

An extensive analysis of the administrative law implications of the Act indicated that it is appropriate to remove the provisions applying to public pools from the previous Act and to establish new legislative arrangements.

It is also acknowledged that the development of this legislation is the first part of reforms in relation to the public pools and a second tranche of legislation will occur in the future with the opportunity to address emerging issues.

OVERVIEW OF THE BILL

The Bill repeals Part 2 and Part 3 of the *Public Baths and Public Bathing Act 1956* and establishes a modern administrative framework to support contemporary management practices for Territory owned public pools consisting of:

- a. the ability to categorise public pools based on the level of regulatory intervention needed;
- b. appropriate administrative powers to implement minimum standards and guidelines for the management, operation and maintenance of facilities of Territory owned public pools, through subordinate legislation and statutory instruments, including:
 - i. arrangements to better support decision making for the safe operation of Territory owned public pools;
 - ii. for fee setting processes and notification requirements for the use of public pools allow the Minister the flexibility to also set fees through contractual arrangements, or exempt fees where necessary; and
- c. provisions that support the modern administrative framework consisting of:
 - i. patrons right of entry, removal and public notice regime to ensure equity of access;
 - ii. a proactive focus on removing patrons from premises who display antisocial behaviour who would otherwise incur a criminal offence under the previous Act;
 - iii. modernising existing outdated criminal offences to meet current legal requirements and community expectations; and
 - iv. clearly defined inspectorate functions and appropriate safeguards.

The Bill only applies to Territory owned public pools and has been developed to allow flexibility to adapt requirements to meet innovative industry practice and standards. Accordingly, the Bill provides the capacity to set guidelines and minimum standards by statutory instrument, in place of strictly prescribing the matters within the Act, and in place of imposing criminal sanctions against operators and patrons for non-compliance. A self-regulation approach has been adopted which provides for minimal regulatory intervention.

The offence provisions that will apply in the Act have been streamlined to remove offences that are duplicated in other legislation. Further, the offences included have been assessed against current community standards and norms and confined to matters of public health and safety or protection of property. This is achieved by amending the approach to the removal of patrons where behaviour is unacceptable, and giving the patron the option of leaving, rather than a person being immediately subject to an offence.

The *Health (Aquatic Facilities) Regulations 2007* (WA) and *Code of Practice for the Design, Construction, Operation, Maintenance and Management of Aquatic Facilities – August 2013* (WA) have been widely consulted in the development of the Bill.

The following laws will be amended by this Bill:

- *Public Baths and Public Bathing Act 1956*; and
- *Uncollected Goods Act 1996*.

Part 1 Preliminary

This Part (clauses 1-6) contains standard preliminary matters, such as providing for the commencement of the legislation, the application of Criminal Code to offences against this Act and the application of the Act.

Part 2 Key concepts

This Part (clauses 7-11) contains the key concepts for public pools by providing definitions for a category, a pool operator, a pool and a pool facility and provides the ability for the Minister to exempt a pool facility or person from the Act.

Part 3 Pool facilities administration – minimum requirements, standards and guidelines

This Part (clauses 12-19) contains the mechanisms to support the move towards self-regulation of public pools through the ability to make standards for: qualifications, skills and training; operations and management; operational matters; conditions of entry and removal; and signage. Guidelines can be made for the setting of fees and the Director-General may prohibit articles from hire or sale.

Part 4 Maintenance directions and pool closure orders

This Part (clauses 20-24) provides the arrangements associated with giving a maintenance direction, emergency pool closure orders, offences for failure to comply with an emergency closure, cancellation of orders and compensation for a pool closure. These provisions should be read in conjunction with Part 8 – Notification and review of decisions.

Part 5 Refusing entry and removal powers

This Part (clauses 25-30) contains the mechanisms for early intervention processes for entry and removal powers and the circumstances surrounding when a person may be refused

entry or given a direction to leave a pool facility. An offence provision applies for failure to comply with a direction.

Part 6 Offences

This Part (clauses 31-36) provides six offence provisions in total, including three strict liability offences, which apply under the Bill.

Part 7 Enforcement

This Part (clauses 37-48) provides the regulatory oversight for public pool activities in the Territory. It contains general requirements for appointment of inspectors, powers of entry, general powers of acquiring documents and information by notice, compensation arrangements and appointment of an auditor under specified circumstances.

Part 8 Notification and review of decisions

This Part (clauses 49-51) provides for the review of certain decisions made under the Bill and specifies who is entitled to seek a review under the Bill. These provisions should be read in conjunction with Schedule 1 – Reviewable decisions, to establish what decisions may be reviewed under the Bill.

Part 9 Miscellaneous

This Part (clauses 52-59) provides protection against liability for lost or damaged property, when civil liability may attach to the Territory, determination and exemptions for fees, the ability to apply laws and instruments of another jurisdiction, approved forms and regulation making powers including the ability to make regulations for first aid equipment and facilities.

Part 10 Repeals and consequential amendments

This Part (clause 60-61) provides for the repeal of regulations and instruments under the *Public Baths and Public Bathing Act 1956* and provides that Schedule 2 makes consequential amendments to necessary legislation.

Part 20 Transitional

This Part (clauses 200-203) provides transitional arrangements to facilitate implementation of the Bill in the Territory.

Schedules

Schedules to the Bill provide for:

- decisions that may be reviewed under the Act;
- consequential amendments to the *Public Baths and Public Bathing Act 1956* and *Uncollected Goods Act 1996*; and
- the Dictionary.

HUMAN RIGHTS IMPLICATIONS

The Bill as a law of the Territory may be seen as engaging a number of rights in the *Human Rights Act 2004*. An assessment of the Bill against Section 28 of the *Human Rights Act 2004* is provided below for each of the provisions that may engage a potential limitation of a human right under the *Human Rights Act 2004*. These provisions are:

- protection of the family and children, section 11;
- freedom of movement, section 13;
- rights in criminal proceedings (presumption of innocence until proven guilty), subsection 22 (1); and
- rights in criminal proceedings (right against self-incrimination), paragraph 22(2)(i).

A Compatibility Statement under the *Human Rights Act 2004* has been issued for the Bill by the Attorney General.

Protection of the family and children, section 11

Any limitation on the rights for the protection of the family and children under section 11 of the *Human Rights Act 2004* is reasonable and proportionate, noting the public interest benefits from addressing the protection of children and requiring supervision by an adult. Section 28 of the *Human Rights Act 2004* provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the *Human Rights Act 2004* provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

The nature of the right being limited

Paragraph 14(1)(e) and subparagraph 15(2)(a)(ii) provide for the making of standards in relation to the minimum age at which a child must be supervised by an adult when in a pool facility. Paragraph 26(1)(a) of the Bill specifically provides that an authorised person may refuse entry to a child if the child is under the minimum age and not accompanied by an adult.

The importance of the purpose of the limitation

Minors are entitled to special protection in recognition of their vulnerability because of their status as a child. This is not limited to the treatment within the family but extends to treatment by others and by public authorities.² The Royal Life Saving Society – Australia (RLSS) has for many years stressed the importance of children being supervised in, on and around, water. The findings of the Coroner’s Inquiry,³ found that “Children under 10 must be supervised by an adult at all times when in the aquatics area” and at paragraph 65, “Even if all safety arrangements are in place, it is important for a parent accompanying a child who cannot swim to know that the result of momentarily losing sight of the child could be fatal,

² Department of Justice and Community Safety, *Guidelines for ACT Departments: Developing Legislation and Policy*, February 2010, p 27.

³ Chief Coroner Cahill, in *Inquest into the Death of Kaled Kanj*, 29 October 2009, ACT Coroner’s Court.

as had happened in this case.” Accordingly, the purpose of the limitation is critically important for water safety and conversely, the Bill supports the protection of the family and children through mitigating their risk in a pool facility.

The nature and extent of the limitation

The limitation provides that no child under the prescribed minimum age may be unaccompanied at a pool facility and therefore a child may be refused entry. Standards may also be set in relation to adult supervision of a child. The minimum age has not been specified in the Bill as occurred under the previous Act (see below).

The relationship between the limitation and its purpose

The purpose of the limitation is to protect the best interests of the child by limiting the occurrences where a child is placed in unnecessary danger by not being supervised in, on, or around water by an adult, other than a lifeguard. The purpose of the limitation is of paramount importance to minimise children drowning and should not be underestimated.

Less restrictive means reasonably available to achieve the purpose

Consideration was given to whether there was a less restrictive means reasonably available to achieve the purpose for restricting access to children that are not accompanied by an adult. Parents and carers have a responsibility to look after their own children but operators of pool facilities also have a responsibility to ensure all patrons are safe. While lifeguards are valuable in keeping pools safe, they are not babysitters and cannot provide one-on-one supervision for every patron in the facility. As such, operators need to implement other strategies to ensure the safety of those children, including the use of signs promoting supervision messages.⁴ As these strategies are also being proposed as part of the Bill, there is no other reasonable alternative for this measure.

Prescribing the minimum age for unaccompanied entry by a child under the *Public Baths and Public Bathing Act 1956* became problematic when the RLSS raised the recommended minimum age where children should be supervised by an adult. The Territory was not able to respond to these requirements quickly and in the best interests of the child. By setting the minimum age in the standards, different levels of supervision for children will be able to be adopted, thereby allowing strategies to be implemented to minimise the risks of children drowning. The Director-General will also be able to respond to changing trends and safety measures quickly.

⁴ Royal Life Saving Society – Australia, *State of the Industry 2013: a Royal Life Saving Report on the Aquatics Industry in Australia in 2013*.

Freedom of movement – section 13

Maintenance direction and emergency closure order - Division 4.1 and 4.2.

It is possible that the provision allowing the Director-General the ability to issue a maintenance direction and an emergency closure order to close a public pool may engage human rights, particularly the right to freedom of movement. However, it should be noted that the directions apply to an operator within a commercial setting and the limitation to the human rights is more likely to apply to the patrons being limited entry to the pool facility. Any limitation on these rights is considered reasonable and proportionate, noting the public interest benefits from addressing the risks to community safety. Section 28 of the *Human Rights Act 2004* provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the *Human Rights Act 2004* provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

The nature of the right being limited

The provision may engage the right to freedom of movement to the extent that an operator may be directed to maintain a public pool and close a public pool, thereby impacting access by patrons.

The importance of the purpose of the limitation

The purpose of the limitation (protecting the individuals concerned, and the broader community, from the dangers posed by failure to maintain a pool facility and an emergency closure) is of very high importance.

The nature and extent of the limitation

The limitation is not extensive. The power to direct maintenance by an undertaking, which may also necessitate the closure of the pool, and the power to close the pool facility in an emergency may be exercised only when there is an undue risk posed to people, property or the environment.

The Director-General already has significant powers under the contractual Agreements to issue a direction for the maintenance of pool facilities and subsection 9(2) of the previous Act provides, amongst other things, that the pools may be closed for cleansing and repairing or any other reason which the Minister thinks is sufficient. The Bill proposes to place limitations on these powers in that a closure may only occur under clause 21 if the maintenance direction specified (in accordance with subclause 20(4)) that if the direction is not complied with, an emergency closure may occur. The emergency closure may only occur if it is the only viable option to prevent or reduce undue risk to people, property or the environment. Depending on the maintenance required under the direction, the Director-General must attempt to make a stated period for maintenance occur during an “off-peak” period as far as practicable.

An emergency closure may only occur if the Director-General satisfies the reasonable grounds test for the prevention and reduction of risk to people, property or the environment and it is the only viable option to do so. The power does not extend outside that criterion. In recognition of the seriousness of the action that may be taken under Divisions 4.1 and 4.2, clause 24 ensures that if there were insufficient grounds for the direction, or the closure order, the Territory must pay the operator reasonable compensation.

The relationship between the limitation and its purpose

The provisions of the Bill seek to support the Director-General's efforts to protect and preserve safety at a community asset, and together with other ACT Directorates, safeguard property and the environment, especially considering the possible damage that may be caused as a result of leakage and seepage into waterways and other infrastructure. However, in order to protect the community, property and the environment strict legislative tests must be observed by the Director-General when issuing such directions and closure orders. As there is to be no other viable option than closing a pool facility any limitation on peoples' freedom of movement would be to their benefit, as the risk to their lives and possible safety, posed by the emergency, would be reduced.

Less restrictive means reasonably available to achieve the purpose

It is not considered that there are any less restrictive means available to achieve the purpose of an emergency closure order, especially given the ability initially to provide a direction to rectify any safety and maintenance matters that may affect a person, property or the environment. Furthermore, it is considered that the tests imposed for directions and orders are sufficiently restrictive and have the necessary additional oversight of an independent arbiter, as reviewable decisions by the ACT Civil and Administrative Tribunal. For these reasons it is considered that any limitation arising from Part 4 is reasonable and proportionate.

Refusal of entry and a direction to leave a pool facility

The provisions allowing the authorised officer the ability to refuse entry or direct a person to leave a pool area may engage human rights, particularly the right to freedom of movement – note Part 5 of the Bill (specifically paragraph 27(2)(b), subclause 28(1) and subclause 29(5)). Any limitation on these rights must be reasonable and proportionate. Section 28 of the *Human Rights Act 2004* provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Subsection 28(2) of the *Human Rights Act 2004* provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

The nature of the right being limited

The provision may engage the right to freedom of movement to the extent that:

- a person may be refused entry to a pool facility; and
- a person may be directed to leave a public pool facility.

The importance of the purpose of the limitation

The purpose of the limitation is of very high importance and is to minimise occurrences of transmission by water of a contagious disease; instances or circumstances where death by drowning is elevated; and the protection of the broader community from anti-social behaviour at a pool facility. This is especially important for transmission of diseases where assistance animals enter a pool and the person the assistance animal is accompanying refuses to remove the animal from the pool.

The specific policy is designed on the principle that individuals that exhibit anti-social behaviour are directed to leave the premises in place of having a criminal offence recorded against them – the early intervention process. This is considered especially important given the current Act treats a minor behavioural infraction as a criminal offence, resulting in a disproportionate long lasting impact.

