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

TENTH ASSEMBLY

Building (Swimming Pool Safety) Legislation Amendment Bill 2023

Explanatory Statement

and

Human Rights Compatibility Statement

(Human Rights Act 2004, s 37)

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BUILDING (SWIMMING POOL SAFETY) LEGISLATION AMENDMENT BILL 2023

This explanatory statement relates to the Building (Swimming Pool Safety) Legislation Amendment Bill 2023 (the Bill) as presented to the ACT Legislative Assembly.

The statement is to be read in conjunction with the Bill. It is not a complete description but provides information about the intent of the provisions in the Bill.

It has been prepared to assist the reader. It does not form part of the Bill, has not been endorsed by the Assembly and is not to be taken as providing a definitive interpretation of the meaning of a provision.

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Bill:

- Establishes a regulatory framework that requires home swimming pools and spas to have a barrier compliant with prescribed safety standards after a specified transition period
- Imposes requirements for the compliance status of a swimming pool or spa to be disclosed on sale of a property (a future regulation will set these requirements for lease of a property)
- Imposes requirements to maintain swimming pool and spa barriers and prevent access to swimming pools and spas when not in use
- Imposes offences for failing to comply with the regulatory framework
- Provides an exemption pathway from compliance with prescribed safety standards
- Provides for a compliance certificate framework

The objects of the Bill are to:

- protect the public by ensuring home swimming pools and spas in the ACT are fenced in accordance with modern safety standards; and
- uphold safety standards for home swimming pools and spas in the ACT.

In developing the Bill, consideration was given to frameworks enacted in other jurisdictions and advice received about best practice frameworks from industry, in particular the Swimming Pool and Spa Association of Australia (SPASA).

The Bill will be supported by regulations and disallowable and notifiable instruments.

The Bill establishes a regulatory framework that requires home swimming pools and spas to have a barrier compliant with prescribed safety standards after a specified transition period. The Bill prescribes the safety standard for swimming pools built (or altered) before 1 May 2023 to be the current version of the Building Code of Australia (National Construction Code (NCC) 2022, Volumes 1 and 2) that calls up Australian Standards AS 1926.1 (2012) (Swimming pool safety, Part 1: Safety barriers for swimming pools) and AS 1926.2 (2007) (Swimming pool safety, Part 2: Location of safety barriers for swimming pools). The Building Code and the two Australian Standards adopted by the Building Code form the series of standards dealing with barriers and location of barriers that restrict access by young people to swimming pools and swimming pool areas that present a drowning risk. This approach ensures safety barriers of existing swimming pools and spas are brought up to modern safety standards.

For swimming pools and spas built (or altered) on or after 1 May 2023, the prescribed safety standard is the Building Code of Australia, as amended from time to time and the Australian Standards called up by the Building Code at the time the swimming pool or spa is built or altered. This approach maintains the current regulatory settings for swimming pools and spas and means that new swimming pools and spas will continue to have to comply with the standards as they develop over time.

The framework will apply to all ACT home swimming pools and spas that are capable of containing water to a depth greater than 300mm, that are associated with a residential building such as a house, unit, townhouse or block of apartments. This includes in-ground and above-ground pools, temporary and permanent pools, wading pools, demountable pools, portable pools, kids' pools and spas. It will not apply to swimming pools in tourist and visitor accommodation such as hotels, motels and caravan parks. Any building that has both a residential and a commercial element will be covered. Swimming pools in tourist and visitor accommodation such as hotels, motels and caravan parks generally have more secure fencing and access restrictions (e.g. requiring access through secure doors with a pass, code or key). Extending the framework to these pools may be considered in the future. The scheme will not apply to public swimming pools which are already subject to specific regulatory requirements in the ACT (*Public Pools Act 2015*).

The framework will impose requirements for the compliance status of a swimming pool or spa to be disclosed on sale or lease of a property and establish requirements to maintain swimming pool and spa barriers and prevent access to swimming pools and spas when not in use. The framework will impose offences for failing to comply with these requirements. The requirements on sale of a property are established by this Bill. The requirements on lease of a property will be established in a future regulation under the *Residential Tenancies Act 1997* and will be implemented as a minimum housing standard.

The framework provides an exemption pathway from compliance with the prescribed safety standards in specified circumstances.

The framework will be administered by the Minister for Sustainable Building and Construction as the Minister responsible for the *Building Act 2004* (ACT). The Bill confers on the Minister a range of powers to enable effective administration and enforcement.

The Bill sets up the compliance and enforcement framework, including offences. Offences under the Bill are similar to those in place under similar frameworks in other jurisdictions and aligns with existing offences under the *Building Act 2004* (ACT).

CONSULTATION ON THE PROPOSED APPROACH

In developing the Bill, the Government consulted with the public, industry, key stakeholders and other jurisdictions in a number of ways over a period of 12 months.

Public consultation through the ACT Government's YourSay webpage was undertaken between 1 February and 15 March 2023 and included a consultation paper and a survey. In response to the consultation, 362 survey responses were received from the public, and 3 written submissions were received from key industry stakeholders. There was also a community face-to-face engagement at the annual 'A Day at the Lake' water safety event run by the Royal Life Saving Society ACT on 12 February 2023. Additional consultation was undertaken through the ACT YourSay Community Panel, with 1,023 survey responses received. A listening report is available on the YourSay webpage.

Consultation has been undertaken with key industry stakeholders, including SPASA, the Australian Institute of Building Surveyors (AIBS), the Royal Life Saving Society of Australia, Master Builders Association, Housing Industry Association, Property Council of Australia and Real Estate Institute of the ACT.

Consultation with the community, industry and key stakeholders will continue throughout implementation and the transition period.

CONSISTENCY WITH HUMAN RIGHTS

During the development of the Bill, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

An assessment of the Bill against section 28 of the HRA is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Rights engaged

The Bill engages the following sections of the HRA:

- Section 8 – Recognition and equality before the law (promoted)
- Section 9 – Right to life (promoted)
- Section 12 – Right to privacy and reputation (limited)
- Section 22 – Rights in criminal proceedings (limited)

Rights Promoted

Recognition and equality before the law

The Bill promotes the right to recognition and equality before the law by including provisions that consider the needs of a person with a disability and provide an alternative pathway for exemption from compliance if required.

Section 8 of the HRA provides that everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination. Section 8 of the *Discrimination Act 1991* sets out the meaning of discrimination, including indirect discrimination where a condition is imposed that has, or is likely to have, the effect of disadvantaging someone because they have a protected attribute such as a disability.

In developing the Bill, particularly the exemption pathways, consideration was given to the impacts the framework may have on those with a disability. The Bill establishes a specific exemption pathway for premises with a regulated swimming pool where a person with a disability is, or is to become, an occupier of the premises, and it would be physically impracticable for the person because of the person's disability, to access the pool if it had barriers complying with the prescribed safety standard.

In submitting an application for exemption on this ground, the property owner or owners corporation must propose an alternative safety measure as part of their exemption application. Where there is no viable alternative safety measure, the Minister may still consider an application. A condition of this exemption is that it ends on the premises ceasing to be occupied by a person with a disability.

The Bill includes a signpost definition of disability, referring to section 5AA of the *Discrimination Act 1991*. The intention is that this provision ensures that people with a disability whose access to a regulated swimming pool may be affected by this Bill have an alternative pathway for exemption from compliance if required.

Right to life

The Bill promotes the right to life by establishing a regulatory framework designed to reduce the risk of death and serious injury from drowning and near drownings in home swimming pools.

In the ACT, the home swimming pool is the most common location for drowning death and serious injury for children under the age of five. It is estimated conservatively that for every child that fatally drowns in an Australian pool, between four and seven are resuscitated, suffering life-long disability from brain, lung and other organ damage. It is not only children that live at houses with swimming pools that drown or suffer serious injury from a near-drowning incident, children and

relatives that may be visiting or children from neighbouring properties are also at risk.

