

Building (General) Amendment Regulation 2024 (No 1)

Subordinate law SL2024-6

made under the

Building Act 2004

EXPLANATORY STATEMENT

This explanatory statement relates to the *Building (General) Amendment Regulation 2024 (No 1)* (the **regulation**) as made by the Executive. It has been prepared to assist the reader of the regulation. It does not form part of the regulation and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. 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.

OVERVIEW

The regulation is made under section 152 of the *Building Act 2004* (the **Act**).

The *Building (Swimming Pool Safety) Legislation Amendment Act 2023* (the **Swimming Pool Safety Act**) established new rules for regulated swimming pools in the ACT. The objective of the Swimming Pool Safety Act is to uphold safety standards for home swimming pools and spas in the ACT and to protect the public by ensuring home swimming pools and spas in the ACT are fenced in accordance with modern safety standards.

This regulation supports the commencement of the Swimming Pool Safety Act on 1 May 2024.

The Regulation:

- prescribes the considerations as to competency when appointing an authorised person; and
- specifies certifiers as a class of person taken to be appointed as an authorised person.

It also includes minor and technical amendments related to commencement of the Swimming Pool Safety Act and other minor and technical amendments to maintain the currency of the ACT's building regulatory system by removing outdated references to guidelines and standards.

HUMAN RIGHTS ASSESSMENT

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts of subordinate legislation, among other matters.

Human rights impacts were assessed for the Swimming Pool Safety Act. The detailed human rights assessment is contained in the [Explanatory Statement](http://www.legislation.act.gov.au) (www.legislation.act.gov.au – *Building (Swimming Pool Safety) Legislation Amendment Act 2023*).

This regulation establishes the matters that are taken into consideration when appointing an authorised person and as such may engage and limit the following human rights:

- Section 8 - Recognition and equality before the law
- Section 12 - Right to privacy and reputation

Suitability information of the type contained in the regulation may engage the right to equality if it permits the consideration of an irrelevant criminal record in determining a person's eligibility for appointment. It may also engage the right to privacy and reputation through the collection of personal information. The protection of privacy is necessarily relative, and personal information should only be collected where it is in the interests of the community.

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

This regulation includes matters that the Director-General must consider in being satisfied that a person is competent to exercise the functions of an authorised person under new Part 5A of the *Building Act 2004* enacted by the *Swimming Pool Safety Act*.

Matters that are prescribed in the regulation for consideration of a person's competency to perform the functions of an authorised person include:

- demonstrated adequate knowledge and experience relevant to the functions of the authorised persons (for example, experience inspecting swimming pool barriers or other building structures against prescribed standards and completion of relevant training)
- citizenship/residency requirements (this is consistent with other regulatory settings where functions are performed by a person who is not a public servant)

- consideration of conviction (s) or finding (s) of guilt in relation to:
 - an indictable offence under a law of the ACT or the Commonwealth; or
 - an offence committed outside the ACT that would be an indictable offence against a law of the ACT if committed in the ACT
- disciplinary action relating to a construction occupation that involved a finding of guilt.
- breach of appointment or functions of an authorised person under the Act or a relevant law.

It is anticipated that applications for appointment as an authorised person will include persons working within the building and construction sector or who perform these functions under the law of another jurisdiction, for example, the *Swimming Pools Act 1992* (NSW).

Legitimate purpose (s28 (b))

The *Swimming Pool Safety Act* 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 a 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.

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

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.

As such it is appropriate to consider their criminal record and other information as part of determining suitability as an authorised person.

Proportionality (s28 (e))

The Director-General has discretion in determining whether information obtained makes a person suitable or not for appointment. The Director-General is not prohibited from appointing a person who discloses information that relates to criminal

history, disciplinary action or other non-compliance with functions of an authorised person.

A further safeguard is that an individual whose application for appointment is refused may seek to have the decision reviewed internally and then seek ACAT review of the review decision.

REGULATORY IMPACT STATEMENT

A regulatory impact statement is not required as this regulation does not impose any appreciable costs on the community, or part of a community under section 34 (1) of the *Legislation Act 2001*.

The reforms in the Swimming Pool Safety Act are designed to avoid preventable deaths and serious injuries from drownings and near drownings in home swimming pools and spas in the ACT by making sure that home swimming pools and spas in the ACT are fenced in accordance with current safety standards.

It is impossible to assign a monetary value to the trauma to families and communities from a fatal or near fatal drowning, particularly where a young child is involved. This includes those involved in the initial emergency response. In the first year after a child's death a parent is two to three times more likely to be hospitalised for mental health problems.

Costs to the community and Government for life-long care for non-fatal drownings are substantial, in addition to the cost of their loss of life-quality and productivity. Family members, carers and pool owners can also suffer loss of life-quality and productivity as a result of a fatal or non-fatal drowning.