Furthermore as public pool facilities are generally frequented by people of various age, the dangers represented by anti-social behaviour highlight the need for public safety measures dealing with that behaviour to be directed at changing the behaviour, or removing the source of the behaviour, from the pool facility as quickly as possible.

The nature and extent of the limitation

The limitation is not extensive. The power to refuse entry to a person or direct a person may be exercised only for the health and safety of persons at the pool facility, and protection of property or the environment. A number of safeguards have been inserted to maximise regulatory consistency in decision making and ensuring that all patrons are aware of the requirements and limitations – see clauses 15 and 16 of the Bill. Authorised persons must exercise their powers on reasonable grounds; and Part 5 of the Bill provides statutory limitations in how and when powers may be exercised; and what preconditions must be met, for example how information must be displayed or provided.

Subclause 26(1) is a specific provision relating to the ability of a child to enter a pool without appropriate adult supervision (note above discussion on *Human Rights Implications - Protection of the family and children, section 11*). The minimum age is the age as determined in accordance with under clause 15 and a child is given the broad interpretation under the *Legislation Act 2001*. As indicated above, the importance of refusing a child entry when not supervised engages the fundamental principles of protection of the family and children, however, the consequences for not doing so are significant and were evidenced in

the findings of the Coroner's Inquest.⁵ Conversely it is also arguable that the Bill supports the protection of the family and children through mitigating the risk of harm for children that would otherwise be unsupervised in a pool facility.

The relationship between the limitation and its purpose

The provisions seek to support an early intervention process where a patron has the ability to leave a pool area of their own accord once given a direction for anti-social behaviour by an authorised officer. Previous provisions of the *Public Baths and Public Bathing Act 1956* prescribed offences for relatively minor infractions of behaviour without alternative options. The policy intent of the Bill is to refuse admission when necessary to do so (unaccompanied minor, being intoxicated), seek removal of patrons for bad behaviour to enable other patrons to safely enjoy the community facility, minimise circumstances of death by drowning and only impose a criminal offence when there is no other alternative.

Less restrictive means reasonably available to achieve the purpose

It is not considered that there are any less restrictive means available to achieve the purpose of the Bill as the early intervention process is preferable to a person committing an offence without a number of opportunities to either rectify their behaviour or leave the premises.

Furthermore, a number of mechanisms and specific safeguards have been inserted throughout the early intervention process to limit the human rights impact at those stages. For example, removal and refusal to entry must only occur for those matters specified in the standards – see clause 15. This also maximises the regulatory consistency across public pool facilities in the Territory and assists in consistency in decision making. Those matters must be clearly displayed or provided to patrons at the time of entry – see clause 16.

It is recognised that there may be circumstances where a person may be refused entry when such refusal is not warranted. A number of mechanisms have been included to enable the person the opportunity to seek resolution for the unfair refusal to entry. Complaints may be actioned through the operator's internal complaints process. Alternatively, the Director-General may specify standards that the operator will be required to comply with under paragraph 14(1)(g) for complaint processes. However, the person will also have the ability to bring the matter to the attention of the responsible Directorate and Minister so action may be taken to rectify the behaviour of the operator's staff.

The authorised person must act reasonably in having the appropriate grounds for giving the direction. On any direction being given, the person must be informed that failure to comply with a direction may result in an offence being committed. The preference is that at all

⁵ Chief Coroner Cahill, in *Inquest into the Death of Kaled Kanj*, 29 October 2009, ACT Coroner's Court.

times a person is given an opportunity to leave the pool facility and not incur a criminal offence. The removal of a person who refuses to leave under subclause 30(4) may only be performed by suitably qualified persons, for example a police officer or a licensed security guard, to minimise the risks of unreasonable force being applied or a person being unreasonably or illegally detained.

For these reasons it is considered that any limitation arising from these provisions is reasonable and proportionate.

Rights in criminal proceedings - presumption of innocence until proven guilty, subsection 22(1)

Any limitation on the right to the presumption of innocence until proven guilty is reasonable and proportionate, noting the public interest benefits from addressing the safety of persons and protect of property and the environment. Section 28 of the *Human Rights Act 2004* provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the *Human Rights Act 2004* provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

The nature of the right being limited

The incorporation of strict liability elements has been carefully considered during the Bill's development. Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The Bill has six strict liability offences under:

- clause 22, Offence - fail to comply with emergency closure order;
- clause 30, Offence - fail to comply with direction;
- clause 32, Smoking prohibited;
- clause 33, Consumption of liquor;
- clause 34, Possession of liquor; and
- subclause 38(4), Failure to return identity card.

The importance of the purpose of the limitation

The rationale for inclusion of strict liability offences is based on the way that the Bill has been constructed to provide a number of alternatives before an offence can be committed. As noted in the particular areas for each individual offence, strict liability has only been attached to those offences where the conduct is such that it significantly increases the dangers for death by drowning (note clauses 34 and 34), is an emergency situation requiring closure of the pool facility and the operator fails to comply with the emergency closure order (clause 22); the behaviour by a patron is such that the person has been requested to

leave the premises and fails to do so (clause 30); where a person is on notice that smoking is prohibited (clause 32); and where a person was a previous inspector and as a regulator is on notice of the contents of the legislation and subsequently fails to comply with the requirements to return their identity card (subclause 38(4)).

The nature and extent of the limitation

The extent of the limitation in all of the above matters is restrained and where possible a number of alternatives have been provided in an attempt to rectify a person's behaviour. The focus is on rectification of a person's behaviour and not the offence being committed. For example: giving a direction to a person to leave the pool facility at first glance appears to be a significant limitation on a person's rights. However, under such circumstances the person would be clearly on notice that the conditions of entry prescribed the behaviour as unacceptable; signage and information must be clearly given; the person is warned by an authorised officer that the behaviour is unacceptable and must cease, and/or they must leave the premises; the person must be advised that they commit an offence if they do not leave; and finally; if the person still fails to leave of their own accord a strict liability offence is committed. The limitations also apply a number of matters to reduce the impact on human rights and include such matters as: the provision of a reasonable direction, limiting the person that may be responsible for the offence (for example, only an operator must provide documents); an offence is not committed without appropriate signage, matters that are beyond a person's control that limit a person's ability to comply with the legislation, or there must be some positive act that has occurred (for example, concealment of liquor and consuming liquor).

Furthermore, the matters where a person may be given a direction to leave the premises are limited to those matters prescribed under clause 15 – Conditions of entry and removal. This also limits the occurrences and arbitrary decision making where a person may be required to leave. It provides a positive mechanism for regulatory consistency in decision making not only at the individual pool facility and but across all Territory owned pool facilities. Finally, to maximise a person's dignity and safety, strict limitations have been placed on the persons that may physically remove a person from a pool facility. To ensure that people are suitably qualified and know the legal concepts surrounding reasonable force and what constitutes lawful detention, removal can only be effected by a police officer or a licensed security guard.

The relationship between the limitation and its purpose

The overriding rationale for the majority of the strict liability offences is to minimise the circumstances where death by drowning or injury can occur. The offences included have been assessed against current community standards and norms and confined to public health and safety or protection of property. This approach is achieved by amending the focus to the removal of patrons where behaviour is unacceptable rather than a person being charged with an offence. The provisions of the Bill move away from prescribing a large

number of offences. The previous Act exceeded thirty offences and this Bill contains a total of 11 offences, six of which are strict liability offences. However, the small number of offences addresses matters which society either regards as generally unacceptable behaviour or a danger to health and safety. It is worth noting that the other new offences, other than the strict liability offences indicated above, which are included in the Bill are:

- clause 31 – Offences, Infections;
- clause 35 – Offences, Graffiti etc;
- clause 36 – Offences, Damaging infrastructure; and
- subclause 44(2), comply with a requirements under subsection 44(1)(f) to give information, answer questions or produce documents or anything else when at a pool facility; and
- subclause 45(2), comply with a requirements under subsection 45(1) – to give information, answer questions or produce documents or anything else when requested in writing.

Emergency closure orders are subject to strict parameters before a pool can be closed and must satisfy the test that no other viable option can be taken to reduce the undue risk to people, property or the environment. Therefore the limitation is to meet the purpose of safety.

The limitations are justifiable and there is sufficient evidence, especially with the liquor offences at clause 33 and 34 of potential harm. Liquor has been found to lead to an increased risk of drowning and aquatic injury, and the effects of alcohol are magnified when in, on, or around the water.⁶ The offences have also generally been constructed as an option of last resort with options and statutory defences applying where necessary.

Smoking and the use of alcohol all elevate the risk to providing a safe and enjoyable recreational facility for the community. The fact that partaking in alcohol consumption alone has been shown to significantly increase the risk of drowning due to a range of physical and behavioural changes that occur, the limitations are justified and within the scope to protect the community.

The fact that a person who was an inspector must return their identity card is an offence that goes to the heart of the compliance and enforcement regime for the protection of the community. This offence provision removes the possibility of another person imitating the powers of an inspector or the person exercising the powers when they are not authorised to do so. As a regulator the person is on notice to what the inspector's obligations under the Bill are and therefore it is fundamental that the person adheres to any requirements that

⁶ Royal Life Saving Society – Australia, *Swim safe swim sober: A study examining drowning in NSW and the influence of alcohol*, 2012.

the Act places on that person. However, it should be noted that specific statutory defences apply to this offence.

Less restrictive means reasonably available to achieve the purpose

In developing the legislation an assessment was made as to whether any less restrictive means were available and accordingly, the Bill has been constructed to provide a number of alternatives before an offence can be committed. For example, clause 30 provides requirements for signage – both on entry and within the facility so a patron is clearly aware of their responsibilities. There are also provisions to provide for the making of rules of behaviour and conditions that must be displayed. Furthermore, a warning must be provided by an authorised person that if patron refuses to leave the pool facility that an offence is being committed. It is only when the person still refuses to leave the facility of their own accord that this offence provision is triggered.

The harm that is associated with anti-social behaviour in such an environment increases the risks of death by drowning and therefore cannot be underestimated. There comes a point of time where a person must modify their behaviour or be subject to the consequences.

Where possible the impact on human rights has been recognised and mitigated by provisions detailing when the offence does not apply. For example: the offence of smoking requires that there must be sufficient notice to the person before the offence can apply; additional compensation provisions are required where there were insufficient grounds for issuing an emergency closure order (also supported as a reviewable decision by the ACT Civil and Administrative Tribunal; the requirement to warn persons if they will be committing an offence; the exercise of powers must be based on reasonable grounds; and there must be sufficient notice provided to patrons for conditions of entry.

During the development of the Bill consideration was also given to a number of offence provisions that are normally considered to be strict liability offences in a regulatory context. However, those offence provisions (clauses 31, 35, 36, 44 and 45) were considered not to warrant being categorised as strict liability offences.

There is no less restrictive means available for the strict liability offences due to inclusion of an early intervention process in the Bill, which provides a focus on modifying or removing bad behaviour and the introduction of self-regulation principles. The maximum penalty units applied for the strict liability offences also conforms to the *Guide for Framing Offences*.⁷ Furthermore the Criminal Code defences are still available to a person charged under these offence provisions, particularly the mistake of fact defence (Code section 36) and where appropriate the defence of intervening act (Code section 39) and the defence of duress (Code section 40).

⁷ Australian Capital Territory Government, Department of Justice and Community Safety, *Guide for Framing Offences*, April 2010, p29.

Rights in criminal proceedings (right against self-incrimination), paragraph 22(2)(i)

The Bill requires a person to give information, answer questions or produce documents or anything reasonably needed to exercise the inspector's powers – see paragraph 44(1)(f) and subclause 45(1).

The provision granting an inspector the power to require a person to give information, answer questions, or produce documents or anything else reasonably needed may engage human rights. Rights engaged may include the right to privacy and rights in criminal proceedings. Any limitation on these rights is reasonable and proportionate, noting that the only person whose interest may be affected is an operator of a pool facility. The Bill does not provide authority for the collection of any type personal information. Section 28 of the *Human Rights Act 2004* provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the *Human Rights Act 2004* provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

The nature of the right being limited

Paragraph 44(1)(f) and subclause 45(1) insert the general powers of inspectors under the Bill to require an operator to give information, answer questions, or produce documents or anything else reasonably needed. The requirement may only be made for the purposes of the Part and the information must be reasonably needed. There is no power to compel a person to comply with such a requirement; however, it is an offence to not comply with the requirement. In recognition of the impact on human rights and in the interests of not unduly penalising a pool operator, the Bill inserts a reasonable steps requirement for compliance with such a request from an inspector. Subclauses 44(2) and 45(2) provide that a person must only take reasonable steps to comply with such a requirement.

The importance of the purpose of the limitation

The purpose of the limitation (allowing an inspector to undertake necessary inspections, enforcement and compliance to reduce the risks of deaths by drowning, provide proactive initiatives that may minimise undue harm to life, property and the environment) is of high importance.

The nature and extent of the limitation

When developing the Bill it was not anticipated that Inspectors should have extensive enforcement powers under the Act and therefore the provisions are not as comprehensive as other Acts requiring regulatory oversight. For example: inspectors may not apply for a search warrant and have no seizure powers. However, the requirement to give information, answer questions, or produce documents or anything else reasonably needed, is fundamental to the enforcement of a pool facility and therefore only applies to an operator.

Consideration was given to the type of information that the operator would be required to provide under the provisions and this would only extend to those matters under the scope of the Act that primarily deal with compliance with the Part 3 of the Bill. Accordingly, it cannot be conceived where the circumstances would extend to information relating to the operator personally or other staff members, excepting documents for the proof of qualifications.

Therefore it is considered the provisions have been developed to limit the rights being impacted as the offences only apply to an operator and for those business matters relevant to the commercial operation and safety of a pool facility. The fact that the Bill does not require a statutory obligation to supply information that may incriminate the operator, only that the person must take reasonable steps to comply with a reasonable request for information also further limits the application of this provision. Accordingly, only a moderate maximum penalty of 20 penalty units applies to the offence.

The relationship between the limitation and its purpose

The Bill seeks to support the efforts of the Minister and Director-General to provide a safe community facility that minimises danger to patrons, property and the environment and reduces the risks of death by drowning.

