

LAPCSESC
Criminal & Other Legislation
Submission 007



AN ASSOCIATION OF
ACCOMMODATION AND
CARE SERVICE
ORGANISATIONS

9 December 2011

Research Director
Legal Affairs, Police, Corrective Services & Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Email: lapcsesc@parliament.qld.gov.au

Dear Sir/Madam

Re: Criminal and Other Legislation Amendment Bill 2011

On behalf of Retirement Village Association Queensland and this organization, I attach our Joint Submission.

We look forward to the opportunity of having a joint presentation by our organizations to amplify our position and assist the Committee in your deliberations.

Please contact the undersigned in regard to meeting with the Committee at a Public Hearing or if any further information is required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Taylor', with a long horizontal flourish extending to the right.

Geri Taylor
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Queensland Retirement Village Scheme Operators Joint Submission

Response to the Criminal and Other Legislation
Amendment Bill 2011 (Qld) ('Draft Bill')

Aged Care Queensland Inc &
Retirement Village Association Ltd

December 2011

1. EXECUTIVE SUMMARY

The Queensland Retirement Village Scheme Operators comprising Aged Care Queensland (ACQ) and the Retirement Village Association (RVA) (“the **Operators**”), thank you for the opportunity to submit a response to the Criminal and Other Legislation Amendment Bill 2011 (Qld) as it relates to the retirement village industry.

We support the Government’s commitment for an outcome that will encourage best practice standards, provide a clear regulatory framework to ensure certainty for the retirement village industry in planning for future expansion, and ensuring consumer and community confidence.

However, the industry regrets that amendments to the Retirement Villages Act are buried in other legislation rather than in a stand alone Bill. Such piece meal processes runs the risk of counteracting an appropriate legislative umbrella.

While noting the desire by Government to legislate for improved clarity and transparency, it is important that the Queensland Retirement Village Scheme Operators have this opportunity to present their perspective on the proposed Amendment to the Criminal and Other Legislation Amendment Bill 2011 (Qld) not only for their own interests, but also for the long term availability of retirement accommodation choices for older Queenslanders.

This Submission has been prepared by the Scheme Operators owning and managing Queensland retirement villages and is intended for the purpose described in this paper and not for any other purpose. The contents of this Submission should not be re-produced without the express permission of either organisation – RVA Limited and ACQ Inc.

2. QUEENSLAND MEMBER ASSOCIATIONS

2.1 Aged Care Queensland (ACQ)

Aged Care Queensland (ACQ) is a not-for-profit Association consisting of more than 400 members who provide care and accommodation services to older Queenslanders at approximately 800 sites. It is a senior member of the two National Peak Aged Care Organisations – Aged Care Association Australia (for profit) and Aged & Community Services Australia (not for profit). These two national organisations represent the overwhelming majority of community care, retirement villages, residential aged care and many seniors rental housing organisations.

In Queensland, ACQ represents members who operate retirement villages, nursing homes, hostels, independent living units, rental accommodation for the aged, serviced apartments, respite care and in-home care services.

ACQ chairs the International Retirement Community Accreditation Scheme (IRCAS) on behalf of the two National Peak Organisations which is an internationally endorsed accreditation program undertaken independently by Quality In Practice.

ACQ assists members by promoting the accommodation and aged care sector to the community and to Governments, and by keeping members informed of matters that affect their operations. It also facilitates policy and strategic development for the industry, and offers education and training specific to the accommodation and aged care industry.

Membership of ACQ is open to all organisations serving older Queenslanders – church, charitable, community, private enterprise, State and Local Government.

2.2 Retirement Village Association (RVA)

The Retirement Village Association (RVA) is Australia’s peak body for the retirement village industry.

The RVA represents over 750 village and associate members nationally, and plays a critical role in the ongoing growth and sustainability of the retirement village industry.

With five regional offices located in Brisbane, Sydney, Melbourne, Adelaide and Perth, RVA membership consists of retirement village operators, managers, owners, developers, investors and industry specialists across Australia. The principal objectives of the RVA are to:

- lead the building and growth of a sustainable and responsible industry;
- advocate and strengthen our relationships with local, state and federal governments to ensure the best legislative outcomes for the retirement village industry;
- encourage industry excellence and best practice through accreditation, and facilitate quality improvement through an effective and relevant professional development program; and
- support and promote the benefits of retirement villages as “the preferred choice of lifestyle for senior Australians”.