The Bill promotes the right to life by:

- requiring all regulated swimming pools to have a barrier compliant with prescribed safety standards to reduce the risk of these incidents;
- requiring the compliance status of a swimming pool or spa to be disclosed on sale of a property;
- requiring ongoing maintenance of safety barriers;
- introducing obligations to prevent access to swimming pools and spas by ensuring access points are closed when not in use; and
- introducing offences for failure to comply with these requirements as a deterrent.

Child resistant pool barriers are a vital safety measure designed to help restrict access of children to a pool or spa, and are considered the best injury prevention initiatives for preventing drowning and near drowning incidents when combined with supervision.

Over time, safety barriers (pool fences, gates and locks) can deteriorate, leading to the pool barrier no longer operating as designed, to be a child-resistant barrier. Additionally, keeping a pool gate propped open undermines the purpose of the safety barrier as a child-resistant barrier.

The Bill allows for action to be taken against homeowners, tenants, and owners corporations who fail to comply with the requirements of the framework. Offence provisions are included to deter conduct that does not support the prevention of drownings or near drownings in regulated swimming pools. A robust regulatory framework is essential to establishing community responsibility and safe behaviours around regulated swimming pools.

The ACT's proposed approach is intended to be responsive to potential risks and associated harms to individuals and the community from death and serious injuries from drownings or near drownings in home swimming pools. It is also in line with what has been introduced in other jurisdictions to address these same issues.

Most jurisdictions (New South Wales, Northern Territory, Queensland, Victoria and Western Australia) have taken action to address the issue of child drownings and near drownings in home swimming pools by requiring pool barriers to meet prescribed safety standards, owners to maintain pool barriers and occupiers of premises with a regulated swimming pool to ensure access points are closed when the regulated swimming pool is not in use.

The 2021 National Drowning Report released by the Royal Life Saving Association reported that 25 children aged between 0 and 4 years drowned in Australia in

2020/21 with the largest proportion occurring as a result of the child falling into a swimming pool. This is an increase of 9% compared with the 10-year average and a 108% increase compared with the previous year. However, overall swimming pools recorded a 17% decrease compared with the 10-year average as the location for drowning deaths. In QLD and NSW, who have had swimming pool fencing legislation for at least ten years, the percentage of drownings that occurred in swimming pools during 2020/21 was six percent.

In June 2017, Royal Life Saving Australia released a major report into non-fatal drownings in Australia which showed nationally:

- for every fatal drowning in a swimming pool, there were 4.34 non-fatal drownings;
- young children make up 64.6 per cent of non-fatal drownings in swimming pools; and
- the average cost to the community per non-fatal drowning incident is \$690,000 but this may vary significantly depending on the nature and severity of the injuries sustained.

Rights Limited

Right to Privacy and Reputation

Under section 12 of the HRA, everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

The right to privacy also protects against arbitrary interference relating to an individual, an individual's family, home or correspondence, even when authorised by law. Such interference should be in accordance with the provisions, aims and objectives of the HRA and be reasonable in the particular circumstances. Arbitrary interference in someone's private or family life is interference that may be lawful, but is unreasonable, unnecessary and the degree of interference is not proportionate to the need.

The protection of privacy is necessarily relative, and personal information should only be collected where it is in the interests of the community. The right to privacy is therefore not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society.

Nature of the right and the limitation (s28(a) and (c))

The Bill limits the right to privacy by requiring the collection of personal information by Government and the provision of access to an individual's home.

The Bill includes exemption pathways from compliance in specified circumstances, such as on the grounds of disability. In order to obtain an exemption, a person will be required to submit an application to Government disclosing personal information

such as the person's name, contact information and property address where the regulated swimming pool is located.

Personal information may also be collected as part of the collection of information about the compliance status of regulated swimming pools constructed before 1 May 2013. These pools will be required to lodge a compliance certificate with Government by the end of the transition period. The information collected on the compliance certificate will include the name of the current owner of the premises on which the regulated swimming pool is located (as per the Certificate of Title), the property address where the regulated swimming pool is located, the compliance status of the regulated swimming pool and the contact details for the authorised person who issued the compliance certificate.

The Bill also requires authorised persons to be provided with access to premises on which a regulated pool is located and thus access to the individual's home. Access will be required to:

- determine the compliance status of the regulated swimming pool;
- identify any remedial work required to make a regulated swimming pool compliant with the prescribed safety standards; and
- confirm that the remedial work has been undertaken and the regulated swimming pool is compliant.

Authorised persons may also access an individual's home to perform an inspection of the regulated pool and property to support an exemption application. Access will only ever be with the consent of the home owner.

The Construction Occupations Registrar and building inspectors will also have a role in regulating and enforcing the scheme as part of their existing role in regulating buildings and building work.

Legitimate purpose (s28(b))

The legitimate objective of this limitation is to support the objective of the Bill, which is to promote the right to life by:

- Protecting the public by ensuring home swimming pools and spas in the ACT are fenced in accordance with modern safety standards, and
- Upholding safety standards for home swimming pools and spas in the ACT.

Rational connection between the limitation and the purpose (s28 (d))

The purpose of requiring collection of personal information by Government, including about a person with a disability, is to provide a pathway for exemption from the requirement for a regulated home swimming pool to have a barrier compliant with prescribed safety standards. If the framework did not include this there would be no way for Government to assess if an exemption should be granted.

The purpose of requiring the collection of personal information by Government about the compliance status of a regulated swimming pool built before 1 May 2013, is to ensure that regulated swimming pools that were constructed before the current safety standard was in place are compliant with the prescribed safety standard. This date is when the current safety standard was implemented in the ACT, so any regulated swimming pool built or altered before this date was not legally required to comply with the prescribed safety standard.

The purpose of requiring authorised persons to access an individual's home is to enable the compliance status of the regulated swimming pool to be determined, to identify any remedial work required to make a regulated swimming pool compliant with the prescribed safety standards and to confirm that the remedial work has been undertaken and the regulated swimming pool is compliant. Authorised persons may also access an individual's home to perform an inspection of the regulated pool and property to support an exemption application.

Authorised persons will not have access to a person's home without their consent and will be engaged directly by the owner of the property. Access powers have not been provided to authorised persons which acts as a safeguard to having one's homes interfered with unlawfully or arbitrarily.

The purpose of providing the Construction Occupations Registrar and building inspectors access to an individual's home is to ensure compliance with the framework through education and appropriate regulatory action.

The Construction Occupations Registrar and building inspectors will only access an individual's home when required for regulatory action. The Bill relies on existing inspection and audit powers under the *Building Act 2004* which contains existing safeguards to ensure that an individual's home is not interfered with unlawfully or arbitrarily.

Proportionality (s28 (e))

Collection of personal information by Government, including about a person with a disability, is necessary in order for Government to make a decision on an exemption application. There will be safeguards in place through Government requirements when handling personal information, and all information will be collected and stored in accordance with the *Information Privacy Act 2014*. Additionally, the application process will be designed to only collect the information that is reasonably required to assess an application.

In instances where the ground on which the exemption is sought requires the disclosure of sensitive personal information or health information, the collection of this information will be limited to the level of information that is reasonably required to assess an application. The information will be handled by the ACT Government in accordance with existing requirements when dealing with information of this nature. In issuing exemption certificates on grounds that require disclosure of this

information, the exemption will simply state the high-level circumstances on which the exemption is granted as per the *Building (General) Regulation 2008*, for example:

Reason for exemption: an occupier of the premises on which the swimming pool is located has a disability.

Collection of personal information by Government is necessary in order for Government to be aware of the compliance status of pools and spas that were constructed before the current safety standard was in place, and therefore likely required to upgrade their barriers to make them compliant. There will be safeguards in place through existing Government requirements when handling personal information, and all information will be collected and stored in accordance with the *Information Privacy Act 2014*. Additionally, the compliance certificate process will be designed to only collect the information that is absolutely necessary to disclose the compliance status of a regulated swimming pool.