The provisions ensure that information or documents necessary to facilitate the effective enforcement and compliance requirements of the Bill are provided. Instances when the power could be used include where an inspector is responding to the implementation of minimum standards recommended by a coronial inquiry to ascertain compliance with the standards. Any limitations in this regard need to be contrasted against the possible engagement of an operator's human rights with the need to mitigate the risks for death by drowning of patrons.

Less restrictive means reasonably available to achieve the purpose

These provisions seek to ensure that inspectors have access to appropriate information to support and minimise occurrences of drowning in public pools. The limitations apply to the scope of the Bill and are restricted to being exercised by a public servant that is an inspector and a police officer.

Consideration during the development of the Bill considered what documentation could be provided and the likely event that those documents may incriminate an operator. It was considered that such an event occurring was very slight to negligible. It is also considered reasonable given that in many circumstances, failure to comply with requirement to provide information and documents, in other regulatory contexts, would make the offence either one of strict liability or where the person was required to provide the information even though that information could incriminate the person. Neither of those elements apply in

the Bill. Therefore, the engagement of the human right that privilege against self-incrimination may actually occur is considered reasonable.

The fact that the provision has been limited to operators of the pool facility and not extended to employees or other persons that could reasonably assist has also been considered as applying less restrictive means for the application of the offence provisions. It is therefore proposed that there is no less restrictive means available to enable the Minister and Director-General to provide a safe environment where the possibility of drowning occurring is minimised.

CLAUSE NOTES

PART 1 PRELIMINARY

Clause 1 Name of Act

This clause is a formal provision setting out the name of the Act as the *Public Pools Act 2014*.

Clause 2 Commencement

The Act will commence on the day after its notification day.

Clause 3 Dictionary

This clause clarifies that the dictionary is located at the end of the Act and is to be included as part of the Act.

Clause 4 Notes

This clause is a formal provision providing that a note included in the Act is intended as explanatory information only and is not part of the Act.

Clause 5 Offences against Act – application of Criminal Code etc

This clause clarifies that other legislation applies in relation to offences against the Act. As set out in Note 1 to this provision, Chapter 2 of the Criminal Code applies to all offences against this Bill. Note 2 provides the meaning of penalty units for offence penalties is contained under section 133 of the *Legislation Act 2001*.

Clause 6 Application of Act

This clause introduces a new mechanism to provide the administrative framework to indicate different categories of facilities to which the Act may apply. Currently, the Act applies to a category 1 facility which is defined under clause 7 of the Bill.

PART 2 KEY CONCEPTS

Clause 7 Meaning of category 1 facility

Clause 7 provides the definition of what constitutes a category 1 facility. A category 1 facility is a pool facility that is owned by the Territory, is open and used by the public regardless of whether a person pays to enter the pool facility. For the purposes of a category 1 facility it includes a pool facility that is managed under a contractual arrangement with the Territory known as a facility management agreement (Agreement). Pools that are Territory owned assets are currently managed under such Agreements. A 'pool facility' is also defined under clause 10 of this Bill.

The only distinction between pool categories in the previous Act was the classification of pools into 'leased public baths' and 'public baths, other than leased public baths'. This

terminology was problematic especially given that the meaning of ‘leased’ has evolved since the Act was originally enacted in 1956. Therefore, the legislation has been developed to allow the Government to determine different categories of pools to enable the level of regulatory intervention to occur based on the risk that it represents to the community.

Clause 8 Meaning of operator

Clause 8 introduces the concept of operator and was previously known as a manager under the old Act. The meaning of operator has been cast broadly to take into consideration all the different types of permutations that may result in a person being in control of the pool facility.

Subclause 8(1) defines an operator, of a pool facility-

- (a) means the person who, alone or with someone else, manages or controls the pool facility;
- (b) and includes-
 - i. a person for the time being managing or controlling the pool facility; and
 - ii. a person managing or controlling the pool facility in accordance with a facility management agreement; and
 - iii. any other person prescribed by regulation.
- (c) does not include a person excluded from the definition by regulation.

Subsection 160(1) of the *Legislation Act 2001* provides that a reference to a ‘person’ generally includes a reference to a corporation as well as an individual. Paragraph 8(1)(a) provides the broad parameters for an operator consisting of a single person, including a group of people, that manages and controls the pool facilities. Paragraph 8(1)(b) has been inserted to indicate some of the types of arrangements under which a person would be considered to be an operator.

Subparagraph 8(1)(b)(i) would include those circumstances where a person may be acting as a manager on temporary basis. Subparagraph 8(1)(b)(ii) specifically caters for those events where a company may be contracted to the Territory to manage a pool facility and that agreement specifies that a particular person who holds a designated position would be responsible for managing the pool facility. Subparagraph 8(1)(b)(ii) should not be taken to mean a public servant that manages the performance of the Agreement for the Territory. Subparagraph 8(1)(b)(iii) provides that the Minister may prescribe by regulation a person (or class of person) that would be considered as managing the facility. Section 48(2) of the *Legislation Act 2001* provides that a power to make a regulation about a person allows a regulation to be made in relation to a class of persons.

Paragraph 8(1)(c) provides that if a person is excluded under the regulations then that person cannot be an operator of a pool facility. This subclause should not be considered as

conflicting with subparagraph 8(1)(b)(ii). Paragraph 8(1)(c) specifically allows the Minister to exclude a person (or class of persons) from becoming an operator of a pool facility.

Subclause 8(2) provides that if more than one operator is managing the pool facility the operators will be compliant with requirements of the Act if either person exercises the function or provides any notice or other document required under the Act.

Clause 9 Meaning of pool

Clause 9 of the Bill provides guidance on what constitutes a pool under the Bill. In determining whether a pool is captured under the definition consideration must be given to what categories of facilities apply (see clause 6 and clause 7 of the Bill). If a type of pool does not come within the category it is not a pool for the purposes of the Bill. For example, it would not a private backyard pool as the pool is not open to or used by the public. The provision makes it clear that the Act is not encompassing those pools that can be overturned easily for example, a plastic shell toddler wading pool. The Act does not encompass those structures that are primarily for the cleaning of the body. A creek or river is also not captured under the definition.

Subclause 9(a) provides that a pool means an artificial structure or vessel that is-

- i. capable of being filled with water; and
- ii. used or intended to be used for swimming , diving, wading, paddling or any other recreational water activity; and
- iii. unable to be emptied by overturning the structure or vessel;

Subclause 9(b) provides that it does not include:

- i. a bath tub or other vessel used for cleaning the body; or
- ii. an artificial structure or vessel prescribed by regulation.

Subclause 9(b) provides the Minister with the flexibility to exclude structures or vessels that have or would otherwise be inadvertently captured under the Act.

Clause 10 Meaning of pool facility

This clause provides the meaning of a pool facility and caters for those circumstances where a pool and its surroundings are within its own complex or land area, and pools that may be situated within another recreational complex, such as co-location within a gymnasium. It is not the intention of this legislation to regulate those areas not associated with the pool facility where a pool is contained within another complex.

Clause 10 provides in this Act:

- (a) means 1 or more pools; and
- (b) includes any 1 or more of the following:
 - i. the plant associated with each pool;

- ii. the concourse for each pool;
 - iii. the toilets, change rooms and similar facilities associated with each pool;
 - iv. lighting;
 - v. a fence and any other structure that-
 - (A) excludes access, around each pool; or
 - (B) forms a boundary around 1 or more pools;
 - vi. premises used for administration in relation to each pool;
 - vii. any other structure, building or plant necessary for the operation of each pool; but
- (c) does not include—
- i. if the pool is located within a gymnasium or recreational centre—the areas of the recreational centre not associated with the pool; or
 - ii. a facility prescribed by regulation.

Clause 11 Exemption of pool facility or person from Act

Subclause 11(1) provides the Minister with the power to exempt a pool facility or a person under this Act. An exemption may relate to different classes of pool facilities or people and the exemption may apply differently to categories of pool facilities or a particular pool facility or a particular person (note section 48 of the *Legislation Act 2001* – power to make statutory instrument (including exemptions) includes power to make different provision in relation to different matters or different classes of matters, and to make an instrument that applies differently by reference to stated exceptions or factors).

Subclauses 11(2) and 11(3) have been inserted to make it clear that the Minister must consider any criteria prescribed by regulation to exempt the pool facility or person and the exemption may be conditional. It is noted that these clauses of the Bill confer a wide range of administrative power on the Minister as there is no stated limit concerning the matters that would be relevant or irrelevant to the exercise of power.

When developing the Bill consideration was given to the feasibility of the Minister’s powers being subject to stated limits and it was considered that this may compromise the policy objective to limit the regulatory intervention in the management and administration of pool facilities wherever possible. It was considered that the power conferred on the Minister would also be limited to the matters relating to the management and administration of the business for pool facilities and therefore the discretion would be subject to only the scope and objects of the Bill in that regard. However, it is anticipated that an exemption may be granted in circumstances where an operator is operating the pool facility over and above the minimum standards prescribed. As it is the intention of the Bill to only intervene where regulatory intervention is required, the Minister could exempt the operator from various enforcement and reporting requirements.

This provision was included to enable the Minister to exempt persons or pool facilities from the regulation of the entire Act or parts of the Act. It was considered to place a limit on the matters that the Minister could consider was likely to result in a person who would otherwise not be captured under the Act needing to be included. However, to ensure that this power is exercised appropriately the exemption will have Legislative Assembly oversight as a disallowable instrument under subclause 11(5). Subclause 11(4) provides that an exemption has no effect to the extent that it is inconsistent with a regulation during any period in which a condition of the exemption is not complied with. This provision is to ensure that if there is an inconsistency between the instrument and the legislation, the legislation will prevail.

PART 3 Pool facilities administration – minimum requirements, standards and guidelines

Division 3.1 Pool operators and staff

The previous Act required the Minister to approve a significant number of ‘day to day’ operational functions. This included, amongst other things, requirements to approve all swimming coaches and instructors; each individual request for exclusive hire, and approval of people that may sell or hire any article at a public pool. These arrangements were administratively cumbersome and created an unnecessary regulatory burden. Further, the previous Act did not provide the Minister with the ability to set minimum standards or guidelines for the safe operation of public pools, regardless of ownership. For example: signage; first aid equipment and facilities; staff qualifications; Royal Life Saving Society – Australia (RLSS) standards to be observed; and operational manuals and reporting requirements.

The Bill will establish a modern administrative framework that provides flexibility for the Minister to delegate responsibility to appropriate officials and set minimum parameters for guiding the operation of public pools. This will assist in providing direct oversight of Territory owned pools to responsible directorates, remove unnecessary approval processes and provide an efficient management system for pool operators.

Part 3 of the Bill adopts the administrative framework to enable the Minister and responsible Directorate to update requirements when industry standards are changed or Agreements need clarification. To further complement the administrative framework, there will be a move away from strictly prescribing matters in the Act with which pool operators must comply, by establishing minimum standards and guideline processes that support self-regulation principles. For example, an instrument can prescribe the minimum qualifications or training that staff must have to work at a public pool. Under current arrangements, the operator must apply separately to the Minister for each person to be authorised.

Where possible, specific criteria and requirements surrounding the matters that the Minister or Director-General may set standards and guidelines as statutory instruments for are included to limit the administrative power being conferred.

Clause 12 Qualifications, skills and training

Subclause 12(1) provides that the Director-General may determine minimum qualifications, skills and training requirements for operators, employees, people engaged under contract or volunteers at a pool facility. Under the previous Act, section 14A, the Minister was required to approve each individual person engaged for reward in teaching a person to swim or in coaching or instructing a person to swim. As noted above this regulatory requirement was administratively cumbersome.

Clause 12(2) confers a narrow range of criteria when the Director-General may exercise administrative power when making an instrument. Accordingly, the Director-General may only make an instrument relating to:

- (a) the kinds of qualifications, training, skills or experience required by-
 - i. operators of pool facilities; and
 - ii. in accordance with their functions – employees, people engaged under contract or volunteers at a pool facility.

The Director-General can only include matters in the determination relevant to professional development and training requirements, paragraph 12(2)(b) – this requires that it must be relevant for the functions/duties of the position. Further under paragraph 12(2)(c) the Director-General can only advise if compliance with the *Working with Vulnerable People (Background Checking) Act 2011* is a requirement, not create new parameters to broaden the scope of people to be included as relevant for a background check. Finally under paragraph 12(2)(d) the Director-General may only specify a requirement for the keeping of records for matters pertaining to qualifications, training, skills or experience and not other matters that may relate to a person's employment, for example conduct of employees or attendance records.

Paragraph 12(2)(a) provides that the Director-General may make a determination in relation to the kinds of qualifications, training, skills or experience required by: pool operators, employees, contractors and volunteers (consistent with their functions). This limits the Director-General to specifying only those persons that work or volunteer at a pool facility when their functions of employment/engagement so require – for example a swimming instructor or lifeguard. This requirement has been included to make it clear that the Government is committed to enhance water safety principles and minimise risk of people drowning which is consistent with other Australian jurisdictions. For instance, Australian lifeguards are world-renown for their high levels of skill and knowledge in accident prevention and rescue response. The minimum qualification for pool lifeguards in Australia is the Royal Life Saving Society - Australia (RLSS) Pool Lifeguard Award and this is recognised

in some states and territories as a 'licence'. Training is undertaken to obtain this qualification so every lifeguard possesses the skills and knowledge to undertake a wide variety of duties at pool facilities in Australia. The minimum qualifications will now be able to be expressed by standards to guide the industry on recognised Australian standards. This addresses an anomaly under the previous Act which did not provide guidance to industry on the applicable requirements or standards that should be encouraged.

A determination may also stipulate the ongoing professional development and training requirements if the nature of the functions of the job requires continuous development and training under paragraph 12(2)(b). This provision is consistent with the principles for regular training in the Inquest recommendations for lifeguards.⁸ However, the Coroner's recommendation stipulated providing a minimum of four training sessions per year and it is not the intention of this clause, nor should it be interpreted as such, as supporting the specificity of any of the Inquest recommendations.