3. JOINT POSITION, COMMENTS AND RECOMMENDATIONS

ACQ and RVAQ acknowledge that all but two of the proposed changes to the Retirement Villages Act 1999 (**Act**) in the *Criminal and Other Legislation Amendment Bill 2011 (Qld)* (**Draft Bill**) are intended to provide certainty to the industry and we support that. We recommend that an amendment approved by the Ministerial Working Party 2008 be included in the Draft Bill.

We are concerned that the proposed amendment to Section 28 of the RV Act (Clause 76 in the Bill) in its current form will create increased uncertainty in the registration of new retirement villages and therefore may be a barrier to development of new villages. By not allowing the chief executive any discretion in refusing registration of a scheme, there will be a resulting slowdown in the processing of retirement village registrations, which will delay commencement of a scheme and the consequential financial impost on the scheme operator.

The proposed amendments to Sections 56 of the RV Act (Clause 77 of the Bill) are welcome, but do not go far enough to deal with the gaps in the process of a resident's contract terminating, the unit being reinstated and a relative exercising their rights under Section 70B of the RV Act. These do need to be addressed to prevent the uncertainty that will continue if the current amendment is adopted unchanged.

ACQ and RVA propose that a change to the cooling-off period provision (Section 45A of the RV Act) included in the 2010 draft of the *Fair Trading and Other Legislation Amendment Bill 2011 (Qld)* should be added to the Bill. This change was approved by all parties of the 2008 Ministerial Working Party, including the ARQRV.

In our submission below:

- 'Act' means the *Retirement Villages Act 1999* (Qld).
- 'Explanatory Notes' means the explanatory notes to the Draft Bill.
- 'Fair Trading Bill' means the original consultation draft of the *Fair Trading and Other Legislation Amendment Bill 2011* (Qld) issued by the Government in November 2010.
- 'Government's Summary' means the 'Summary of proposed amendments' prepared by the Department of Employment, Economic Development and Innovation in November 2010 to accompany the original consultation draft of the Fair Trading Bill.

4. SPECIFIC COMMENTS

Draft clause	Bill	Retirement Villages Act section	Comments
Clauses 76, 80	Section 28	(Registration of a retirement village scheme), new Part 15 Div 3 (Transitional provisions for Criminal and Other Legislation Amendment Act	The sections proposed to be inserted into the Act are inconsistent with, and broader than, the explanation of the amendments in both the Explanatory Notes and the Government's Summary. Specifically: 1. The Explanatory Notes say that the proposed amendments clarify that ' <i>the chief executive may refuse to register a scheme as a 'retirement village' scheme if it is inconsistent with the</i>

Draft clause	Bill	Retirement Villages Act section	Comments
		2011)	<p><i>objectives of the Act'</i>, and, separately, that the amendments will 'allow the chief executive not to register a retirement village scheme to be contrary to the regulatory framework of the Act.'</p> <p>2. The Government's Summary says the proposed amendments in the Fair Trading Bill (which are in the same form as those in the Draft Bill) clarify that '<i>the chief executive may refuse to register a scheme on the ground it is so inconsistent with how the Act envisages a retirement village to operate that it cannot be considered a 'retirement village' as defined by the Act.'</i></p> <p>The Explanatory Notes, and the Government's Summary to the Fair Trading Bill, both suggest that the ability of the chief executive to refuse to register a scheme on the relevant ground is intended to be discretion for the chief executive. However, the section states that where the chief executive reasonably considers the scheme is contrary to the Act's regulatory framework, then he or she must refuse to register the scheme. Given that the section is cast as an obligation rather than discretion, it will impose a strict obligation on the chief executive to form a reasonably considered view.</p> <p>ACQ and RVA are concerned that this will result in the need for both increased scrutiny and more cautious decision-making by the chief executive regarding scheme registration. The chief executive will need to review all Public Information Documents and residence contracts in a significant level of detail, resulting in increased processing and assessment times for applications for new schemes and, potentially, a greater number of obstacles and compromises required in order to achieve registration of schemes.</p> <p>The use of 'must' will also open up the potential for claims by residents that the chief executive ought to have formed a view that a scheme was contrary to the Act's regulatory framework, and therefore ought not to have been registered. For these reasons, ACQ and RVA submit that the section should be cast as a discretion.</p> <p>Furthermore, the relevant standard for assessing whether the chief executive ought to refuse to register a scheme is whether the scheme is contrary to the 'regulatory framework' under the Act. This is a very broad and imprecise test.</p>