Authorised persons will provide an essential function to support the regulatory framework and support the community to have regulated swimming pools that comply with modern safety standards and are effective at reducing the risk of drowning or near drowning. Authorised persons will be engaged directly by the owner of the premises on which the regulated swimming pool is located. In instances where this is a tenanted property, existing obligations on lessors to provide notice and obligations on lessees to provide access for maintenance and compliance with the law will apply.

The Bill utilises existing powers that the Construction Occupations Registrar and building inspectors have in the *Building Act 2004* in relation to building work to support enforcement of the framework. The existing powers include safeguards around building inspectors providing evidence of authorisation to remain on premises when asked by the occupier of the premises.

Rights in criminal proceedings – strict liability offences

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

Nature of the right and the limitation (s28 (a) and (c))

The Bill introduces new strict liability offences to support the effective operation of the scheme. Strict liability offences engage and limit the right to be presumed innocent until proven guilty because they allow for the imposition of criminal liability without the need to prove fault.

This Bill introduces several strict liability offences which support the effectiveness of the framework. These strict liability offences include:

- Failure to comply with exemption certificate conditions (section 83I) (maximum penalty: 20 penalty units)
- Failure to notify change of exemption circumstances (section 83J) (maximum penalty: 20 penalty units)
- Failure to lodge compliance certificate etc for regulated swimming pool (section 83M) (maximum penalty: 20 penalty units)
- Failure to maintain swimming pool safety barrier (section 83N) (maximum penalty: 30 penalty units)
- Failure to close swimming pool safety barrier (section 83O) (maximum penalty: 30 penalty units)
- Failure to obtain a compliance certificate for regulated swimming pool (section 83OB) (maximum penalty: 30 penalty units)
- Failure by authorised person to return identity card (section 83Q (2)) (maximum penalty: 1 penalty unit)
- Carrying out the functions of an authorised person when not authorised (section 83R (1) (a) & (b) and section 83R (2)) (maximum penalty: 30 penalty units)

Strict liability offences typically arise in a regulatory context where for reasons such as public safety and ensuring that regulatory schemes are complied with, criminal penalties are required. A defendant can reasonably be expected, because of their involvement with the regulated activity, to know what the requirements of the law are, and as such the mental, or fault, element can justifiably be excluded.

Legitimate purpose (s28 (b))

The legitimate objective of this limitation is to support the objective of the Bill, which is to promote the right to life by:

- protecting the public by ensuring regulated swimming pools have safety barriers in accordance with modern safety standards,
- upholding safety standards for regulated swimming pools in the ACT; and
- ensuring functions of authorised persons are only carried out by authorised persons to ensure the above objectives are achieved.

Rational connection between the limitation and the purpose (s28 (d))

The intention of the strict liability offences introduced by this Bill is to support an effective regulatory scheme. The purpose of the specific penalties attributable to

these offences is to provide an appropriate disincentive to individuals from undertaking the actions subject to the offence provisions.

As with many regulatory frameworks involving safety, the inclusion of a suite of strict liability offences is considered important in deterring non-compliance. A robust regulatory framework is essential to establishing community responsibility and safe behaviours around regulated swimming pools, and infringement notice penalties have been found to be effective at changing behaviours. The range of strict liability offences supports a regulatory framework that is intended to provide enhanced health and safety outcomes for individuals and the community.

The purpose of the offence for failing to maintain a pool barrier is to combat the safety issues that arise from the deterioration of barriers over time. Well maintained child resistant pool barriers are a vital safety measure designed to help restrict access of children to a pool or spa. However, if the barrier is not well maintained over time it can lead to safety issues such as the gate locking mechanism breaking or gates not automatically closing. Introducing an offence for this conduct is designed to change behaviours by encouraging people to undertake regular maintenance of their pool and spa barriers to ensure they stay child resistant.

The Building Code of Australia requires that a swimming pool barrier must:

- be continuous for the full extent of the hazard;
- be of a strength and rigidity to withstand the foreseeable impact of people;
- restrict the access of young kids to the pool and the immediate pool surrounds; and
- have any gates and doors fitted with latching devices not readily operated by young kids, and constructed to automatically close and latch.

Regular maintenance ensures that a swimming pool barrier continues to meet these requirements during its life and remains an effective and safe child resistant barrier.

The purpose of the offence of failing to close a safety barrier is to address the importance of preventing access to a regulated swimming pool when not in use. The purpose of safety barriers is to restrict child access. This is no longer achieved when, for example, a pool gate is left open, allowing easy access into the pool or spa area. Introducing an offence for this conduct is intended to encourage people to close safety barriers when not in use to ensure pool and spa areas are not easily accessed by children. It is not considered that there are any less restrictive means for addressing this behaviour.

The community will be made aware of this offence through an extensive communication and awareness campaign that will be undertaken with the community and industry as part of implementation and commencement of the framework. There will also be points during the transition period where reminder education and awareness campaigns will be run. There will also be a dedicated website for the

community and industry to go to for information on their obligations. The ACT Government will also continue to run its Backyard Lifeguard Campaign which will remind the community of these obligations as part of the key messages of that campaign. A key message in that campaign already is the need to restrict access by making sure the pool barrier is shut at all times.

Education and awareness campaigns have gone some way to changing behaviours but regulatory settings have proven to be required. Victoria initially undertook a non-regulatory approach, then proceeded to introduce regulation which includes penalties:

- for the owner of premises on which a swimming pool or spa is located failing to take all reasonable steps to ensure that a barrier restricting access to the swimming pool or spa is properly maintained;
- for the occupier of premises on which a swimming pool or spa is located failing to take all reasonable steps to ensure that a barrier restricting access to the swimming pool or spa is operating effectively;
- for the occupier of premises on which a swimming pool or spa is located failing to take all reasonable steps to ensure that any gate or door forming part of a barrier restricting access to the swimming pool or spa remains closed except when a person is entering or leaving the part of the land on which the swimming pool or spa is located; and
- for a person who opens a gate or door forming part of a barrier restricting access to the swimming pool or spa and does not ensure that the gate or door is closed immediately after leaving or entering the part of the land on which the swimming pool or spa is located.

Victoria's initial non-regulatory approach was similar to the approach currently in place in the ACT (prior to the Bill) which includes providing homeowners with checklists and other guidance material to educate them of the safety of their barriers and how to maintain barriers. Tragically in Victoria following introduction on their non-regulatory approach, two children died as a result of drowning in home swimming pools or spas. In both cases, the barriers were found to be non-compliant.

Victoria was the latest jurisdiction to introduce swimming pool fencing reforms in 2019. A Regulatory Impact Statement undertaken by the Department of Environment, Land, Water and Planning found:

- The consequences of a non-fatal drowning vary. However, research has found that around 20 per cent of non-fatal drowning events result in some form of long-term behavioural and learning impairment.
- Of the 27 fatal drownings in Victoria since 2000, coronial findings reported that in 20 cases the safety barrier was non-compliant with the relevant technical standard and this non-compliance may have played a direct role in the fatal drowning.
- Aside from an absence of adult supervision, the non-compliance of the safety barrier is the single biggest contributing cause to these tragedies.

- There are high levels of non-compliance on initial inspection – between 80 and 90 per cent.
- Non-compliance commonly arises due to a lack of maintenance on operable parts of the barrier but can also occur where alterations and additions are made to adjacent buildings, landscaping elements and boundary fences.

Enforcement activity will be undertaken on an educate first basis and will be supported by an extensive and ongoing public education and awareness campaign.

The inclusion of strict liability offences in the Bill is under the framework. There are no less restrictive means available to effectively achieve this purpose. Education and awareness campaigns have gone some way to changing behaviours, but regulatory settings have proven to be required. This is evidenced by most jurisdictions having taken action to address the issue of child drownings and near drownings in home swimming pools by requiring pool barriers to meet prescribed safety standards and owners to maintain pool barriers. New South Wales, Queensland, Victoria and Northern Territory have all implemented upgrade requirements and frameworks similar to what is proposed through this Bill for the ACT.