Paragraph 12(2)(c) provides maximum transparency for industry and persons involved in the industry as it reiterates the need for compliance with the requirements under the *Working with Vulnerable People (Background Checking) Act 2011* (WVP Act). The WVP Act requires a person to undergo such checking when volunteering or being employed in a regulated activity (for example coaching and tuition) provides contact with a range of people that may be vulnerable, such as - children, persons with a disability, persons unable to communicate (see WVP Act for precise details). It should be noted that any determination under clause 12 is unable to stipulate that a person is bound to the WVP Act if that obligation is not already imposed under the WVP Act. The WVP Act has received a compatibility statement under section 37 of the *Human Rights Act 2004*.

The Director-General may also stipulate requirements for the keeping of records in relation to qualifications, skills and training under paragraph 12(2)(d) of the Bill. Subclause 12(3) provides that any determination made is required to be notified on the ACT Legislation Register.

Division 3.2 Standards

Clause 13 Operations and management – Ministerial standards

Subclause 13(1) provides that the Minister may determine standards in relation to the operation or management of a pool facility. (Note section 48 of the *Legislation Act 2001* – power to make statutory instrument (including a disallowable instrument) includes power to make different provision in relation to different matters or different classes of matters, and to make an instrument that applies differently by reference to stated exceptions or factors).

⁸ Chief Coroner Cahill, in *Inquest into the Death of Kaled Kanj*, 29 October 2009, ACT Coroner's Court.

Subclause 13(1) has been inserted to make it clear that the operation and management of a pool facility may have minimum requirements determined by the Minister if considered necessary. It is noted that this clause of the Bill confers a wide scope of administrative power on the Minister as there is no stated limit concerning the matters that would be relevant or irrelevant to the exercise of power. When developing the Bill consideration was given to the feasibility of the Minister's powers being subject to stated limits. It was considered that this may compromise the policy objective which is to limit regulatory intervention in the management and administration of pool facilities wherever possible. To expressly indicate the matters to which the Minister must consider would hamper the Minister's ability to respond appropriately to emerging harm reduction initiatives and the changing needs of industry. However, as it was deemed impracticable at this time to define the individual matters to limit the powers, subclause 13(2) has been inserted to ensure that the Minister must consult on any proposed standard prior to the standard being determined.

Paragraph 13(2)(a) provides that the Minister must consult with people and organisations that are involved in the industry before the standard is determined. Paragraph 13(2)(b) further provides that the Minister must invite people and organisations to make written comments on the proposed standards. Under subclause 13(3) the Minister must take into consideration any written comments before determining the standards.

As the power conferred on the Minister is limited to the matters relating to the operation and management of the business for pool facilities the discretion will be subject to only the scope and objects of the Bill in that regard. However, to ensure that this occurs the determination will have Legislative Assembly oversight as a disallowable instrument under subclause 13(4) of the Bill. Furthermore, as the disallowable instrument is required to have an explanatory statement attached it is expected that any reasoning for the standard and the nature of consultation that has taken place would be detailed in the statement.

Clause 14 Operational matters

Subclause 14(1) provides that the Director-General may determine standards in relation to specified operational matters in relation to pool facilities. Consideration was given to confining this power to the Minister, however a main objective of the Act is to reduce red tape while not compromising the safety of patrons and being able to react quickly to changing industry standards that are in place as a matter of safety. As noted previously, the powers which the Director-General will be limited to when determining standards are those matters which affect the 'day to day' operation and smooth running of the pool facilities. Accordingly, the regulatory and administrative burden that can be reduced is significant.

Under subclause 14(1) the Director-General powers to determine standards are limited to the following matters:

- (a) occupancy loading;
- (b) pool loading;
- (c) water safety initiatives;
- (d) safety rules and requirements;
- (e) adult supervision of a child;
- (f) supervision of patrons by pool facility staff;
- (g) customer service charters;
- (h) mandatory safety equipment;
- (i) mandatory or recommended best practice signage in relation to a pool facility, including meeting any AS, AS/NZS or international standards for safety signs;
- (j) record keeping in relation to the operation and management of a pool facility.

The matters in subclause 14(1) allow the Director-General to update requirements when industry standards are changed or Agreements need clarification.

To limit the powers of the Director-General, paragraph 14(2)(a) has been inserted to provide that the Director-General must consult with people and organisations that are involved in the industry before the standard is determined. Paragraph 14(2)(b) further provides that the Director-General must invite people and organisations to make written comments on the proposed standards. Under subclause 14(3) the Director-General must take into consideration any written comments before determining the standards.

The power conferred on the Director-General is limited to the matters stated at subsection 14(1) and that power will also be subject only to the scope and objects of the Bill. The determination will be a notifiable instrument under subclause 14(4) of the Bill to ensure maximum transparency.

Clause 15 Conditions of entry and removal

This clause supports the early intervention process to minimise the types and number of times a patron is subject to a criminal offence. Subclause 15(1) provides that the Director-General may determine standards in relation to the conditions of entry to a pool facility. The Director-General may also determine standards that stipulate when a person may be removed from a pool.

Under subclause 15(2) the Director-General's powers have been limited to those matters for:

- (a) conditions of entry, including—
 - i. health and hygiene requirements;
 - ii. the minimum age for entry without adult supervision; and
 - iii. in relation to assistance animals;

- (b) rules of behaviour, including behaviour that may cause a person to be excluded or removed from a pool facility; and
- (c) procedures and grounds for excluding people, including in relation to operational matters.

Under subclause 15(3) a determination is a notifiable instrument and must be notified on the ACT Legislation Register. This will ensure that there is an additional mechanism for members of the community to ascertain the conditions relating to entry, refusal from entry and type of behaviour that may result in removal from the pool facility.

This clause should be read in conjunction with clause 16 – signs and Part 5 of the Bill which provide legislative mechanisms to limit the impact on a person’s human rights, especially the right to freedom of movement. As noted in clause 16, any notifiable instrument that gives effect to this clause must adequately notify the person of the conditions. By preparing the standards for removal and entry provisions as notifiable instruments a number of positive benefits for the community will occur, namely as far as possible that the same conditions for entry and removal at a category 1 pool will apply at all category 1 pools and the information will be freely available to the public. This will enable regulatory consistency in the application of this provision and minimise circumstances where a person may not be given fair access.

Clause 16 Signs

Clause 16 provides the mechanisms and processes that are to support all standards made under Part 3 and have special relevance in the way that clause 15 may be enforced. These provisions have been inserted to provide that the Director-General may make standards in relation to signage and how that signage must be displayed at a pool facility. Subclause 16(3) provides that standards in relation to signage must be determined as a notifiable instrument and placed on the ACT Legislation Register.

The powers of the Director-General will be limited to the objects and scope of the Act and have been further constrained under subclause 16(2) to matters that relate to:

- (a) minimum construction and design requirements for signs, including words and images that may be displayed on signs;
- (b) the size and location of signs;
- (c) signs that are mandatory or reflect best practice;
- (d) the form of a sign and how patrons may be notified of pool facility conditions of entry and grounds for exclusion or removal.

Accordingly for the removal powers to be relevant under Part 5 of the Bill, signage in relation to standards must be in accordance with provisions that will be prescribed under this clause. For example a person must have adequate notice of the behaviour that may

result in the person being removed. If signage is not displayed correctly a person would not be able to be removed from the pool facility for anti-social behaviour. This provides a limitation on how Part 5 may be exercised to reduce the impact on human rights, especially freedom of movement.

Notification and the requirements for signage were part of the recommendations of the Coroner's Inquiry⁹ and it is considered important for the education of patrons to minimise the risk of death by drowning.

Division 3.3 Pool fees

Clause 17 Pool fee guidelines

This clause has been inserted to provide the Government with the ability to ensure that Territory owned assets that are under an Agreement retain the fundamental principles for fees to provide equity of access for the community. The clause also formalises existing processes and procedures.

Subclause 17(1) provides that this section only applies to category 1 facilities that have been made exempt by the Minister under clause 55 of the Bill from any fee determination in accordance with clause 54. Subclause 17(2) provides that the Minister may issue guidelines for fees.

Subclause 17(3) provides a limit on the matter that the Minister may address under a guideline to those matters relating to setting fees for the use of the pool facilities. Importantly, paragraph 17(3)(a) provides that the Minister may further refine which pools within the category 1 facility classification the guidelines are to apply to. This has been inserted to make it clear that not all Territory owned assets are under an Agreement. Therefore those operators will need to comply with the requirements under clause 54 of the Bill for determining fees if that particular pool facility has not been made exempt under clause 55.

Paragraphs 17(3)(i) and 17(3)(j) have been inserted to make it clear that the Director-General will still be able to review any proposed fees that category 1 pool operators seek to apply to patrons. The policy rationale for this requirement is to minimise the occurrences where individual sectors of the community may not be able to partake in the enjoyment of the pool facility due to the pricing structure. Given that category 1 facilities are Territory owned, a broad range of the community must be able to enjoy those facilities. Therefore the Government needs to retain the ability to oversight fees, especially in regard to prospective patrons that hold concessions issued by the Territory, State or the Commonwealth.

⁹ Chief Coroner Cahill, in *Inquest into the Death of Kaled Kanj*, 29 October 2009, ACT Coroner's Court.

Subclause 17(4) has been inserted to require the pool fee guideline to be a notifiable instrument. This provides the mechanism for administrative consistency when considering fees being made by an operator under this clause.

Division 3.4 Prohibited articles

Clause 18 Meaning of prohibited article

This clause provides that the Director-General may declare items that are prohibited from sale or hire at pool facilities. Under the previous Act a person was not able to sell or hire, or offer for sale or hire, articles without Ministerial approval for each article. This Division has been inserted to give effect to the policy position that it is unreasonable to expect a pool operator to seek approval for every article for sale or hire. Accordingly, Division 3.4 seeks to allow pool operators the flexibility to operate their business and reduce the administrative burden. This is achieved by replacing the previous requirement for approval of each item to a process where an operator may sell or hire any article that is not prohibited. Articles that are prohibited from sale or hire will not be able to be used within a pool facility by virtue of clause 15 – Conditions of entry and removal.

Clause 19 Declaration of prohibited articles

Subclause 19(1) provides that the Director-General may declare a thing to be a prohibited article. This power has been vested in the Director-General to increase the efficiency of regulatory function as the matter deals with the day to day operation of a facility.

Paragraph 19(1)(a) provides the limit on powers for the articles that the Director-General may declare as prohibited. The Director-General must be satisfied that the article or thing is likely to be obscene or offensive, a risk to the health and safety of people using the facility or a hazard at the pool facility. For example, an item that is of glass or ceramic construction poses a higher safety risk due to the high proportion of patrons that are normally barefoot.

Paragraph 19(1)(b) provides that if an article is otherwise inappropriate to be sold or hired at a pool facility it may be prohibited. This caters for those items that may be legal to be sold however would not be sensible to be sold at the pool facility. For example, items that react once placed in water, such as a bath bomb or bubble bath, are items that are very innocent but may cause considerable damage to infrastructure i.e. filtration systems, water balance, and discolouration of tiles. An item that is prohibited for sale or hire at a pool facility would be excluded from being used at the pool facility by virtue of clauses 14 and 15 of the Bill.

Subclause 19(2) provides that the declaration may state that a prohibited article must not be sold or hired or offered for sale or hire at a pool facility.

Subclause 19(3) makes a declaration a notifiable instrument and therefore must be notified on the ACT Legislation Register. This notification process will also provide transparency to all public pools, patrons and suppliers on what items are prohibited items.

PART 4 MAINTENANCE DIRECTIONS AND POOL CLOSURE ORDERS

This Part provides the mechanisms to issue a maintenance direction and close a public pool under an emergency situation. These provisions significantly narrow the circumstances where a public pool may be closed from the previous Act. Under subsection 9(2) of the previous Act the Minister may have caused any public pool to be closed at any time for the purpose of cleaning or repairing the pool or for any other reason which the Minister thought was sufficient.

Due to the significant impact a maintenance requirement or direction could have on the viable operation of a pool facility business, the arrangements are now clearly articulated and provide clear tests for when those actions may be appropriate.

The powers under the Part have been conferred on the Director-General due to the operational nature of the Part, the desire to have clear administrative review arrangements in place, and the fact that the powers to be exercised would be subject to cumulative tests before such action could be taken. Necessary safeguards for the exercise of powers have been included as actions under this Division and must be based on reasonable grounds. As such they are subject to appeal mechanisms to the ACT Civil and Administrative Tribunal of the (ACAT). Furthermore, subclause 24(4) provides that where the Minister is satisfied that there were insufficient grounds for giving the direction the Territory must pay the pool operator compensation. The rights of a pool operator to seek a review of a decision made under this Part were not available under the previous Act.

Division 4.1 Maintenance directions

Clause 20 Pool facility not maintained

Subclauses 20(1) and 20(2) allows the Director-General to issue a maintenance direction. A direction may only be issued if the Director-General is satisfied on reasonable grounds that a pool operator is not maintaining the pool facility in good repair or condition, and the failure to properly maintain the facility is causing undue risk to people, property or the environment. This is a cumulative test, there must be a failure to maintain and that failure must represent a safety risk to people, property and the environment. That is if the facility is not being maintained and there is no risk to possible patrons then a direction must not be issued.

A decision to exercise the power under this provision must be reasonable and must be appropriately based on evidence justifying such action, as a decision under this provision is a reviewable decision under item 1 of Schedule 1 to the Bill. Furthermore, subclause 24(4)

provides that where the Minister is satisfied that there were insufficient grounds for giving the direction the Territory must pay the pool operator compensation.

Subclause 20(3) provides that a maintenance direction must be in writing and state the action, or actions, that must be taken. The requirements for a maintenance direction are listed at paragraph (a) to (c) and include:

- (a) the details of the maintenance work required, or matters to be rectified;
- (b) when the maintenance direction must be complied with, being a day at least 1 month after the day the maintenance direction is given to the operator;
- (c) if the maintenance required is extensive—
 - i. that the pool facility be closed for a period (a *stated period*) for maintenance work to be carried out; and
 - ii. the stated period the pool must be closed.

Subclause 20(4) requires that a maintenance direction must also indicate that if the direction is not complied with the pool facility may be closed under the emergency closure provisions if it is the only viable option to prevent or reduce undue risk to people, property and environment.