Draft clause	Bill Retirement Villages Act section	Comments
		<p>Other than the example given, no criteria are provided as to what would be considered to be contrary to the 'regulatory framework' under the Act. ACQ and RVA submit that such a significant power in, and obligation on, the chief executive needs to be more clearly defined to avoid uncertainty, both for the chief executive (in applying it) and industry members (who have much at stake in achieving the prompt registration of retirement village schemes).</p> <p>The proposed provision also has the potential to restrict innovation by scheme operators in the way retirement village schemes are structured unless the way it is to be applied by the chief executive is made clearer. The pace of change in the retirement villages sector make it essential that innovation in retirement living options not be discouraged by broad, unclear and ambiguous powers such as the one proposed.</p> <p>Furthermore, the test is different from that which had been indicated in the Government's Summary, which stated that in order for the discretion to apply, a scheme must be so inconsistent with how the Act envisages a retirement village to operate that it cannot be considered a 'retirement village' as defined by the Act. This is a significantly narrower, and clearer, test than the test that the scheme is contrary to the regulatory framework under the Act.</p> <p>In summary, the ACQ and RVA submit that the proposed section be amended so that:</p> <ul style="list-style-type: none"> (a) it is stated to be a <i>discretion</i> of the chief executive and not an obligation; and (b) the event giving rise to the discretion is consistent with that which had been stated in the Government's Summary (ie inconsistency with the definition of a 'retirement village' in the Act), rather than the broader and less certain concept of inconsistency with 'the regulatory framework under the Act'.
Clauses 77, 81	Section 56 (Interpretation for div 5), section 70B (Relative's right to	ACQ and RVA submit that whilst the proposed amendments to sections 56 and 70B go some way to deal with the 'gaps' present in the timing of the triggering of the 'termination date', they do not go far enough.

Draft clause	Bill	Retirement Villages Act section	Comments
		reside after death or vacation), new Part 15 Div 3 (Transitional provisions for Criminal and Other Legislation Amendment Act 2011)	<p>The 'termination date' (which is defined in section 56(1)) is the trigger date for the timelines on agreeing with a departing resident on the reinstatement work required for their unit and the resale value. For most residents the 'termination date' is the day the resident's right to reside terminates (as provided in section 56(1) (a)).</p> <p>The existing definition of 'termination date' in the current Act is problematic where a relative resides in a unit under section 70B(2). The existing section 56(1) (b) provides that where a relative has a right to live in the unit for 3 months under section 70B(2) then the 'termination date' is not the date the former resident's right to reside terminates (as would usually be the case) but the date the relative advises the scheme operator (under section 70B(5)(d)) that they want to enter into a residence contract for the accommodation unit. From this date, the time periods for agreeing on reinstatement work and the resale value start to run.</p> <p>However, under the existing provisions, the circumstances where the relative has a right to stay on for 3 months but either:</p> <ul style="list-style-type: none"> (a) does not take up the right to reside for the 3 month period at all; (b) takes up the right to reside but does not have the right to enter into a residence contract under section 70B(5) because the criteria are not fulfilled (for example, the unit being a freehold unit); or (c) takes up the right to reside (in a leasehold/licence scheme) and has the right to enter into a residence contract under section 70B(5), but decides not to, <p>are simply not dealt with and are clear 'gaps' in the way the Act operates.</p> <p>The amendments that are proposed to section 56 by the Draft Bill trigger a 'termination date' in the circumstance set out in paragraph (b) above – that is, where the relative has the right to reside in the unit under section 70B(2) but does not have a right to enter into a residence contract under section 70B(5). (Specifically, the 'termination date' that then applies is the date the relative vacates the unit).</p>