The Bill requires compliance certificates to be obtained by homeowners and owners corporations with a pool or spa on their property that was built prior to 1 May 2013. This date is when the prescribed safety standard for those pools was implemented in the ACT, so any pool or spa constructed before this date was not legally required to comply with the prescribed safety standard. Compliance certificates will need to be lodged with the Government by the end of the transition period. The purpose of the offence for failing to lodge a compliance certificate is to encourage people to comply with this requirement. If people do not lodge a compliance certificate with Government by the end of the transition period, there is no way of knowing if these properties have made their pool and spa barriers compliant with prescribed safety standards.

The purpose of the offence of failing to comply with exemption certificate conditions is to have an enforcement tool to use should people breach the conditions of an exemption. It is also a consumer protection measure and is necessary to ensure a robust regulatory and compliance framework.

Proportionality (s28 (e))

There will be an education first approach taken to enforcement. There will also be an education and awareness campaign to provide the community with adequate information about their obligations established by the Bill and the provisions explicitly state the conduct that is required to commit the offence. The public have been on notice of the intention to reform the ACT's swimming pool fencing laws since 2017. A public awareness campaign will be run in the lead up to commencement of the Bill to inform the community of the new requirements, and the Bill has a delayed commencement to support this.

There is also a four-year transition period before penalties will apply for having a non-compliant safety barrier, not lodging a compliance certificate, and not obtaining a compliance certificate. The offences relating to maintaining a swimming pool safety barrier and failing to close a swimming pool safety barrier regulated swimming pool will commence on 1 May 2024 when the Bill commences. Penalties for offences relating to exemption certificates (failure to comply with conditions or notify of a change of circumstances) will be on statute books from 1 May 2024 and will apply from that date for regulated swimming pools subject to an standing exemption but will only be available for regulated swimming pools subject to a Ministerial exemption from the point the owner of premises on which a regulated swimming pool is located is granted an exemption.

There are also ongoing disclosure requirements when selling or leasing a property which will assist anyone who buys or leases a property with a regulated swimming pool to be aware of the obligations they are taking on and the regulatory settings that apply.

Appropriate regulatory actions are essential to building community and industry confidence. There is a high expectation that homeowners, tenants and owners corporations will comply with the requirements of the Bill, and it is important that those requirements are enforced through appropriate penalties to protect the community and promote safe behaviours.

Section 83N requires owners of premises on which a regulated swimming pool is located to maintain a safety barrier for the pool that is an effective and safe child-resistant barrier, which is defined in reference to the safety standards which are prescribed by regulation. The prescribed safety standard is the Building Code of Australia, and certain Australian Standards. Prescribing the standards by regulation is appropriate so that the framework can be responsive to changes to the Building Code and swimming pool safety standards.

As noted above, owners of premises where a regulated swimming pool is located will be supported to understand their obligations through an education and awareness campaign, publicly available factsheets and guidance material and specifically during the transition period through the Ministerial guidance required by s 83H when selling or leasing a property.

There will be exemption pathways available in specified circumstances where a homeowner or owners corporation is unable to meet the requirement for the regulated swimming pool to have a safety barrier compliant with the prescribed safety standards. If these specified circumstances apply an exemption certificate will need to be obtained by homeowners and owners corporations by the end of the transition period. An exemption certificate will only be available for a regulated swimming pool constructed or significantly altered prior to 1 May 2023.

Where a partial exemption is obtained, a compliance certificate will be required for the non-exempt parts of the prescribed safety standards. Both certificates will be required to be lodged with the Government if the regulated swimming pool was built before 1 May 2013. Those with a pool or spa that was constructed or significantly altered between 1 May 2013 and 30 April 2023 should also obtain an exemption certificate before the end of the transition period, in case an exemption is not granted. However, they will only need an exemption certificate for the disclosure requirements when selling or leasing a property after the transition period.

The offences and penalties are consistent with the ACT Government *Guide for Framing Offences* and are considered proportionate to the purpose of the Bill. The maximum penalties attached to the offences reflect the seriousness of the offence relative to other offences in the Bill and other offences of a similar nature in the ACT and other jurisdictions. They also reflect the level of responsibility the person committing the offence has for the conduct that will result in the offence being committed and the potential serious consequences that can arise for individuals and the community where there is non-compliance with the provisions.

Penalties created for the strict liability offences will include infringement notice penalties. Infringement notices are an important component of an effective regulatory framework by providing a deterrent to non-compliance and an alternative to prosecution. Effective infringement notice schemes minimise the cost of litigation for the Territory while offering people a choice concerning whether to accept a lesser penalty without admitting the offence or remaining liable to prosecution.

Any breaches of the offence framework will be managed through an 'engage, educate and enforce' compliance process. This provides a safeguard to ensure the limitation on rights is reasonable and proportionate. Should a breach occur, conduct that contravenes the legislative framework will be considered on a case-by-case basis and within its own context in the same way as existing offences under the *Building Act 2004*. The regulator for the purposes of the *Building Act 2004* is the Construction Occupations Registrar. The Registrar will determine what enforcement action it considers appropriate to take. The Registrar sits within Access Canberra and applies the Access Canberra Accountability Commitment and takes a risk-based approach to taking regulatory action. The Access Canberra Accountability Framework includes the [Building and construction services compliance framework](#) which is publicly available.

The strict liability offences introduced by this Bill are framed with clear criteria as to whether the offence has occurred. The disclosure requirements on leasing or selling a property will ensure that the community is provided with information on these obligations on an ongoing basis. These requirements will be supported by an extensive communication and awareness campaign that will be undertaken with the community and industry as part of implementation and commencement of the Bill. There will also be points during the transition period where reminder education and awareness campaigns will be run. There will also be a dedicated website for the

community and industry to go to for information on their obligations. The ACT Government will also continue to run its Backyard Lifeguard Campaign which will remind the community of these obligations as part of the key messages of that campaign.

The clear framing of offences, as well as strong communication around the obligations of homeowners, tenants and owners corporations are important safeguards on individual rights and ensure the proportionality of introducing strict liability offences.

Chapter 2 of the Criminal Code applies to all offences under this Act. There is a specific defence of mistake of fact for strict liability offences (section 23 Criminal Code 2002), which preserves the principle that a person is innocent until proven guilty, is available in response to the strict liability offences. Section 23 (3) of the Code makes it clear that other defences may also be available for strict liability offences, including the defence of intervening conduct or event (section 39), duress (section 40), sudden or extraordinary emergency (section 41), self-defence (section 42) or lawful authority (section 43).

Rights in criminal proceedings – legal and evidential burden

Placing an evidentiary onus of proof on a defendant, instead of the prosecution, is known as an evidentiary reverse onus of proof. The starting point for the formulation of offences is that the prosecution has the evidentiary burden of proving the elements of the offence beyond reasonable doubt. The prosecution also has the task of negating any defences, exceptions or excuses raised by a defendant beyond reasonable doubt.

Nature of the right and the limitation (s28 (a) and (c))

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The presumption of innocence means that the prosecution has the burden of proving 'beyond reasonable doubt' that the accused committed the offence. A reverse evidential burden would engage and limit the presumption of innocence, as it requires a defendant to disprove a fact or provide evidence sufficient to raise a reasonable possibility that a matter exists or does not exist.

This Bill introduces an offence for an authorised person to fail to return an identity card on ceasing to be an authorised person which places an evidentiary onus of proof on the defendant for specific elements of the offence. The onus is placed on the defendant to prove that the identity card was lost, stolen or destroyed by someone else.

The offence in sections 83N places the legal burden of proof on the defendant for proving any defence created by the offence in accordance with section 59 of the *Criminal Code 2002*. Section 83S clarifies that the legal burden of proof is on the

defendant in relation to a defence to a relevant offence under Part 5A in circumstances where the defendant is an owner's corporation.