If the maintenance required is extensive under paragraph 20(3)(c) then subclause 20(5) provides that a time period of at least 60 days must be given for complying with the direction and if possible that period of time should be during the 'off-peak' season. Further, subclause 20(6) also provides that the period stated on the maintenance direction under paragraph 20(3)(c) may end on a particular day or when an event occurs.

Division 4.2 Emergency closure orders

Clause 21 Emergency closure of pool facility

Under subclause 21(1) the Director-General may order an operator of a pool facility to close the pool facility, if the Director-General believes on reasonable grounds that—

- (a) the operator did not comply with a maintenance direction, and the closure of the pool facility is the only viable option to prevent or reduce undue risk to people, property or the environment; or
- (b) the immediate closure of a pool facility is the only viable option to prevent or reduce undue risk to people, property or the environment.

This clause provides that the Director-General must on reasonable grounds believe a number of things before issuing an order to close the facility. This requires the Director-General to consider the stated matters and ensure there is sufficient reasoning to warrant such emergency action being taken. The first test for closure is that a maintenance

direction under clause 21 has been issued and the matters listed for repair in that maintenance direction have not been rectified. Failure to rectify those items must now represent an undue risk to people, property or the environment. To meet the test of reasonableness, the test requires that there would either need to be a failure to fix those items or the items were not appropriately repaired and the situation has worsened. Therefore, the situation is such that there is an unacceptable risk to the safety of the community, the property itself or the environment (especially given the possibility of seepage of chemicals that may be used at a pool facility).

Subclause 21(2) provides a written notice must be given immediately, or as soon as practicable, to the operator. Normally a notice would be given at the time the emergency closure would occur. The provision that a notice may be given as soon as practicable after the closure has occurred is to accommodate those circumstances where a written notice may not be able to be given to an operator at the time of the closure. As an emergency closure, where undue risk to the community, property, or environment is prevalent, the ability to give the notice other than at the time, is reasonable and proportionate for such emergency action. The written notice must state:

- (a) the pool facility that must be closed by the operator;
- (b) the grounds on which the order is given;
- (c) the date of issue of the order;
- (d) that the order starts on the day the order is given;
- (e) when the order ends;
- (f) that if the order is not complied with, the operator may be committing an offence;
- (g) that the operator may apply for the cancellation of the order and the details about the application process.

Subclause 21(3) provides that the order may end on a stated day or on the happening of a stated event. To provide protection to a pool operator subclause 24(4) provides that where the Minister is satisfied that there were insufficient grounds for giving the direction the Territory must pay the pool operator compensation.

Clause 21 should also be considered in conjunction with clause 22, Offence - fail to comply with emergency closure order; and clause 23, Cancellation of emergency closure order - application.

Clause 22 Offence - fail to comply with emergency closure order

Clause 22 provides that it is an offence if a person is subject to an emergency closure order and the person fails to comply with the order. An offence against this provision is a strict liability offence and a maximum of 50 penalty units applies to reflect the seriousness of the offence. The monetary penalty is consistent with the *Guide for Framing Offences 2010*.¹⁰

Subclause 22(2) prescribes the offence as one of strict liability and this is discussed above in the section *Human Rights Implications – Right to Privacy and Reputation*. The person who has been charged with an offence under this provision bears an evidential burden in relation to the matters if they wish to deny criminal responsibility under section 58 of the *Criminal Code 2002*. It is considered that failure to comply with an emergency closure order is significant as it is specifically an offence aimed at ensuring public health and safety, protection of property and protection of the environment.

The tests imposed for an emergency closure are necessarily strict because of the undue risk posed. The Director-General must be satisfied that there was no other viable option to prevent or reduce the risk other than closing the entire pool facility. For example the closing of one or two pools would not reduce the risk.

It was also considered appropriate for the offence to be one of strict liability as the person responsible for the closure of the pool facility is the pool operator who has ultimate responsibility for the management of the facility and to ensure that a safe environment is provided to patrons and staff. The severe consequences that can flow from an operator refusing to close a pool facility that is under an emergency closure order must not be underestimated. This is compounded due to the type of environment, the number of people and their ages that will frequent the facility and the types of equipment and chemicals used in providing a stable and sanitised environment. A failure in any one of those systems has the potential to result in sickness, injury and death.

Therefore the fact that the operator was given notice and refused to close the pool warrants a strict liability offence. It should be noted that the Criminal Code defences are also available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36) and the defence of intervening act (Code section 39).

Clause 23 Cancellation of emergency closure order - application

Under subclause 23(1) a pool operator has 7 days to apply in writing to the Director-General for cancellation of the emergency closure. The operator must state the reasons why the Director-General should cancel the order.

¹⁰ Australian Capital Territory Government, Department of Justice and Community Safety, *Guide for Framing Offences*, April 2010, p29.

Subclause 23(2) provides that the Director-General must before making a decision consider: the reasons stated in the application; the grounds why the emergency closure order was originally issued; and the current state of the pool facility.

If the Director-General is satisfied on reasonable grounds that the cancellation will not endanger the health or safety of people or cause undue risk to property or the environment, the Director-General may cancel the order under subclause 23(3). If the Director-General refuses to cancel the emergency closure order the pool operator must be advised in writing of the reasons for the decision and that the operator may seek to have the decision reviewed by ACAT, see subclause 23(4). This clause should be read in conjunction with Part 8 – Notification and Review of Decisions.

Clause 24 Compensation - pool closure

This clause has been included due to the possible consequences of the action under this Part and the need to ensure an operator has sufficient protection if, in the unlikely case, the direction or closure order was not warranted.

Subclauses 24(1) and 24(2) provide the criteria that apply if the operator has been subject to a direction or an order requiring the facility to be closed when there were insufficient grounds for doing so including if, as a result of the order the operator has suffered loss or expense and is desirous of seeking compensation from the Territory. Any such application for compensation must be made to the Minister and be in writing setting out the reasons why compensation should be paid.

Subclause 24(3) requires the Minister to decide if compensation is to be payable and if so the amount of any such compensation. The operator must be given written notice of the decision. However, in deciding whether to pay compensation, the Minister must be satisfied that the Director-General had insufficient grounds for issuing the direction or order. The Territory must pay the operator the reasonable compensation as decided by the Minister (subclause 24(4)).

Subclause 24(5) provides the circumstances when compensation will not be payable to the operator. Compensation is not payable on any loss or expense suffered by the operator because of an act or omission of the operator; if the operator caused or contributed to the circumstances that caused the direction or order to be given; or if the direction or order was given in accordance with this Act and in good faith.

Subclause 24(6) has been inserted to provide clarity that if the application has not been decided within 28 days after the day the Minister receives the application, the Minister is to be taken to have refused to pay compensation.

PART 5 REFUSING ENTRY AND REMOVAL POWERS

Currently the only legislative option available to a pool operator when a patron is behaving in an anti-social way is that a patron commits an offence. This Part of the Bill will change this approach by inserting an early intervention process in place of offence provisions. . One of the fundamental principles of this approach is the preference for patrons that exhibit anti-social behaviour to be removed from the premises. Unlike the previous Act, consideration has been given to how these principles can be applied while minimising the risks of pool operators and employees being personally placed in danger. The provisions below give the operator and patron a choice on whether the patron leaves of their own accord or whether they don't leave and therefore potentially commit an offence. This Part must be read in conjunction with Part 3, specifically Division 3.2.

It is recognised that there may be circumstances where a person may be refused entry when such refusal is not warranted. A number of mechanisms have been included to minimise the occurrence of this occurring and to enable the person the opportunity to seek resolution for the unfair refusal to entry. Complaints may be actioned through the operator's internal complaints process. Alternatively, the Director-General may specify standards that the operator will be required to comply with under paragraph 14(1)(g) for complaint processes. However, the person will also have the ability to bring the matter to the attention of the responsible Directorate and Minister so action may be taken to rectify the behaviour of the operator's staff.

Clause 25 Definitions – pt 5

This clause provides the definitions for:

authorised person, in relation to a pool facility, means—

- (a) the operator; or
- (b) an employee of the operator; or
- (c) a licensed security guard engaged by the operator;

licensed security guard means a person who holds a security licence.

security licence means a licence under the *Security Industry Act 2003* that authorises the licensee to carry out crowd control under that Act, whether or not it authorises the licensee to do anything else.

The inclusion of a licensed security guard as an authorised officer is to enable crowd control and removal of persons from premises to be undertaken by trained personnel other than a police officer or an employee of the operator.

Clause 26 Authorised person may refuse entry

This provision may engage section 11 of the *Human Rights Act 2004* for the protection of the family and children and the right to freedom of movement under section 13 of the *Human Rights Act 2004*, to the extent that an unsupervised child person and an adult may

be refused entry to a public pool. See the section on *Human Rights Implications – Freedom of movement* of this Explanatory Statement for further information.

Subclause 26(1) provides that an authorised person may refuse entry to a pool facility to a child if the child is—

- (a) under the minimum age; and
- (b) not accompanied by an adult.

Minors are entitled to special protection in recognition of their vulnerability because of their status as a child and this is supported by the RLSS guidelines that have for many years stressed the importance of children being supervised in, on and around water. While it can be argued that the limitation imposed infringes on the right of the family to make decisions about whether their child should be supervised, conversely, the Bill supports the protection of the family and children through mitigating their risks in a pool facility. The purpose of the limitation is critically important for water safety.

Subclause 26(2) provides that an authorised person may also refuse a person entry to a pool facility if the authorised person believes on reasonable grounds that—

- (a) the person has committed, or is likely to commit, an offence against this Act; or
- (b) the person has contravened, or is likely to contravene a condition of entry to the pool facility; or
- (c) admitting the person will be inconsistent with a standard.

Subclause 26(2) has been inserted to limit the range of matters for which an authorised person may refuse entry to a person. Refusal of a person is closely linked to the early intervention process and may be considered to infringe a person's right to freedom of movement under section 13 of the *Human Rights Act 2004*. As noted before, the policy intent of the Bill is to refuse admission when necessary to do so (e.g. being intoxicated) so patrons can safely enjoy the community facility and circumstances that might lead to death by drowning are minimised.

It is considered that there are not any less restrictive means available to achieve the purpose of the Bill as the early intervention process (refusal of entry) is preferable to a person committing an offence. Furthermore a number of mechanisms have also been inserted to limit the human rights impact, including that a refusal must be based on reasonable grounds. Subclause 26(3) has been inserted to make it clear that a person may only be refused entry under paragraph 26(2)(b) and 26(2)(c) if the conditions of entry or standard, and grounds for exclusion for contravening those conditions or to meet a standard, are displayed or made available at the entry of the pool facility, thereby further limiting the application of the provision. Finally, providing the conditions of entry and standards and grounds for exclusion by notifiable instrument maximises the Government's

ability to provide regulatory consistency and provide clear pathways for administrative decision making.

Subclause 26(4) provides that the minimum age is the age prescribed by regulation and that for the purposes of clause 26, a standard means a standard determined under Division 3.2 of the Bill.

Clause 27 Authorised person's directions

The provision may engage the right to freedom of movement under section 13 of the *Human Rights Act 2004*, to the extent that a person may be directed to leave a public pool. See the section on *Human Rights Implications – Freedom of movement* of this Explanatory Statement for further information.

Subclause 27(1) provides that the section applies if an authorised person believes on reasonable grounds that a person at a pool facility—

- (a) has committed, is committing or is about to commit an offence against this Act; or
- (b) has contravened, or is likely to contravene, a condition of entry to the pool facility.

Contravened in paragraph 27(1)(b) also means fails to comply in accordance with the definitions provided under the *Legislation Act 2001*, Dictionary, Part 1, and section 104 of the *Legislation Act 2001* that an Act includes regulation and instruments made under the Act. Reasonable grounds on what may be considered a contravention under the Act will only be satisfied if the reason is one of those circumstances that are prescribed under clause 15 - Conditions of entry and removal.

Subclause 27(2) provides that the authorised person may direct the person—

- (a) as reasonably necessary for—
 - (i) the good management of the pool facility; or
 - (ii) the safety and enjoyment of people at the pool facility; or
- (b) to immediately leave the pool facility.

Paragraph 27(2)(a) has been inserted to make it clear that the authorised officer has the ability to direct a person for the good management and safety and enjoyment of others at the facility. This paragraph provides the authorised officer with an option other than requesting a person to leave the facility and incorporates the fundamental provisions for the early intervention process, in place of the harsher alternative of the person committing a criminal offence. For example, an authorised officer may warn a person that their behaviour may result in removal from the pool facility, thereby giving the person an opportunity to modify their behaviour.

An authorised officer would accordingly be bound by Division 3.2 that sets the minimum standards for the operational requirements of the facility, and the behaviour expected of patrons to remain within the pool facility. This will minimise inconsistent application and provide a consistent regulatory approach across all pool facilities. This paragraph should also be read in conjunction with paragraph 14(1)(f) which specifically allows the Director-General to determine standards in relation to supervision of patrons by pool facility staff. It must also be noted that paragraph 27(2)(a) does not under any circumstances give an authorised officer authority to direct a person to leave a pool facility (addressed at paragraph 27(2)(b)).

Paragraph 27(2)(b) provides an authorised officer with the power to issue a direction to leave the pool facility. It is acknowledged that this power is extensive and consideration was given to whether there was any less restrictive means to give effect to the policy objectives. The policy is designed on the principle that individuals that exhibit anti-social behaviour are directed to leave the premises in place of having a criminal offence recorded against them – the process of early intervention. This is considered especially important given that pool facilities are generally frequented by people of various age, where a minor behavioural infraction has a disproportionate impact.

Under subclause 27(3) the power to give a direction to remove a person can only occur if the conditions of entry and grounds for removing a person are displayed or made available at the entry of the pool. This is to ensure that the person is on notice of the behaviour that will be deemed unacceptable. The power is further constrained as the authorised officer must under all circumstances advise the person when giving the direction to leave that it is an offence if the person fails to leave the pool facility. Subclause 30(4) provides the limitations on who may physically eject a person from a pool facility if they refuse to leave under their own accord. These provisions have been inserted to limit the impact of section 13 of the *Human Rights Act 2004* (Freedom of movement) and importantly, to give a person a choice whether they will leave the pool willingly before incurring an offence.