Draft clause	Bill Retirement Villages Act section	Comments
		<p>However, the circumstances set out in paragraphs (a) and (c) are not addressed by the proposed amendments.</p> <p>ACQ and RVA submit that to ensure that all the existing 'gaps' are dealt with, the circumstances set out in paragraphs (a) and (c) should be addressed in the amendments.</p> <p>Also, ACQ and RVA submit that the 'termination date' prescribed for the circumstances in paragraph (b) (the date the relative vacates the unit) should be amended or capped to ensure that the 'termination date' (being the trigger date for agreeing on reinstatement and the resale value) occurs in a timely manner in the event that the relative delays in complying with his or her obligation to vacate the unit after the 3 month period.</p>
Clause 78	Section 91 (Capital Replacement Fund)	<p>The proposed amendment achieves the purpose of ensuring that the general prohibition in section 91(5)(a) on using funds in the CRF to pay for <i>repairs</i> does not apply to repairs the scheme operator is obliged to fund out of the CRF as part of its share of reinstatement costs under section 62(4). ACQ and RVA support this amendment in the form proposed.</p> <p>In addition, however, section 91(3) should be amended to allow the CRF to be used in a way that is consistent with section 62(4).</p>
Clause 79	Section 105 (General Services Charges for unsold right to reside in accommodation units)	<p>The proposed amendment achieves the purpose of making it clear that it is only the MRF contribution portion of the general services charges for unsold or vacant accommodation units that the operator must pay into the MRF.</p> <p>ACQ and RVA support the amendment in the form proposed.</p>
Clause 80	Section 106 (Increasing charges for general services)	<p>ACQ and RVA support the amendment in the form proposed.</p>
Not applicable	Section 45 (Content of residence contract), section 45A (Scheme operator to give notice of end of cooling-off period in particular	<p>The consultation draft Fair Trading Bill issued by the Government in 2010 contained additional proposed amendments to those appearing in the Draft Bill, including amendments to the provisions of the Act regarding:</p> <ol style="list-style-type: none"> 1. the calculation of exit fees; and 2. cooling-off periods.

Draft clause	Bill	Retirement Villages Act section	Comments
		circumstances), new Part 15 Div 3 (Transitional provisions for Criminal and Other Legislation Amendment Act 2011), Schedule (Dictionary)	<p>It is noted that the calculation of exit fees has been dealt with separately in the <i>Civil Proceedings Bill 2011</i> (Qld).</p> <p>However, the proposed changes to the cooling-off provisions are not currently being dealt with anywhere in the Draft Bill or in any other proposed legislation.</p> <p>The proposed amendments to the cooling-off provisions in the Fair Trading Bill were designed to reinstate the definition of 'cooling-off period' contained in the original 1999 Act, under which the cooling-off period started on the day the contract was signed (as is the case in the retirement villages legislation in other Australian jurisdictions).</p> <p>The proposed amendments in the draft Fair Trading Bill would have achieved that intended purpose and would have operated to benefit both operators and residents. A high level of consensus has for some time existed between industry and resident stakeholders that the amendments should proceed.</p> <p>Accordingly, ACQ and RVA strongly urge that the original proposed amendments to the cooling-off provisions that were contained in the consultation draft of the Fair Trading Bill be included in the Draft Bill, together with some minor tidy-up drafting at section 237 to achieve that purpose (section 237 refers to the current definition of cooling-off period but that particular section was not proposed to be amended in the Fair Trading Bill).</p>

5. CONCLUSION

With an ageing population, the growing role of retirement village accommodation is becoming increasingly recognised and it is widely accepted that the industry's importance will continue as a source of housing choice for those aged 70 plus years. With rapidly increasing expenditure by State, Territory and Commonwealth Governments on public housing, health and ageing, it is important that governments recognise the interaction between these expenditures with the retirement village industry.

Retirement villages provide valuable infrastructure to local communities. They enable Queensland Seniors to have effective social support, improved lifestyle, enhanced health and care along with security of tenure at no cost to government. Importantly, they employ both professional and semi skilled staff across the 311 registered villages.

Representatives from Aged Care Queensland and the Retirement Village Association remain available to meet with the Committee to discuss these matters further, as required.