Legitimate purpose (s28 (b))

The legitimate objective of this limitation is to support the objective of the Bill, which is to promote the right to life by:

- protecting the public by ensuring regulated swimming pools have safety barriers in accordance with modern safety standards,
- upholding safety standards for regulated swimming pools in the ACT; and
- ensuring functions of authorised persons are only carried out by authorised persons to ensure the above objectives are achieved.

Rational connection between the limitation and the purpose (s28 (d))

The purpose of the placing the onus of proof on the defendant in relation to whether the identity card was lost, stolen or destroyed by someone else is to ensure appropriate regulatory action can be taken in a reasonable and efficient manner. The evidence of whether an authorised person's identity card has been lost, stolen or destroyed by someone else is a matter that is uniquely within the knowledge of the defendant as the authorised person. It would be unreasonable for the prosecution to establish this element.

Proportionality (s28 (e))

Despite the amendments referred to, the burden of proof remains on the prosecution to prove the other elements of the offence. The reverse onus is limited to matters specifically within the knowledge of the defendant and for which it would be unreasonable for the prosecution to establish.

Safeguards to the reverse onus of proof are authorised persons will be required as a term of their appointment to inform the director-general if their identity card is lost, stolen or destroyed by someone else as soon as practicable but within 14 days of becoming aware that their identity card has been lost, stolen or destroyed by someone else.

Building (Swimming Pool Safety) Legislation Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Building (Swimming Pool Safety) Legislation Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

PART 1 PRELIMINARY

This part contains clauses 1 to 3 of the Bill and deals with formal matters including name of the proposed Act, commencement and the legislation that is amended by the Bill.

Clause 1 Name of Act

This clause is a technical clause that provides that the name of the Act is the *Building (Swimming Pool Safety) Legislation Amendment Act 2023*.

Clause 2 Commencement

This clause provides for commencement of the Act. This Act, except sections 5, 6 and 29, will commence on 1 May 2024. Sections 5, 6 and 29 commence on 1 May 2028.

Clause 3 Legislation amended

This clause states the legislation amended by the Bill is that mentioned in parts 2 to 7. This Bill will amend the:

- *Building Act 2004*
- *Building (General) Regulation 2008*
- *Civil Law (Sale of Residential Property) Act 2003*
- *Civil Law (Sale of Residential Property) Regulation 2004*
- *Common Boundaries Act 1981*
- *Magistrates Court (Building Infringement Notices) Regulation 2008*

PART 2 BUILDING ACT 2004

This part of the Bill makes amendments to the *Building Act 2004* to introduce Part 5A Regulated swimming pools and make amendments to support enforcement of new Part 5A. It also makes minor and technical amendments to the inspection powers of building inspectors to clarify the intent of the powers.

Clause 4 New part 5A

This clause inserts a new part in the *Building Act 2004* entitled Part 5A Regulated swimming pools.

New part 5A consists of four divisions:

- Division 5A.1 Preliminary
- Division 5A.2 Compliance with safety standards

- Division 5A.3 Swimming pool safety
- Division 5A.4 Administration
- Division 5A.5 Miscellaneous

Division 5A.1 Preliminary

Definitions—pt 5A

New section 83

This provision creates new definitions for part 5A. This provision defines *access point, authorised person, compliance certificate, exemption certificate, Ministerial exemption, occupier, owner, safety barrier, safety standards* and *standing exemption*.

It also includes definitions of *child-resistant doorset, common property, registered proprietor* and *unit* that apply to this provision.

Meaning of *safety standards*—pt 5A

New section 83A

This provision provides that for part 5A, the *safety standards* for a *regulated swimming pool* means the standards prescribed by regulation.

Meaning of *regulated swimming pool*

New section 83B

This provision defines *regulated swimming pool* for the purposes of the *Building Act 2004*. The definition is based on the current definition of swimming pool in the *Building General Regulation 2008* which is replaced by this definition. It is also based on the definition in Building Code of Australia and relevant Australian standards.

A regulated swimming pool includes a *demountable swimming pool*, a flotation tub, flotation tank and a *spa*. A *regulated swimming pool* is a swimming pool or spa that is capable of containing water to a depth greater than 300mm and is associated with a residential building such as a house, unit, townhouse or block of apartments. It includes in-ground and above-ground pools, temporary and permanent pools, wading pools, demountable pools, portable pools and kids spas.

It does not include:

- a bath in a bathroom;
- a birthing pool used only for waterbirths;
- an ornamental pond;
- a water feature;

- a pool at a category 1 facility;
- a pool at short-term accommodation premises;
- an inflatable pool; and
- anything else prescribed by regulation

A category 1 facility is defined in the *Public Pools Act 2015*, section 7.

The obligations created by clause 4 will not apply to swimming pools in tourist and visitor accommodation such as hotels, motels and caravan parks. These pools have been excluded at this time.

The definition brings in a new exclusion for inflatable pools. An *inflatable pool* is defined as a pool that can be deflated and inflated, filled with water to a depth of not more than 300mm and does not have a filtration system. At the point such a pool has a filtration system it will become a demountable swimming pool and a regulated swimming pool.

A *spa* includes a swim spa and a flotation tank or flotation tub equipped to create bubbles or turbulence into water but does not include a spa bath in a bathroom.

Division 5A.2 Compliance with safety standards

Subdivision 5A.2.1 Exemptions

Standing exemption

New section 83C

This provision provides that a *regulated swimming pool* is exempt from the *safety standards* if a circumstance prescribed by regulation applies to the pool. Unlike the Ministerial exemption pathway an exemption application is not required and an exemption certificate will not be issued.

Ministerial exemption

New section 83D

This provision provides that the owner of premises on which a *regulated swimming pool* is located may apply in writing to the Minister for the pool to be exempt from all or part of the *safety standards*.

A Ministerial exemption can only be granted if a circumstance prescribed by regulation applies to the *regulated swimming pool*.

An exemption may be subject to conditions the Minister considers appropriate.

The Minister may seek further information from the applicant if reasonably required to consider the application. The Minister may also seek advice from an

entity the Minister considers suitable to give advice about a matter relevant to making a decision whether to grant an exemption.

If the Minister grants an exemption, the Minister must issue an *exemption certificate*. New section 83D (6) sets out the information that must be contained in an *exemption certificate*.

An exemption must be obtained for an existing regulated swimming pool prior to 30 April 2028.

An exemption certificate will be issued for a maximum period of 5 years.

Variation of Ministerial exemption

New section 83E

This provision provides for the variation of a Ministerial exemption either on receipt of an application in writing from the owner of the premises or on the Minister's own initiative.

If the Minister seeks to vary the exemption on their own initiative, they must provide the owner of the premises on which the *regulated swimming pool* is located with written notice in accordance with section 83E (4). The owner of the premises will have 28 days to respond to the written notice.

The variation will take effect from either 90 days after the notice is given to the owner or if another date is stated in the notice – on the stated day.

Revocation of exemption

New section 83F

This provision provides for the revocation of a Ministerial exemption on the Minister's own initiative if any of the circumstances outlined in section 83F (1) apply. This includes:

- failure to comply with the conditions of the exemption;
- the owner knowingly or recklessly used false or misleading information in the application for the exemption or variation of the exemption;
- no circumstance prescribed by regulation applies to the pool;
- there is an immediate and serious risk to the health or safety of a person.

Prior to revoking an exemption, the Minister must provide the owner of the premises with written notice in accordance with section 83F (2). The owner of the premises will have 28 days to respond to the written notice. Written notice is not required if the reason for revocation is an immediate and serious risk to the

health or safety of a person. Such a revocation will commence immediately. In any other case the revocation will take effect from either 90 days after the notice is given to the owner or if the notice states another day, the stated day.