Subsection 27(5) makes it clear that a direction can be given to a person at the pool facility whether or not the person has paid an entry fee.

Clause 28 Authorised person's direction – operational reasons

Subclause 28(1) provides that an authorised person may direct a person at any time to immediately leave a pool facility because the pool facility is required for a specific operational purpose. This clause has been included for those circumstances that deal with special hiring arrangements where there is a need that the class of persons or children should for safety reasons have other use of the pool limited, for example a school swimming carnival. The provision may engage the right to freedom of movement under section 13 of the *Human Rights Act 2004*, to the extent that a person may be directed to leave a public

pool. See the section on *Human Rights Implications – Freedom of movement* of this Explanatory Statement for further information.

Subclause 28(2) provides that if an authorised person directs a person to leave, the authorised person must advise that it is an offence to fail to comply with the direction. Subclause 28(1) applies whether or not the person paid an entry fee to the pool facility – subclause 28(3).

Normal operational practice would result in a sign being placed at the entry advising that the pool would be closed for a specific time and purpose. However, subclause 28(4) has been inserted to ensure that unless a sign is displayed at the entry of the pool facility stating that the facility will be closed for a specific purpose, the person who is directed to leave under subsection 28(1) is entitled to a full refund of the person's entry fee.

Clause 29 Disability - assistance animals

The provision may engage the right to freedom of movement under section 13 of the *Human Rights Act 2004*, to the extent that a person that is accompanied by an assistance animal may be directed to leave a public pool facility if the animal enters the waters of the pool and the person does not remove the animal from the water. See the section on *Human Rights Implications – Freedom of movement* of this Explanatory Statement for further information.

Subclauses 29(1) and 29(2) have been inserted to make it clear that where a person requires the aid of an assistance animal, that the assistance animal may accompany the person within the pool facility.

However, due to health reasons subclause 29(3) provides that the person must not cause or allow the assistance animal to enter or remain in a pool. Section 56 of the *Discrimination Act 1991* does not make unlawful discrimination against a person on the ground of disability if the discrimination is necessary and reasonable to protect public health. An assistance animal is permitted into the pool facility if the person requires the aid of and is accompanied by an assistance animal. However, no animal is permitted under any circumstances to enter the water of a pool (due to the high risk of water contamination) and it is the action of allowing the animal to remain in the water, or refusal to remove the animal from the water, that will result in a person being directed to leave a pool facility.

Subclause 29(4) provides that if an assistance animal enters a pool, an authorised person may direct the person to remove the animal from the pool. Subclause 29(5) provides that if the person fails to comply with a direction to remove the animal, the authorised person may direct the person to immediately leave the pool facility, regardless if they have paid a fee or not. These provisions have been inserted to make it clear that if the person removes the animal from the pool they are entitled to remain at the pool facility.

Subclause 29(6) provides that an authorised person may only give a direction if the conditions that assistance animals are not permitted in the pool water is displayed or made available at the entry of the pool facility. This is to ensure that the person is on notice that this behaviour is not appropriate. Accordingly, if a person has a vision impairment the operator would have an obligation to also advise the person verbally of the requirements. The power is further constrained as the authorised officer must under all circumstances advise the person contravening those conditions that it is an offence if the person fails to leave the pool facility – subclause 29(7). Subclause 30(4) provides the limitations on who may physically eject a person from a pool facility if they refuse to leave under their own accord.

Clause 30 Offence – fail to comply with direction

Subclause 30(1) provides that a person commits an offence if the person is subject to a direction and the person fails to comply with the direction. Fail to comply includes ‘refuse’ to comply – Dictionary, Part 1 *Legislation Act 2001*. This offence provision is subject to a direction to leave a pool facility issued under paragraph 27(2)(b) and subclauses 28(1) and 29(5).

Subsection 30(2) prescribes the offence as one of strict liability and this is discussed further above in the section *Human Rights Implications – Right to the Presumption of Innocence*. The person who has been charged with an offence under this provision bears an evidential burden in relation to the matters if they wish to deny criminal responsibility under section 58 of the *Criminal Code 2002*. A strict liability offence is regarded as necessary under the circumstances as the person has been given every opportunity to be aware of the requirements for being in the pool facility and has still refused to leave.

However, subclause 30(3) limits the offence provision as it will not apply to a person if, before giving the direction, the authorised person did not warn the person that failure to leave the pool facility was an offence. As also noted above, a person is unable to be directed to leave if the person is not given sufficient notice under the respective clauses 27(3) and 29(6). Clause 28 applies to different circumstances, although has the same effect that all provisions relating to being given a direction have given the person opportunity to leave the pool facilities under their own ‘steam’. It is the failure to leave the pool facility that is the offence. Substantial consideration was given during the development of the Bill to whether other less drastic means could be used. This process was specifically designed to reduce the harsh requirement to apply a criminal offence for minor behavioural infractions. However, this offence provision is the final action of an early intervention process that has made every opportunity available to enable a person to modify their behaviour or leave the pool facility without further action being taken. Accordingly, a maximum penalty of ten penalty units has been prescribed.

It was considered appropriate for a number of policy reasons that the persons that would be able to remove people from the pool facility needed to be limited. Firstly, there was concern that the legislation should not authorise, nor imply, a person to physically remove a person where that person would physically be putting themselves in danger with possible substantial workplace health and safety issues. Also removing persons from the facility requires appropriate training and skills to effect such a removal with the minimal fuss and dignity being afforded to the person being removed.

Therefore subclause 30(4) was inserted to provide that only a police officer or licensed security guard may remove a person from the pool facility. A 'licensed security guard' is a person who is licensed under the *Security Industry Act 2003* – see clause 25. However, removal is limited to the use of reasonable force. Reasonable force is the use of as much force as is reasonably necessary to apprehend and detain the person or remove the person from, or stop the person from re-entering, the pool facility. Where there is a dispute as to the reasonableness of the force used it will be up to a court of competent jurisdiction to decide whether the force used was reasonable in all the circumstances. Use of excessive force may result in civil and criminal action being taken against the police officer or licensed security guard.

Subclause 30(5) has been inserted to provide that a police officer or licensed security guard may act with such assistance as is reasonably necessary from an authorised person. However, given the possible implications that may apply to work health and safety obligations it is likely that requests for such assistance would be limited too where an employee would be placed in physical danger of being assaulted.

Subclause 30(6) has been inserted to make it clear that a person must not be detained under paragraph 30(4)(a) for longer than is reasonably necessary to remove the person from the pool facility.

These provisions have been inserted to limit the engagement of section 13 of the *Human Rights Act 2004* (Freedom of movement) and importantly, to give a person a choice to leave the pool willingly. The Criminal Code defences are also available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36).

PART 6 Offences

The previous Act contained thirty-two offence provisions, many with multiple permutations. There is a move in this Bill towards the Minister or Director-General having the ability to set guidelines and minimum standards by statutory instruments, in place of strictly prescribing the matters within the Act, and imposing criminal sanctions against operators or patrons. As such the Bill now only contains 11 offences. This change underpins the self-regulation

approach which provides an appropriate level of regulatory intervention for the management of risk in modern pool environment.

Accordingly, the offences that will apply in the Act have been modernised and streamlined to remove offences that are duplicated in other legislation. Further, the offences included have been assessed against current community standards and norms and confined to public health and safety or protection of property and the environment. This has been achieved by amending the regulatory approach to one where patrons are requested to leave the pool facility when behaviour is unacceptable, from one where a person is immediately subject to an offence for unacceptable behaviour.

Clause 15 of the Bill provides the mechanism for prescribing conditions of entry and removal, which will indicate the anti-social behaviour and safety rules that may see a person excluded from the pool facility. This approach is preferred rather than resorting to criminal prosecutions or other penalty action. Any offender that otherwise would be prosecuted for a minor behavioural infraction can now voluntarily leave the pool facility when asked to do so. It is only the refusal to leave the facility that would create an offence – see Part 5 of the Bill for clause 30 offence – fail to comply with direction for further explanation.

Six offences are prescribed in Part 6 of the Bill. However, this small number of offences relate to situations of generally unacceptable behaviour or where there is a danger to health and safety. Accordingly, in this area strict liability offences have been used – see the section on *Human Rights Implications* of this Explanatory Statement for further information.

Clause 31 Infections

Subclause 31(1) provides an offence for a person with a skin, gastrointestinal or other infection that is communicable in or around water, and enters and remains at the pool facility. This offence was contained in the previous Act at subsection 17(p). A maximum penalty of five penalty units has been set for this offence. Penalty units are provided for under section 133 of the *Legislation Act 2001*, and the current value of a single penalty unit is \$150.00.

This offence provision has not been limited to those circumstances where a person enters the pool itself. A person should not remain at a pool facility, with a gastrointestinal or other infection as bodily fluids may be unexpectedly produced (such as vomiting), which requires further hygiene and sanitation requirements to be implemented to minimise the chances of contamination to other patrons.

To alleviate the possibility of unduly penalising a person or hindering a person's ability to enjoy a pool facility, the Bill inserts a provision to make it clear that the offence provision does not apply if the person has a medical certificate or report from a doctor advising that they are not a health risk to others at the pool facility.

Clause 32 Smoking prohibited

This clause provides specific offence provisions if smoking occurs at a pool facility.

Subclause 32(1) provides that a person smoking at a pool facility is guilty of an offence. The maximum penalty prescribed is 5 penalty units. Subclause 32(2) prescribes the offence as one of strict liability and this is discussed further above in the section *Human Rights Implications – Right to the Presumption of Innocence*. The person who has been charged with an offence under this provision bears an evidential burden in relation to the matters if they wish to deny criminal responsibility under section 58 of the *Criminal Code 2002*.

The provision is specifically designed as a public health measure due to the well documented dangers of a person being around and inhaling secondary smoke toxins. As a pool facility is highly frequented by people of various age the need to ensure that those messages are conveyed is paramount. Likewise it is essential, as this offence is one of strict liability, that it addresses unlawful behaviour in the context that the person knows, or ought to know their legal obligations. While it could be argued that this offence is one that is designed to catch the general public for an inadvertent breach of the law, this can be negated if the person entering the pool facility has reasonable notice or awareness that they enter on condition of not smoking.

Accordingly, this offence does not apply if the pool facility has no signage indicating that the facility is smoke-free (subclause 32(3)). This defence is included to ensure that a person who normally complies with the law is not punished unjustly given there are some constraints on the places where smoking may occur. Therefore there is a need to take positive steps to have clear signage indicating that the pool facility is smoke-free before a person is prosecuted under this provision.

The Criminal Code defences are also available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36) and the defence of duress (Code section 40).

Clause 33 Consumption of liquor

Subclause 33(1) is prescribed as a strict liability offence and this is discussed further above in the section *Human Rights Implications – Right to the Presumption of Innocence*.

The person who has been charged with an offence under this provision bears an evidential burden in relation to the matters if they wish to deny criminal responsibility under section 58 of the *Criminal Code 2002*.

Liquor has found to lead to an increased risk of drowning and aquatic injury, and the effects of alcohol are magnified when in, on or around the water.¹¹ The use of alcohol prior to partaking in aquatic activity has been shown to significantly increase the risk of drowning due to a range of physical and behavioural changes that occur.

Research on the contribution of alcohol in drowning deaths has suggested that between 30-50% of adolescent and 25-30% adult drowning deaths involve alcohol.¹² However, the 15-29 age groups have the highest number of drowning deaths and this represents nearly 41% of all drowning deaths.¹³ This has significant importance as public pool facilities are generally frequented by people of various age.

Importantly, it must be recognised that people are generally on notice concerning where alcohol may be consumed. Due to the fact that intoxicated people may not enter a pool facility and given that there will be ample warning that liquor is not to be brought into the facility, an offence of strict liability is warranted. For a person to commit an offence under this provision they would be required to be actively involved in the concealment of the liquor and have participated or assisted in the positive act to bring liquor within the pool facility. Also, there is irrefutable evidence of the dangers of liquor consumption when in, on or around waters, and with a heightened risk of a death from drowning that should not be underestimated. Therefore, it is considered paramount that the offence be one of strict liability to discourage the behaviour, however, as the consumption of liquor is normally lawful in many circumstances, this is reflected in the maximum penalty of five penalty units being applied. There was no less restrictive means that could be applied to this provision (note further discussion in *Human Rights Implications – Right to the Presumption of Innocence*).

As there are circumstances that may prevail where a person does not know that they are consuming liquor, or only do so under duress, the Criminal Code defences are still available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36) and the defence of duress (Code section 40).

Clause 34 Possession of liquor

Subclause 34(1) provides that a person in possession of liquor (including low-alcohol liquor) is guilty of an offence. The maximum penalty prescribed is 5 penalty units. Subclause 34(2) prescribes the offence as one of strict liability and this is discussed further above in the section *Human Rights Implications – Right to the Presumption of Innocence*. The person who has been charged with an offence under this provision bears an evidential burden in

¹¹ Royal Life Saving Society – Australia, *Swim safe swim sober: A study examining drowning in NSW and the influence of alcohol*, 2012.

¹² Warner, M, Smith G and Langley J, *Drowning and alcohol in New Zealand – What do the coroners files tell us?* Australian and New Zealand Journal of Public Health, 2000, p 387-390.

¹³ Australian Water Safety Council, *Australian Water Safety Strategy 2008-2011*, 2008.

relation to the matters if they wish to deny criminal responsibility under section 58 of the *Criminal Code 2002*.

The provision is specifically includes a number of considerations. Public pool facilities are generally frequented by a people with a range of ages. The dangers and effects of liquor consumption by drinkers of all ages are well documented and public safety measures consistently warn the public of such dangers. Liquor, especially low-alcohol items such as “alcopops”, are often in glass bottles, which also poses significant safety risks to patrons as a higher percentage of people are likely to be barefoot. As liquor has also been found to lead to an increased risk of drowning and aquatic injury, and the effects of alcohol are magnified when in, on or around the water¹⁴ the need to ensure that liquor is not present at the pool facility is essential.