The trauma experienced as a result of fatal and non-fatal drownings can be physical, psychological and financial:

Physical	Insomnia Aches and pains Loss of appetite Confusion Inability to concentrate
Psychological	Guilt or self-blame; Depression; Anxiety Loneliness – breakdown of social groups Helplessness; Abandonment Chronic irritation or frustration Jealousy of other families and intense rage at the unfairness of their situation Relationship breakdown
Financial	Decline in income Extensive health bills Funeral arrangements \$4000 to \$15,000 more

	<p>Loss of employment – a parent who loses a child is 9% more likely to be unemployed than a parent who has not.</p> <p>Difficulty paying bills on time – over 30% of carer families cannot pay their utility bills on time compared to less than 15% of the general population.</p>
--	--

Victoria was the latest jurisdiction to introduce swimming pool fencing reforms in 2019. A [Regulatory Impact Statement](http://www.vic.gov.au/regulatory-impact-statements-2019) (www.vic.gov.au/regulatory-impact-statements-2019) 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.

SCRUTINY COMMITTEE PRINCIPLES

The regulation is consistent with Scrutiny Committee principles.

CLAUSE NOTES

Clause 1 Name of regulation

This clause provides that the name of the regulation is the *Building (General) Amendment Regulation 2024 (No 1)*.

Clause 2 Commencement

This clause provides for the commencement of regulation. The regulation commences on the commencement of section 3 of the *Building (Swimming Pool Safety) Legislation Amendment Act 2023*.

Clause 3 Legislation amended

This clause provides that the Regulation amends the *Building (General) Regulation 2008*.

Clause 4 Table 36F, item 2, column 3

This clause is a minor and technical amendment consequential on the commencement of the *Urban Forest Act 2023* on 1 January 2024. The *Urban Forest Act 2023* replaced the *Tree Protection Act 2005*.

Clause 5 Section 36F (2), definition of *protected tree*

This clause is a minor and technical amendment consequential on the commencement of the *Urban Forest Act 2023* on 1 January 2024. The *Urban Forest Act 2023* replaced the *Tree Protection Act 2005*.

Clause 6 New sections 36G to 36J

This clause inserts new sections 36G to 36J into new part 3A of the *Building (General) Regulation 2008*. Part 3A was established by the *Building (Swimming Pool Safety) Legislation Amendment Act 2023*.

Prescribed requirements for safety barrier—Act, s 83N (2) (c) New section 36G

New section 36G inserts a new section that clarifies that during the transition period for the new home swimming pool safety rules, a barrier that complied with the requirements in force immediately before 1 May 2024, is taken to be an effective and safe child-resistant barrier for the purposes of the offence provision in section 83N of the *Building (Swimming Pool Safety) Legislation Amendment Act 2023*.

Section 83N 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.

Competency matters for person to exercise functions of authorised person—Act, s 83P (3) New section 36H

New section 36H prescribes the matters the director-general must consider in relation to a person's competency to be appointed as an authorised person.

The matters prescribed include:

- Demonstrated adequate knowledge and experience relevant to the functions of the authorised persons. For example, experience inspecting swimming pool barriers or other building structures against prescribed standards and completion of relevant training.
- Citizenship/residency requirements. This is consistent with other regulatory settings where functions are performed by a person who is not a public servant.

- Consideration of conviction (s) or finding (s) of guilt in relation to:
 - an indictable offence under a law of the ACT or the Commonwealth; or
 - an offence committed outside the ACT that would be an indictable offence against a law of the ACT if committed in the ACT.
- Disciplinary action relating to a construction occupation that involved a finding of guilt.
- Breach of appointment or functions of an authorised person under the Act or a relevant law.

Building surveyor taken to be appointed as authorised person—Act, s 83P (4)
New section 36I

New section 36I prescribes an individual who holds a builder surveyor licence under the *Construction Occupations (Licensing) Act 2004* to be a class of person that is taken to be appointed as an authorised person.

Director-general may end building surveyor's appointment as authorised person
New section 36J

New section 36J provides for the circumstances and process by which a class of person that is taken to be appointed as an authorised person may have that appointment ended.

Clause 7 Schedule 1, part 1.3, item 3, column 1

This clause is a minor and technical amendment consequential to amendments contained in the *Building (Swimming Pool Safety) Amendment Act 2023*.

Clause 8 Schedule 1, part 1.3, item 10, column 1

This clause is a minor and technical amendment consequential to amendments contained in the *Building (Swimming Pool Safety) Amendment Act 2023*.

Clause 9 Schedule 3, section 3.1 (1), definition of *tolerances guide*

This clause is a minor and technical amendment to replace an outdated reference to the Guide to Standards and Tolerances (tolerances guide) with the current version of the tolerances guide.

Clause 10 Schedule 3, section 3.1 (1), notes 2 and 3

This clause is a minor and technical amendment to consolidate existing notes 2 and 3 in accordance with current drafting practice.

Clause 11 Schedule 3, part 3.2, item 12

This clause is a minor and technical amendment consequential to amendments contained in the *Building (Swimming Pool Safety) Amendment Act 2023*.