Minister may make guidelines

New section 83G

This provision provides the Minister with the power to make guidelines about applications for, and granting of, Ministerial exemptions. A guideline will be in the form of a disallowable instrument.

A guideline will cover such matters as the factors to be taken into account in granting an exemption and the evidence that must be provided with an application for a Ministerial exemption.

Guidance about obligations on owners

New section 83H

This provision requires the Minister to prepare guidance material about the obligations of owners of premises on which a *regulated swimming pool* is located, arising under this part. Guidance material will be in the form of a notifiable instrument. This guidance material will be used to meet the disclosure obligations when selling a property contained in clauses 28 and 29. It will also be used to meet the disclosure requirements established by regulation when leasing a property.

This guidance material is only required to be provided during the transition period and thus this provision will expire on 1 May 2028. The guidance material will ensure the provision of consistent information so that prospective buyers are aware of the obligations they are taking on when buying a property with a regulated swimming pool.

Information will be made available by the ACT Government to assist the community to be informed of the obligations created in this Bill. This material will be regularly reviewed and updated.

Failure to comply with exemption certificate conditions

New section 83I

This provision introduces a strict liability offence for failing to comply with a condition of a Ministerial exemption. This offence only applies to a *regulated swimming pool* built before 1 May 2023. Built includes altered. The maximum penalty for this offence is 20 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

Failure to notify change of exemption circumstances

New section 83J

This provision introduces a strict liability offence for failing to notify of change of circumstances which affects a ground on which a Ministerial exemption has been granted within 14 days of the change happening. This offence only applies to a *regulated swimming pool* built before 1 May 2023. Built includes altered. The maximum penalty for this offence is 20 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

Subdivision 5A.2.2 Compliance certificates

Compliance certificates

New section 83K

This provision establishes the requirement for an *authorised person* to give the owner of the premises on which a *regulated swimming pool* is located a compliance certificate as soon as practicable after having inspected a *regulated swimming pool*. A *compliance certificate* must contain the information outlined in section 83K (1). A *compliance certificate* indicates the status of a *regulated swimming pool* against the *safety standards* and may indicate a *regulated swimming pool* is compliant, non-compliant or exempt.

In circumstances where the *regulated swimming pool* is not compliant and this non-compliance does not create a serious and immediate safety risk, the authorised person must give the owner of the premises a written notice in the form of a *pool rectification notice* that states:

- the reason(s) the pool fails to comply with the safety standards;
- the steps needed to be taken for the pool to comply with the standards;
- the day, within 6 months of the issue of the notice (the *rectification day*), by which the pool must comply with the standards;
- anything else prescribed by regulation.

The *authorised person* must lodge a copy of the *pool rectification notice* with the construction occupations registrar within 14 days of issuing the notice.

If the *authorised person* believes on reasonable grounds that the *regulated swimming pool* does not comply with the *safety standards* and the non-compliance creates a serious and immediate safety risk, they must issue a *compliance certificate* to that effect, give the *compliance certificate* to the owner of the premises immediately and lodge the *compliance certificate* with the construction occupations registrar as soon as practicable but no later than 7 days from issuing.

If engaged by the owner of premises on which a *regulated swimming pool* is located that has been issued with a pool rectification notice, an *authorised person* must, prior to issuing a compliance certificate, inspect the *regulated swimming pool* that was issued with a *pool rectification notice* as soon as practicable after the *rectification day* stated in the notice and as soon as practicable but not later than 14 days after the inspection, give the owner a compliance certificate for the pool or issue a subsequent pool rectification notice depending on any non-compliance still identified.

An authorised person must give the construction occupations registrar:

- a copy of a pool rectification notice within 14 days after the notice is given;
- a copy of a compliance certificate given if the compliance certificate states that the pool does not comply with the safety standards to the extent that the pool is not subject to a ministerial exemption, within 14 days after the certificate is given;
- a copy of a compliance certificate given when a non-compliant regulated swimming pool creates a serious and immediate safety risk due to being non-compliant within 7 days of the certificate being given.

Period for which compliance certificate is in force **New section 83L**

This provision establishes the period for which a *compliance certificate* for a *regulated swimming pool* is in force. The general rule is that a compliance certificate will be valid for 5 years if issued on or after 1 May 2028. Prior to that a compliance certificate will be valid during the transition period and for 4 years from the end of the transition period, that is, will expire on 30 April 2032.

A compliance certificate will cease to be valid the day the swimming pool or the safety barrier for the pool is *substantially altered*.

As per clause 5, from 1 May 2028, a compliance certificate will cease to be valid the day the owner of the premises is convicted or found guilty of failing to have a regulated swimming pool compliant with the prescribed safety standards

A swimming pool is *substantially altered* if at least 50% of the pool is modified, demolished or replaced. This is consistent with the current regulation of swimming pools by the regulator.

A safety barrier is *substantially altered* if it is demolished or replaced or an alteration prescribed by regulation occurs.

Failure to lodge a compliance certificate etc for regulated swimming pool
New section 83M

This provision establishes a strict liability offence of failing to lodge a compliance certificate (and any related exemption certificate) with the construction occupations registrar for a *regulated swimming pool* built before 1 May 2013.

This provision establishes that a compliance certificate for a *regulated swimming pool* built before 1 May 2013 must be lodged with the construction occupations registrar by 1 June 2028 and within 30 days of it being issued. If the *regulated swimming pool* also has an exemption, it must lodge both the compliance certificate and the exemption certificate with the construction occupations registrar within 30 days of the compliance certificate being issued.

The obligations created by this clause only apply to owners of premises on which a *regulated swimming pool* is located, and that *regulated swimming pool* was built before 1 May 2013 and a document has not been lodged by a previous owner.

The offence only applies to regulated swimming pools built before 1 May 2013 as those regulated swimming pools where not legally required to comply with the prescribed *safety standard*. All swimming pools built since 1 May 2013 have been legally required to comply with the prescribed safety standard.

The maximum penalty for this offence is 20 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

Division 5A.3 Swimming pool safety

Failure to maintain swimming pool safety barrier
New section 83N

This provision makes it a strict liability offence for the *owner* of premises on which a *regulated swimming pool* is located to fail to maintain a *safety barrier* for the *regulated swimming pool* as an effective and safe child-resistant barrier. The maximum penalty for this offence is 30 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

An effective and safe child-resistant barrier is defined as a barrier that complies with any of the following:

- the safety standards for the regulated swimming pool
- the safety standards to the extent the pool has not been granted a Ministerial exemption from the safety standards
- a required prescribed by regulation

This offence is about ensuring a *safety barrier* continues to perform its function as a safe and effective means to restrict access to a *regulated swimming pool*. Some examples of the type of things that would fall under this offence are where a gate is required to be self-closing or have a lockable latch that mechanism is maintained to perform its function and work effectively to restrict access to the *regulated swimming pool*.

It is a defence to this offence if the defendant proves that the *regulated swimming pool* is subject to a *standing exemption*.

Failure to close swimming pool safety barrier **New section 83O**

This provision makes it a strict liability offence for a person who is the *occupier* of premises on which a *regulated swimming pool* is located to fail to ensure all access points for the pool's *safety barrier* are securely closed when they are not in use. For a *spa* with a *safety barrier* that is a lockable child-resistant cover, the cover is securely fitted and locked when the *spa* is not in use.

The maximum penalty for this offence is 30 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

Division 5A.4 Administration

Authorised person **New section 83P**

This provision provides that the director-general may appoint a person as an *authorised person* for this part. A person must not be appointed unless the director-general is satisfied that the person is competent to exercise the functions of an *authorised person* under this part. A regulation may prescribe the matters that the director-general must consider in relation to a person's competency.

A regulation may prescribe a class of person taken to be appointed as an *authorised person* by the director-general and the terms of appointment for the class of person.

Appointments made other than by prescription in the regulation will be issued in accordance with Part 19.3 of the *Legislation Act 2001*.

Such appointments will also be for a term not longer than 5 years and will be in the form of a notifiable instrument.