Importantly, as this offence is one of strict liability, patrons will be unable to enter the pool facility if intoxicated. Standards that will determined under Division 3.2 and displayed at the facility will also inform patrons that possession of liquor on the premises is not permitted. Patrons will be advised of their legal obligations not to possess liquor at the pool facility. While it could be argued that this offence is one that is designed to catch the general public for an inadvertent breach of the law, this restriction is in line with controls in other recreational premises. For example: liquor is unable to be taken into most, if not all, sporting arenas, concerts and fun parks.

As there will be ample warning that liquor is not to be bought into the facility, coupled with the fact that people are generally aware that liquor is restricted in certain premises, it is considered that any person found in possession of alcohol at a pool facility would have been actively involved in its concealment. A strict liability offence in this regard is warranted because the dangers of liquor being consumed in, on or around water represents a significant safety issue that cannot be ignored. The low maximum penalty amount of five penalty units for an offence under this provision represents the need to balance the safety risk with the fact that possession of liquor in most circumstances is otherwise legal. It is therefore considered that there was no less restrictive means that could be applied to this provision (note further discussion in *Human Rights Implications – Right to the Presumption of Innocence*).

However, it is noted that there may be occasions where a person is unaware that they are in possession of alcohol. Therefore, the Criminal Code defences are also available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36) and the defence of duress (Code section 40).

¹⁴ Royal Life Saving Society – Australia, *Swim safe swim sober: A study examining drowning in NSW and the influence of alcohol*, 2012.

Clause 35 Graffiti etc

Subclause 35(1) provides an offence provision that prohibits the marking of any part of a pool facility that is not authorised by the operator of the facility. A maximum of five penalty units has been prescribed for this offence. Subclause 35(2) provides that 'mark' means write on, draw or paint. This provision is consistent with the approach of the previous offence that related to property damage. Note that scratching parts of a facility would be considered damage under clause 36.

Clause 36 Damaging infrastructure

Subclause 36(1) provides an offence for damaging infrastructure at a pool facility. However, cumulative criteria apply to the offence. A person will commit an offence if the person:

- is at a pool facility; and
- engages in conduct that damages or interferes with any infrastructure of the pool facility; and
- is reckless about whether the conduct is likely to damage or interfere with any infrastructure of the pool facility; and
- is not authorised by the operator of the pool facility to engage in the conduct.

As indicated, each criterion listed above must be satisfied before an offence has been committed. If all of the matters are not present there is no offence. Whether a person is reckless about their conduct see section 20 of the *Criminal Code 2002*.

Whether an offence has been committed will depend on whether the item damaged is considered to be 'infrastructure'. Those items which may be classified as infrastructure are indicated in subclause 36(2).

A maximum of ten penalty units has been prescribed for this offence.

PART 7 ENFORCEMENT

Division 7.1 Inspectors and identity cards

Clause 37 Inspectors

This clause provides that the Director-General may appoint a public servant as an inspector under the Act. A police officer is also an inspector for the Act.

Any appointment made by the Director-General must in writing naming the individual or the position of an individual to be performing those tasks in accordance with Division 19.3.1 of the *Legislation Act 2001*. The appointment in writing is in addition to the requirements to issue an identity card under clause 38.

Clause 38 Identity cards

Subclauses 38(1) and 38 (2) provide that each public servant that has been appointed under subclause 37(1) of the Bill must be issued an identity card. An identity card is not required to be issued to a police officer.

Subclause 38(3) provides that the identity card must show: a recent photograph of the inspector; the card's date of issue and expiry; and anything else prescribed by regulation.

If a person stops being an inspector and fails to return their identity card after they stop being an inspector the person will commit an offence under subclause 38(4). The person must return the card no later than seven days after the day they ceased being an inspector. A maximum penalty of one penalty unit applies to this offence. It is reasonable that as part of the duties of an inspector the person would know of their responsibilities and requirements under the Act and the offence is a regulatory offence. Therefore subclause 38(6) provides that the offence is a strict liability offence.

However, subclause 38(5) provides that if the identity card has been lost or stolen or destroyed by someone else the person will not be guilty of an offence. The Criminal Code defences are also available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36) and the defence of intervening act (Code section 39).

Clause 39 Power not to be exercised before identity card shown

This clause provides that if a public servant is appointed as an inspector under the Act the inspector must show their identity card before exercising a power under the Act. This provision places an important limitation on the power of an inspector to ensure that they exercise their powers as provided for in the Act. A police officer is not issued an identity card by virtue of subclauses 37(1) and 38(1) and as the police officer is appointed under subclause 37(2) they are not bound by this clause. However, it would be expected that a police officer that is not in uniform would show their credentials as a police officer before exercising any powers under this Bill.

Division 7.2 Powers of inspectors

Clause 40 Power to enter pool facility

Paragraph 40(1)(a) provides that an inspector may enter a category 1 facility in accordance with a facility management agreement, or if the agreement is silent on entry, enter the pool when required. This provision is significantly different to the terms and conditions that apply to an inspector entering other pool facilities and it has been inserted due to the particular arrangements that apply under Agreements. Category 1 facilities are owned by the Territory and are managed under facility management agreements. The agreements do not provide any property rights, nor are there any leasing arrangements for the pool facility,

granted to a pool operator. As the Territory is the owner of the asset, with no property rights given over the facilities, officers may enter the facility at any time. However, as part of good business practice it is expected that normal conventions and courtesies would generally apply for inspectors when seeking to enter pool facilities.

Paragraph 40(1)(b) provides powers for an inspector to enter pool premises in certain circumstances. For this Act, an inspector may at any time during the stated period (see subsection 40(5)) enter the premises with the operator's consent.

Subparagraph 40(1)(b)(iii) provides that entry may be gained if the inspector believes on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the pool facility is necessary. The test to enter is cumulative and entry must be reasonable in all circumstances. It would only be satisfied if the circumstances are serious. This provision has been inserted to facilitate an emergency closure of a pool facility under clause 18.

Subclause 40(2) does not authorise entry into a part of premises that is being used only for residential purposes. An inspector may, without the consent of the occupier of premises, enter land around the premises to ask for consent to enter the premises – note subclause 40(3). Subclause 40(4) removes any doubt that an inspector may enter a pool facility without payment of an entry fee or other charge.

Clause 41 Production of identity card

An inspector must not remain at a pool facility if the inspector does not produce the inspector's identity card when asked by the operator of the pool facility. A police officer must not remain at a pool facility entered if the officer does not produce evidence that the officer is a police officer when asked by the operator of the pool facility.

Clause 42 Consent to entry

This clause provides the mechanisms and requirements for inspectors when gaining consent from pool operators to enter a pool facility. Subparagraph 42(1)(b)(ii) requires the inspector, including a police officer, to advise the operator: of the purpose of the entry; that anything found may be used in evidence in court; and that consent may be refused.

Subclause 42(2) provides that when a pool operator consents the inspector must ask the operator to sign a written acknowledgment. The acknowledgement must contain information-

- (a) that the operator was told—
 - (i) the purpose of the entry; and
 - (ii) that anything found under this part may be used in evidence in court; and
 - (iii) that consent may be refused; and
- (b) that the operator consented to the entry; and

- (c) stating the time and date when consent was given.

Subclause 42(3) provides that if the operator of a pool facility signs an acknowledgment of consent, the inspector must as soon as practicable give a copy to the operator.

Subclause 42(4) provides that a court must find that the operator of a pool facility did not consent to an inspector entering the pool facility under this part if—

- (a) the question arises in a proceeding in the court whether the operator consented to the entry; and
- (b) an acknowledgment of consent is not produced in evidence; and
- (c) it is not proved that the operator consented to the entry.

Clause 43 Advance notification and consent to entry

Subclause 43(1) provides that an inspector may seek the advance consent of an operator to enter the pool facility. Subclauses 43(2) and 43(3) provide the procedural matters and mechanisms that must be satisfied in any written request for advance consent and on entry to the pool facility.

Subclause 43(4) provides the requirements for the acknowledgement of advance consent including the matters that must be advised to the pool operator of the pool facility.

Clause 44 General powers on entry to pool facility

The provision may engage rights in criminal proceedings (right against self-incrimination) under paragraph 22(2)(i) of the *Human Rights Act 2004*, to the extent that an operator is required to provide information, documents and answer questions. See the section on *Human Rights Implications – Rights in criminal proceedings* of this Explanatory Statement for further information.

This clause provides the powers of an inspector who enters a pool facility do any of the following in:

- (a) inspect or examine;
- (b) inspect and copy, or take an extract from, any document at the pool facility;
- (c) take measurements or conduct tests;
- (d) take samples;
- (e) take photographs, films, or audio, video or other recordings;
- (f) require the operator of the pool facility to give information, answer questions, or produce documents or anything else, reasonably needed to exercise the inspector's powers under this part.

Subclause 44(2) provides that a person must take reasonable steps to comply with the requirements under paragraph 44(1)(f). A maximum amount of 20 penalty units applies to an offence not to reasonably comply with the requirements of paragraph 44(1)(f).

While it is acknowledged that an operator of the pool facility must comply with the giving of information, documents and answers questions, the right of privilege against self-incrimination has not been exempted from the provision and a reasonable steps excuse has been applied to minimise the impact under the *Human Rights Act 2004*.

Also the offence provision has been limited and only applies to the operator and not any other person by virtue of paragraph 44(1)(f) as the obligation is placed on the operator of a pool facility.

Clause 45 Other powers

Subclause 45(1) has been included to make it clear that an inspector may, by written notice, require the operator of a pool facility to give information, answer questions, or produce documents or anything else, reasonably needed to exercise the inspector's powers under this part.

Subclause 45(2) provides that a person must take reasonable steps to comply with the requirements under subclause 45(1). A maximum amount of 20 penalty units applies to an offence not to take reasonable steps to comply with the requirements of subclause 45(1) of the Bill (note discussion under *Human Rights Implications – Rights in criminal proceedings*).

While it is acknowledged that an operator of the pool facility must comply with the giving of information and answers questions, the right of privilege against self-incrimination has not been exempted from the provision and a reasonable steps excuse has been applied to minimise the impact under the *Human Rights Act 2004* (note discussion under *Human Rights Implications – Rights in criminal proceedings*). Also the offence provision has been limited and only applies to the operator and not any person by virtue of subclause 45(1) as the obligation is placed on the operator of a pool facility.

Division 7.3 Miscellaneous

Clause 46 Damage etc to be minimised

Subclause 46(1) imposes a duty on an inspector, which includes a police officer under clause 37(2), to take all reasonable steps when exercising powers to minimise loss and damage. The inspector must also cause as little inconvenience as possible during the enforcement action.

Subclause 46(2) places a positive obligation on the inspector to provide the operator, for assets owned by the Territory, owner or person responsible for the item with a written notice detailing the damage that has occurred. Subclause 46(4) provides if the operator is not at the premises the notice may be left by securing it conspicuously at the premises.

Subclause 46(3) provides the mandatory requirements that must appear on the notice given under subclause 46(2). Those matters include that the person may claim compensation from the Territory, that compensation may be claimed and ordered by a court and that the court will only make an order for reasonable compensation if it considers it just to do so.

There is also a duty to provide notice to the owner of anything damaged, setting out the details of the damage and advising that compensation may be sought.

Clause 47 Compensation for exercise of enforcement powers

Subclause 47(1) provides that a person may claim compensation from the Territory if the person has, as a result of an inspector exercising functions under the Act, suffered loss or incurred expense.

Subclause 47(2) provides that compensation may be claimed and ordered in a proceeding. A court may order payment of compensation that is reasonable only if it is satisfied it is just to do so under the circumstances under subclause 47(3).

Subclause 47(4) allows the Minister to make regulations to prescribe the matters that the court must or must not take into consideration when considering whether it is just to make the order. This provision must not be construed as instructing the court on how to perform its duties, rather guidance on the criteria that may be applied when considering whether it may be just to make an order.

Division 7.4 Auditing and compliance

Clause 48 Appointment of auditor

Subclause 48(1) provides that the Director-General may appoint a suitably qualified person to conduct an audit of a pool facility. The Director-General's power has been restrained to a person being appointed to audit water safety measures of the pool facility. Any appointment under this provision will need to be in writing and clearly indicate the person to be appointed and the functions to be undertaken (Note Division 19.3.1 of the *Legislation Act 2011*).

This provision is consistent with the recommendations of the Coroner's Inquest¹⁵ that Royal Life Saving Society conduct safety audits for all public pools. It also addresses an anomaly under the previous Act which did not provide for safety audits to be undertaken.

Consideration was given to appointing the person as an Inspector under the Act however, it was the policy intent that all Inspectors are public servants, especially given the provisions of the Bill that provide for civil liability to be attached to the Territory for the actions of public servants. Accordingly, it was considered prudent that any person appointed under this provision would have the professional expertise not normally held within the Territory public service (such as an auditor of the RLSSA) and their own insurance protection. Importantly, it is appropriate that even though the government may appoint a person under this clause any audit findings would be independent of government. Subclause 48(3) has been inserted to provide that written report on the findings will be provided to both the Director-General and operator of the pool facility that is audited.

Subclause 48(2) provides the necessary required conduct of the operator of the pool facility being audited. Paragraph 48(2)(a) has been inserted to make it clear that although the operator must assist an auditor any such requests must be reasonable. To be reasonable, consideration needs to be given to the different types of public pools and business models that may impact an operator for compliance with requests. Paragraph 48(2)(b) provides that an auditor is to be able to access the premises and information where reasonably required to conduct the audit.

Paragraph 48(2)(c) requires that the operator is responsible for the cost of the audit performed. As the regulation of public pools is not undertaken as part of a licensing scheme, there are no fees collected on the regulatory costs for enforcement. Therefore it is appropriate that operators should bear this cost of regulation in place of an annual fee requirement. It must be considered when interpreting this clause that water safety audits are in the best interest of the Territory, operator and general public, thereby the need for a qualified expert in the area is paramount.

It must be noted that although the operator will pay for an audit under clause 48, the auditor is appointed by the Director-General, and may only undertake the functions as directed by the Director-General and the auditor must constrain the audit to those functions. No employee/employer or engagement of services relationship between the auditor and operator arises as a result of the necessity to make payment for the audit.