This provision provides that an *authorised person* has the following functions:

- assessing whether regulated swimming pools comply with the safety standards;

- issuing compliance certificates and pool rectification notices for regulated swimming pools;
- any other function under this part or prescribed by regulation.

This provision provides that an *authorised person* must exercise the person's functions in accordance with any directions the director-general gives the person and where the person is appointed by notifiable instrument, in accordance with the instrument of appointment.

Identity cards

New section 83Q

This provision provides for the identification of authorised persons, by way of an identity card. This provision lists the requirements of the information this card must contain to ensure accurate identification and validity.

This provision establishes a strict liability offence of failing to return the identity card within seven days after the person stops being an authorised person. This offence does not apply if the authorised person's identity card is lost, stolen or destroyed by someone else. The maximum penalty for this offence is 1 penalty unit.

Person pretending to be authorised person

New section 83R

This provision establishes that it is an offence for a person who is not an authorised person to carry out the functions of an authorised person and be reckless as to whether the person is an authorised person. The maximum penalty for this offence is 60 penalty units. This penalty is considered appropriate as an authorised person for the purposes of new Part 5A has significant responsibilities in relation to assessment of a regulated swimming pool's compliance with the prescribed safety standards and carrying out these functions when not authorised puts the community at risk of drowning or near drowning and being reckless about such behaviour demonstrates a lack of responsibility and appreciation of the significant risks arising from such behaviour.

The provision also creates a strict liability offence for a person who carries out the functions of an authorised and is not an authorised person. The maximum penalty for this offence is 30 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

Division 5A.5 Miscellaneous

Criminal liability for executive members of owners corporation

New section 83S

This provision provides that where an offence under Part 5A is committed by the owner of a premises that is an owners corporation, each executive member of the owners corporation is criminal liable. This aligns with the approach taken in the *Unit Titles (Management) Act 2011*.

Clause 5 Period for which compliance certificate in force

New section 83L (1) (c)

This clause commences on 1 May 2028 and is consequential to the amendments in clauses 4 and 6.

This clause provides that if an owner of premises on which a *regulated swimming pool* is located is convicted or found guilty of having a *regulated swimming pool* that fails to comply with the *safety standards* any compliance certificate issued for that *regulated swimming pool* will cease to be in force.

Clause 6 New sections 83OA and 83OB

This clause inserts new sections 83OA and 83OB into Part 5A from 1 May 2028.

Regulated swimming pool fails to comply with safety standards

New section 83OA

This provision establishes an offence of failing to comply with the *safety standards*. This clause will commence on 1 May 2028. The offence will not apply to the extent that the failure to comply with the *safety standards* is consistent with a standing or Ministerial exemption for the *regulated swimming pool*. The maximum penalty for this offence is 60 penalty units. This penalty is considered appropriate as the objective of the Bill is to prevent drownings and near drownings in regulated swimming pools through requiring safety barriers that are compliant with the prescribed standards.

In the ACT, the home swimming pool is the most common location for drowning death and serious injury for children under the age of five. It is estimated conservatively that for every child that fatally drowns in an Australian pool, between four and seven are resuscitated, suffering life-long disability from brain, lung and other organ damage. It is not only children that live at houses with swimming pools that drown or suffer serious injury from a near-drowning incident, children and relatives that may be visiting or children from neighbouring properties are also at risk.

Child resistant pool barriers are a vital safety measure designed to help restrict access of children to a pool or spa, and are considered the best injury prevention initiatives for preventing drowning and near drowning incidents when combined with supervision.

This provision establishes that it is a defence to this offence if the defendant proves that the required documents were disclosed on sale of the premises and not more than 90 days have elapsed since the defendant became the owner of the premises.

Failure to obtain compliance certificate for regulated swimming pool **New section 83OB**

This provision establishes a strict liability offence of failing to obtain a *compliance certificate* (and any related *exemption certificate*) for a *regulated swimming pool* built before 1 May 2028.

The obligations created by this clause only apply to owners of premises on which a *regulated swimming pool* is located, and that *regulated swimming pool* was built before 1 May 2013 as those regulated swimming pools were not legally required to comply with the prescribed safety standard. All swimming pools built since 1 May 2013 have been legally required to comply with the prescribed safety standard.

All regulated swimming pools built before 1 May 2013 must have obtained a compliance certificate or obtained an exemption certificate before 1 May 2028.

This offence does not apply if a compliance certificate was obtained from an authorised person by a previous owner of the premises on which the regulated swimming pool is located. The compliance certificate is attached to the premises on which the regulated swimming pool is located not to the owner.

The maximum penalty for this offence is 30 penalty units. This offence has the option for an infringement notice penalty to be issued (see clause 32).

Clause 7 Inspection of building work where no approval **Section 131 (1) (a)**

This clause substitutes existing section 131 (1) (a) and introduces new section 131 (1) (aa) to clarify the circumstances when the construction occupations registrar can authorise a building inspector to carry out an inspection of building work or a building. This change supports the ACT Government's commitment to a building regulatory system that supports, drives and delivers high quality design and building and compliance with building standards. Compliance with building standards support health, safety, amenity and sustainability which are all important parts of maintaining quality of life.

Clause 8 New section 131 (1) (h) and (i)

This clause inserts new section 131 (1) (h) consequential to the amendments in clause 4.

This clause inserts new section 131 (1) (i) to allow for the expansion of the circumstances when the construction occupations registrar can authorise a building inspector to carry out an inspection of building work or a building by regulation. This amendment supports the registrar to address issues of safety and building quality in a timely manner by allowing for emerging issues to be incorporated into the regulatory system in a timely manner.

This change supports the ACT Government's commitment to a building regulatory system that supports, drives and delivers high quality design and building and compliance with building standards. Compliance with building standards support health, safety, amenity and sustainability which are all important parts of maintaining quality of life.

Clause 9 Dictionary, new definitions

This clause inserts definitions of *access point*, *authorised person*, *compliance certificate*, *exemption certificate*, *Ministerial exemption* and *occupier* and is consequential to the amendments in clause 4.

Clause 10 Dictionary, definition of owner

This clause is a minor and technical amendment and is consequential to the amendments in clause 4.

Clause 11 Dictionary, new definitions

This clause inserts definitions of *regulated swimming pool*, *safety barrier*, *safety standards* and *standing exemption* and is consequential to the amendments in clause 4.

PART 3 BUILDING (GENERAL) REGULATION 2008

This part of the Bill makes amendments to the *Building (General) Regulation 2008* consequential to the amendments at clause 4.

Section 152 of the *Building Act 2004* gives the Executive the power to make regulations for the purposes of this Act.

Clause 12 Unaltered parts need not comply with building code if alternative requirements met—Act, s 29 (2) (b) Section 24 (3) (b) (vi)

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 13 New part 3A

This clause introduces new part 3A, Regulated swimming pools, into the *Building (General) Regulation 2008*. New part 3A relates to regulated swimming pools and is consequential to the amendments at clause 4.

Safety standards—Act, s 83A, def *safety standards* New section 36D

This provision prescribes the safety standards for regulated swimming pools.

For a regulated swimming pool built before 1 May 2023, the safety standards are the current version of the Building Code (National Construction Code (NCC) 2022, Volumes 1 and 2) that calls up Australian Standards AS 1926.1 (2012) (Swimming pool safety, Part 1: Safety barriers for swimming pools) and AS 1926.2 (2007) (Swimming pool safety, Part 2: Location of safety barriers for swimming pools). This safety standard was implemented as the required standard in the ACT on 1 May 2013 and remains the current standard.

The prescribed safety standard for a *regulated swimming pool* built or substantially altered on or after 1 May 2023 is the Building Code as in force at the time the swimming pool is built or altered. This maintains the current regulatory settings for swimming pools.

Substantially altered for this provision means at least 50% of the swimming pool or the safety barrier for the pool, is modified, demolished or replaced.

This section contains a different definition of *substantially altered* to section 83L as this provision is about the standard a regulated swimming pool is required to meet and section 83L is about what triggers the need for a new compliance certificate to be obtained.

Australian Standards are subject to copyright, so cannot be published by way of a notifiable instrument. Australian Standards may be purchased at www.standards.org.au and are available for viewing at the National Library of Australia.

Standing exemptions—circumstances—Act, s 83C New section 36E

This provision prescribes the circumstances in which a regulated swimming pool is exempt from the safety standard. The circumstances prescribed at items 2 and 3 are limited to a *regulated swimming pool* built before 1 May 2023.

Ministerial exemption—circumstances—Act, s 83D (2) New section 36F

This provision prescribes the circumstances in which a regulated swimming pool may be granted an exemption by the Minister from all or part of the prescribed

safety standards. The circumstances prescribed at items 1, 2 and 3 are limited to a *regulated swimming pool* built before 1 May 2013. The circumstances prescribed at items 4 and 5 are limited to a *regulated swimming pool* built before 1 May 2023.

**Clause 14 Exempt buildings and building work
Schedule 1, part 1.1, section 1.1, definition of
*demountable pool***

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 15 Schedule 1, part 1.1, section 1.1, new definition of *safety barrier*

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 16 Schedule 1, part 1.1, section 1.1, definition of *swimming pool*

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 17 Schedule 1, part 1.2, item 11, column 2, paragraph (c)

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 18 Schedule 1, part 1.3, items 1 and 2, column 2

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 19 Schedule 1, part 1.3, items 11 and 12, column 2

This is a minor and technical amendment consequential to the amendments at clause 4.

Clause 20 Schedule 1, part 1.3, new item 12A

This clause inserts new item 12A to make it clear that a *demountable swimming pool* that is erected for not more than 3 consecutive days is exempt from part 3 of the *Building Act 2004*.

**Clause 21 Reviewable decisions
Schedule 4, new items 11A to 11D**

This clause inserts items 11A to 11D into the table of reviewable decisions and is consequential on the amendments at clause 4.

This clause makes the following decisions reviewable decisions:

- section 83D (2) of the *Building Act 2004* to refuse to exempt a regulated swimming pool from the prescribed safety standards;
- section 83D (3) of the *Building Act 2004* to exempt a regulated swimming pool from prescribed safety standards subject to conditions;
- section 83E (4) of the *Building Act 2004* to vary an exemption of a regulated swimming pool from prescribed safety standards; and
- section 83F (1) (a) to (c) of the *Building Act 2004* to revoke an exemption of a regulated swimming pool from prescribed safety standards.

A reviewable decision can be reviewed internally or by ACAT as outlined in Part 9A of the *Building Act 2004*.

Clause 22 Dictionary, note 3

This clause is a minor and technical amendment to insert the term *regulated swimming pool* and is consequential to the amendments at clause 4.

Clause 23 Dictionary, definition of *demountable pool*

This clause replaces the definition of *demountable pool* and is consequential to the amendments at clause 4.

Clause 24 Dictionary, new definition of *demountable swimming pool*

This clause replaces the definition of *demountable pool* and is consequential to the amendments at clauses 4 and 20.

Clause 25 Dictionary, definition of *swimming pool*

This clause omits the definition of *swimming pool* and is consequential to the amendments at clause 4.

PART 4 CIVIL LAW (SALE OF RESIDENTIAL PROPERTY) ACT 2003

This part makes amendments to the *Civil Law (Sale of Residential Property) Act 2003* to introduce a requirement to provide documents relating to the status of a regulated swimming pool when selling a residential property.

Clause 26 Meaning of *required documents* New section 9 (1) (ja)

This clause inserts a requirement for documents prescribed by regulation to be provided when selling a residential property on which a regulated swimming pool is located. This amendment is consequential to the amendments at clause 4.

Clause 27 Section 9 (4), new definition of *regulated swimming pool*

This clause is a minor and technical amendment to insert a definition for *regulated swimming pool* and is consequential to the amendments at clause 26.

PART 5 CIVIL LAW (SALE OF RESIDENTIAL PROPERTY) REGULATION 2004

This part makes amendments to the *Civil Law (Sale of Residential Property) Regulation 2004* to set out the documents that must be provided when selling a residential property on which a regulated swimming pool is located. These amendments are consequential to the amendments at clauses 4 and 26.

Section 40 of the *Civil Law (Sale of Residential Property) Act 2003* gives the Executive the power to make regulations for the Act.

Clause 28 New section 10B

This clause inserts new section 10B which sets out the documents that are required documents when selling a residential property on which a *regulated swimming pool* is located.

Section 10B (1) sets out the required documents for a *regulated swimming pool* built before 1 May 2023. Built includes altered.

Section 10B (2) sets out the required documents for a *regulated swimming pool* built or substantially altered on or after 1 May 2023.

This clause will apply to sales of residential property on which a *regulated swimming pool* is located between 1 May 2024 and 30 April 2028. Clause 29 will apply from 1 May 2028.

During the period in which this provision applies, the required documents are adapted as this is the period which an owner of a premises with a *regulated swimming pool* has to make their *regulated swimming pool* compliant with the prescribed *safety standards* unless subject to a *standing exemption* or granted a *Ministerial exemption*.

Clause 29 Section 10B

This clause will apply to sales of residential property on which a *regulated swimming pool* is located from 1 May 2028. From this date all regulated swimming pools must be compliant with the prescribed *safety standards* unless exempt.

This clause inserts new section 10B which sets out the documents that are required documents when selling a residential property on which a *regulated swimming pool* is located.

Section 10B (1) sets out the required documents for a *regulated swimming pool* built before 1 May 2013. Built includes altered.

Section 10B (2) sets out the required documents for a *regulated swimming pool* built or substantially altered on or after 1 May 2013 but before 1 May 2023.

Section 10B (3) sets out the required documents for a *regulated swimming pool* built or substantially altered on or after 1 May 2023.

PART 6 Common Boundaries Act 1981

This part makes amendments to the *Common Boundaries Act 1981* to provide for the making of a regulation to address disputes about common boundaries arising from the amendments at clause 4.

Clause 30 New section 13A

This clause introduces new section 13A which provides for a regulation to prescribe the matters the ACT Civil and Administrative Tribunal (ACAT) must take into account when making a determination that involves a fence that forms part, or will form part, of a safety barrier for a regulated swimming pool.

Clause 31 New part 4

This clause introduces new part 4 which includes section 29 to provide a regulation-making power for this Act and is consequential to the amendments at clause 30. The power to make regulations for this Act will rest with the Executive.

PART 7 Magistrates Court (Building Infringement Notices) Regulation 2008

This part makes amendments to Schedule 1 of the *Magistrates Court (Building Infringement Notices) Regulation 2008* to set infringement notice penalties for certain new offences introduced by clause 4.

Clause 32 Building legislation infringement notice offences and penalties Schedule 1, pt 1.1, new items 5 to 10

This clause sets infringement notice penalty amounts for offences under sections 83I, 83J, 83M, 83N, 83O and 83R (2) of the *Building Act 2004* and is consequential to the amendments at clause 4.

The ACT *Guide for Framing Offences* provides that, in general, the infringement notice penalty for an offence should not exceed 20% of the maximum court-imposed penalty. The reasoning for this long-standing policy decision is to:

- ensure that the infringement notice amount is a sufficient incentive for a person to forego their right to a trial and avoid using up valuable court time and resources; and
- minimise the harm to innocent recipients who decide to pay the notice, irrespective of whether they believe they are innocent.

The infringement notice penalty amounts set by this clause do not exceed 20% of the maximum court-imposed penalty, are applied only to strict liability offences, are consistent with other offences of a similar nature in the ACT and are consistent with similar offences in other jurisdictions.

These offences are designed to support a regulatory framework that is about protecting the public from the safety risks associated with home swimming pools.