When developing this provision consideration was given to including the ability of the Director-General to appoint a person to conduct compliance audits and matters relevant to

¹⁵ Chief Coroner Cahill, in *Inquest into the Death of Kaled Kanj*, 29 October 2009, ACT Court.

the administration, management or operation of a pool facility. However, it was considered inappropriate to use an external auditor for those purposes when those regulatory skills are retained within the Territory public service.

There is no offence provision for an operator not complying with the requirement. Other mechanisms provided under the Bill are available to assist the Director-General with encouraging compliance, such as Part 3 of the Bill and ultimately emergency closure orders, if an operator is unable to meet minimum requirements for self-regulation and safety.

PART 8 NOTIFICATION AND REVIEW OF DECISIONS

Clause 49 Meaning of reviewable decision – pt 8

Clause 49 provides that reviewable decisions for the purposes of the Bill are those listed in Schedule 1. The listed decisions are subject to review by the ACT Civil and Administrative Tribunal.

Clause 50 Reviewable decision notices

Clause 50 provides that where a decision which is listed in Schedule 1 is made, the decision maker must notify the entity listed in column 4 of Schedule 1. For example, where the Director-General issues a maintenance direction under subclause 20(2), the Director-General must notify the applicant of their right for review.

Clause 51 Applications for review

Clause 51 provides that the entities listed in column 4 of Schedule 1, or any other affected person, may apply to the ACT Civil and Administrative Tribunal for a review of the decisions listed in Schedule 1.

PART 9 MISCELLANEOUS

Clause 52 Liability for loss of, or damage to, property

Subclause 52(1) provides that no action lies against the Territory by reason of the loss of, or damage to, property occurring in any pool facility. This means if a person has a mobile phone lost or stolen at a public pool then the ACT Government is not required to compensate the person for the loss of the mobile phone. Subclause 52(2) also applies the same protection to an operator or employee of a pool operator at a pool facility in the course of their employment. However, this clause must be read in conjunction with the statutory obligations imposed on an operator exercising the functions or employee in the course of their employment for the goods found at pool facilities that may be lost or abandoned under the *Uncollected Goods Act 1996*.

Clause 53 Protection from liability

This clause provides protection for a public servant when exercising functions under the Act. If the public servant does an act or omission honestly and without recklessness the Territory will incur the civil liability in place of the public servant. This provision has been inserted to make it clear that a public servant performing functions under the Act will be provided with appropriate protection from any civil litigation if they act in accordance with the public service obligations to act honestly and without recklessness (also see *Public Sector Management Act 1994* for ACT public servant conduct requirements).

Clause 54 Determination of fees

Clause 54 is a standard inclusion in legislation and provides the power for the Minister to determine fees for the Act. The determination is a disallowable instrument and as such must be notified on the ACT Legislation Register. As a disallowable instrument must be presented to the Legislative Assembly, any determination will retain Assembly oversight.

A determination of fees must be prepared in accordance with the *Legislation Act 2001*, Part 6.3 – Making of certain statutory instruments about fees.

Clause 55 Exemption from fees

This clause provides that the Minister may exempt a pool facility from the application of fees determined under section 54. The ability of the Minister to exempt a pool facility has been inserted to cater for those pools that are Territory owned assets and are managed under an Agreement. Under the Agreements monies collected for the purposes of using the pool facilities are normally not Territory monies. Accordingly, the ability of the Minister to exempt category 1 facilities from the requirement to determine fees under the Act is required to enable the flexible contracting arrangements to continue.

However, if a facility has been exempted from the fee determination provisions, the operator must comply with the requirements specified under clause 17 – Pool Fee Guidelines to ensure that equity of access to facilities is maintained for the community.

Subclause 55 (2) provides that any exemption made under this clause is a disallowable instrument and as such must be notified on the Legislation Register. As a disallowable instrument must be presented to the Legislative Assembly, any exemption will retain Assembly oversight.

Clause 56 Statutory instruments - application etc of other laws or instruments

Clause 56 provides that a statutory instrument under this Act may apply, adopt or incorporate a law of another jurisdiction or an instrument as in force from time to time. To ensure as far as possible that information contained in the standards, note Part 3 of the Bill, is notified on the ACT Legislation Register, and to mitigate as far as possible what is often

considered to be an inappropriate delegation of legislative power, subsection 56(2) places limitations on when the *Legislation Act 2001* may be disapplied.

Subsection 47(6) of the *Legislation Act 2001* does not apply in relation AS, AS/NZS or an international standard, adopted or incorporated for instruments determined under Part 3 of the Bill. The exclusion of the requirement to notify on the Legislation Register will not apply to an AS, AS/NZS or international standard (these Standards) as under the section 47(6) of the *Legislation Act 2001* does not apply (also see *Legislation Act 2001*, subsection 47(7)). It must be noted that these Standards are treated differently as they are owned by Standards Australia Limited and accordingly protected under the provisions of the *Copyright Act 1968*.

It is not the intention of this provision to limit industry or the community's knowledge of these Standards. While it is noted that there is a practice in the Territory to disapply section 47 of the *Legislation Act 2001* for regulation of industry, when using the standards such incorporation will be rare, if at all, for instruments made under Part 3 of the Bill. However, it was considered appropriate that the inclusion of this provision to ensure that there is the ability to react quickly in a regulatory context to the changing environment, especially in relation to deaths by drowning.

The instruments determined under Part 3 of this Bill will clearly indicate the details of the AS/NZS applying and where these Standards may be accessed, including the website address for Standards Australia Limited. A copy of any AS/NZS or international standard incorporated will also be able to be accessed by the public at the responsible Directorate. The means for accessing these Standards and the website address are also clearly indicated at Note 2 to subclause 56(2) of this Bill.

Clause 57 Approved forms

This clause provides that a Director-General may approve forms for the Act and if a form is approved for a particular purpose then the approved form must be used for those purposes. This provision has been inserted to enable a consistent approach to any required reporting and provide administrative efficiencies for directorate officials and pool operators.

Subclause 57(3) provides that if a form is approved by the Director-General it must be notified on the Legislation Register.

Clause 58 Regulation-making power

Subclause 58(1) is a standard inclusion in legislation. It provides the power for the Executive to make regulations for the Act.

Subclause 58(2) provides that a regulation may create offences and fix maximum penalties of not more than 20 penalty units for offences. The maximum penalties prescribed for the regulation power is consistent with *Guide for Framing Offences*.¹⁶

Clause 59 Regulations - first-aid equipment and facilities

Subclause 59(a) provides that a regulation may establish the minimum requirements for first aid equipment and facilities. Subclause 59(b) provides that the regulation may stipulate which pool or pool facility must comply with the requirements in subclauses 59(a), while subclause 59(c) may stipulate the design specification for the first aid facilities.

When developing the Bill it was considered appropriate that these requirements be made by regulation and not as an instrument due to inherent costs that an operator may incur to comply with the requirements. The power that the Minister may make regulations for different categories of pools facilities or individual pools takes into consideration that core functions of a pool facility can change and there may be different needs and requirements in relation to the actual first aid equipment required.

PART 10 REPEALS AND CONSEQUENTIAL AMENDMENTS

Clause 60 Legislation repealed

Clause 60 provides that the *Public Baths and Public Bathing Regulation 1966* is repealed. This regulation is no longer required as a result of the new Act.

Clause 61 Legislation amended – sch 2

Clause 61 provides that the legislation listed in Schedule 2 is amended. The legislation includes the *Public Baths and Public Bathing Act 1956* and the *Uncollected Goods Act 1996*.

PART 20 TRANSITIONAL

This Part has section numbers beginning at section 200. This is standard drafting practice when creating a new Act as it leaves room for the Act to grow and maintains the legislation history endnotes.

(Note: In accordance with clause 203, this Part expires 2 years after commencement)

Clause 200 Meaning of commencement day – pt 20

This clause provides that this part will not commence until section 3 commences, the day after notification.

¹⁶ Australian Capital Territory Government, Department of Justice and Community Safety, *Guide for Framing Offences*, April 2010, p32.

Clause 201 Facility management agreements

Clause 201 provides for the transition of the contractual arrangements (facility agreement) for the management of Territory owned public pools in relation to the *Public Baths and Public Bathing Act 1956*, that were in place immediately before the commencement day are taken on commencement of the Bill to be a public pool that is a category 1 facility.

This provision has been included to make it clear that the contractual agreements in place with contractors for the management of Territory owned public pools remain in force as a facility management agreement.

Clause 202 Transitional regulations

Clause 202 provides that transitional regulations may be developed to ensure that any other matters arising from the enactment of the Bill may be addressed. Subclause 202(2) specifically provides that Part 20 of the Act may be modified by regulation for transitional matters that have not been adequately or appropriately dealt with.

The capacity to modify an Act through subordinate legislation is generally referred to as a 'Henry VIII' clause. It is acknowledged that these clauses are generally not preferable. However, it is considered that this provision is necessary in this Bill as there is no practical alternative available to ensure that any unforeseen matters which might arise during the introduction of the new regulatory framework can be addressed expediently. In developing the Bill, every attempt has been made to foresee issues arising in the transition to the new regulatory framework. However, given that there are existing operators, and that the existing contractual arrangements are being preserved, there may be some additional matters that arise during the transition which will need to be addressed without delay.

It is also acknowledged that the development of this legislation is the first part of reforms in relation to the public pools and a second tranche of legislation will occur in the future with the opportunity to address any emerging issues. It is highly unlikely that the need to make transitional regulations will occur, and as noted above if unforeseen matters arise, it will only be for those issues that must be dealt with expediently.

Clause 203 Expiry – pt 20

Clause 203 provides that Part 20 expires two years after it commences. This will allow sufficient time for any transitional matters in the implementation of the regulatory framework established under the Bill to be addressed.

SCHEDULE 1 REVIEWABLE DECISIONS

Schedule 1 lists the decisions that are reviewable in accordance with Part 8 of the Bill. Each reviewable decision is referenced in the relevant clause.

SCHEDULE 2 CONSEQUENTIAL AMENDMENTS

Part 2.1 *Public Baths and Public Bathing Act 1956*

Clause 2.1 Long title

This clause amends the long title to an Act relating to public bathing.

Clause 2.2 Section 1

This clause amends the name of the *Public Baths and Public Bathing Act 1956* to the *Public Bathing Act 1956*.

Clause 2.3 Section 2, note 1

Clause 2.3 amends Note 1 to the Act by removing references to public baths and substitutes those references with matters applicable to public bathing.

Clause 2.4 Section 6

This clause removes the ability to establish public baths.

Clause 2.5 Parts 2 and 3

Clause 2.5 removes the provisions in relation to Part 2 - Public baths, other than leased public baths and Part 3 – Public baths, including leased public baths to give effect to the new Public Pools legislation.

Clause 2.6 Section 28 heading

This clause replaces the heading title of '*Meaning of public bathing convenience*' to 'Definitions-pt5'.

Clause 2.7 Section 28, new definition of pool facility

This clause provides the cross reference for the definition of pool facility to the *Public Pools Act 2014*, section 10.

Clause 2.8 Section 28, definition of public bathing convenience

Clause 2.8 amends the definition of a public bathing convenience to insert the new terminology by omitting the term '*public baths*' from the definition and substituting the term with '*pool facility*'.

Clause 2.9 Section 38(2)(a)

This clause amends the Minister’s regulation making powers to remove the Minister’s ability to make regulations for bathing in public baths.

Clause 2.10 Section 38(2)(b)

This clause amends the Minister’s regulation making powers to remove the Minister’s ability to make regulations for the use of public baths.

Clause 2.11 Dictionary, note 2

This is a consequential amendment to remove those terms in the Act that are prescribed under the *Legislation Act 2001* and should be read in conjunction with the amendment at Schedule 2, 2.12.

Clause 2.12 to 2.16 Dictionary, note 2

This is a consequential amendment to omit and insert those terms in the Act that are prescribed under the *Legislation Act 2001* that have relevance to the remaining terms used under the Act.

Clause 2.17 Dictionary

This amendment removes a number of definitions that are no longer relevant due to the regulation of public bath provisions being placed into a separate Act.

Part 2.2 Uncollected Goods Act 1996

Clause 2.18 Section 5(d)

This clause gives effect to the change in terminology from ‘*public baths*’ to ‘*public pool*’ and ‘*pool facility*’. There has been no change to the policy in the new provision.

Clause 2.19 Division 2.3 heading

Clause 2.15 inserts a new heading to reflect the change in terminology for the regulation of pool facilities.

Clause 2.20 Section 9

This clause gives effect to the change in terminology in the Bill from ‘*public baths*’ to ‘*pool facility*’ and ‘*Manager and attendant*’ to ‘*operator and employee*’. There has been no change to the policy in the new provision.

Clause 2.21 Section 10

This clause gives effect to the change in terminology in the Bill from ‘*Manager and attendant*’ to ‘*operator and employee*’.

Clause 2.22 Section 11

This clause gives effect to the change in terminology in the Bill from *'public baths'* to *'pool facility'* and *'Manager and attendant'* to *'operator and employee'*. There has been no change to the policy in the new provision.

Clause 2.23 Section 12

This clause gives effect to the change in terminology in the Bill from *'public baths'* to *'pool facility'* and *'Manager and attendant'* to *'operator and employee'*. There has been no change to the policy in the new provision.

Clause 2.24 Dictionary, definitions of leased public baths and manager

This clause deletes the definitions for *'leased public baths'* and *'Manager.'*

Clause 2.25 Dictionary, new definitions

This clause provides the cross reference for the definition of *'operator'* to the *Public Pools Act 2014*, section 8 and the cross reference of pool facility under the *Public Pools Act 2014*, section 10.

Clause 2.26 Dictionary, definition of public baths

This clause omits the definition for public baths.

DICTIONARY

The Dictionary provides definitions of key words and phrases used throughout the Bill. Certain terms relevant to the Bill are defined in the *Legislation Act 2001* and these are outlined at the start of the Dictionary. Note also that definitions relevant only to specific provisions may be included within individual clauses.