



Submission

Elder Law Section

Accommodation bonds under the Aged Care Act 1997 (Cth)

To: The Hon. Justine Elliot MP, Minister for Ageing

A submission from the Elder Law Section of the Law Institute of Victoria (LIV)

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Queries regarding this submission should be directed to:

Contact person *Téa Paris*
Ph *(03) 9607 9489*
Email *tparis@liv.asn.au*

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1 Introduction

The Law Institute of Victoria (LIV) wishes to raise concerns relating to accommodation bonds and the operation of the *Aged Care Act 1997* (Cth) (the Act) and the Aged Care Complaints Investigation Scheme (the Scheme) of the Department of Health and Ageing (the Department).

Under the Act, approved providers (providers) may ask certain individuals to pay an accommodation bond when entering into low level residential care or an extra service place (for high or low level care). Division 57 of the Act and Part 4 of the *User Rights Principles 1997* (the Principles) set out rules that providers must follow if they want to charge an accommodation bond for the entry of a person to a residential care facility.

2 Disclosure of information

It is a common occurrence for residents or their relatives to seek legal advice after a person has moved into residential care. Residents or their families may not have the time or inclination to seek advice prior to moving into care given that their focus will be on finding and securing an appropriate residential care place, often in a very short space of time.

However, feedback from LIV members indicates that one of the major problems at the time of residents moving into care is the disparity of knowledge between residents and providers. Residents may often be completely unaware of their rights and taken by surprise when asked to pay an accommodation bond. For example, a large number of residents are unaware that the amount of the bond is negotiable when entering into accommodation bond agreements.

In the LIV's view, there is a failure on the part of some providers to disclose some or all of the information about the bond that they are required to disclose under s57-2(1)(d) of the Act and s23.28 of the Principles prior to the resident's entry to the facility. Some providers do not even mention a bond amount or come to an agreement with the resident about what the maximum bond could be. It is unlikely that the resident is obliged to pay any bond at all in these circumstances. It is important that residents (or their representatives) obtain independent legal advice before entering into any agreement to pay a bond.

The LIV proposes that the Department mandate that providers be required to disclose all relevant information about bonds to residents when discussing the terms of entry to the facility and that providers also be required to recommend to residents that they obtain independent legal advice prior to entering into or executing an agreement to pay a bond. The LIV notes that there are currently no provisions in the Act that require a provider to recommend that legal advice be obtained.

3 Accommodation bond agreements and liability to pay

An accommodation bond agreement should set out the rights and responsibilities of the resident and provider as negotiated and agreed to before entry. These agreements are not standardised, varying according to the individual provider, and tend to be lengthy and complex.

Difficulties often occur in practice when dealing with the interface between the Act and contractual principles relating to when an obligation to pay a bond of a certain amount, if at all, comes about.

The Act sets out a framework within which providers must operate. While the Act regulates the types of payments (such as accommodation bonds) and the maximum amount of each payment that a provider may ask residents to pay, the Act itself does not impose on residents any liability to pay. It is for the provider and the resident to agree on the financial terms on which a place in a facility is offered and accepted, as long as those terms come within the scope of the legislation. Liability to pay an accommodation bond only exists if there is a binding agreement between the resident and the provider in relation to paying a bond.

However, when determining complaints about bonds or related payments such as interest or monthly retention amounts charged by a provider, the Scheme appears to only consider whether the amount of the bond that the provider claims to be payable, or the related payment, is within the scope of the Act. There is no consideration of whether the relevant resident has any contractual obligation to pay the bond or payment in question. The LIV is aware of situations where the Scheme found that a provider was entitled to charge a resident a bond and/or a related payment when in fact no contractual obligation to pay existed. There was no binding agreement between the parties regarding the payment in question. The Scheme needs to be aware that when the Act provides that a provider may charge a certain payment it does not mean that in a particular case the resident has any liability to pay it.

The Department's Information Sheet No 16 *Accommodation Bonds* (Information Sheet) states that: "You cannot be asked to pay the bond unless you have entered into a bond agreement". Under s 57-9 of the Act and Part 4, Division 5 of the Principles, a document must contain certain information for it to be an "accommodation bond agreement". Under section 57-2(1)(e) of the Act, entering into an accommodation bond agreement with a resident before or within 21 days after entry, is one of the rules that a provider must follow if they wish to charge a bond for that resident's entry to the facility. Although the Act does not specifically state that a provider who breaches this rule is not permitted to charge a bond, the LIV submits that the Information Sheet clearly indicates that the Department's position is that no bond is payable if the provider fails to enter into a document meeting the requirements of an accommodation bond agreement before, or within 21 days after, the resident's entry.

The LIV is aware of cases where residents have paid a bond, interest or a monthly retention amount where not only was there no contractual obligation to pay, there was also no bond agreement entered into. Yet in these cases the Scheme has not required the providers to refund the payments to the residents. The Scheme seems to have taken the view that the providers were entitled to charge the payments simply because the types of payment were within the scope of the Act. The Scheme did not act on either the lack of any contractual obligation to pay or the lack of a bond agreement. The LIV submits that this is inconsistent with the position stated in the Information Sheet that no bond is payable unless an accommodation bond agreement has been entered into.

The LIV is also aware of cases where there has been sufficient discussion and agreement between the relevant provider and resident prior to entry for an obligation to pay a bond to arise under contract law but no written accommodation bond agreement has been entered into. The LIV submits that the Department's position that no bond is payable if a provider fails to enter into an accommodation

bond agreement before or within 21 days after the resident's entry indicates that a provider's failure to comply with section 57-2(1)(e) overrides the contractual position, meaning that if an accommodation bond agreement is not entered into before or within 21 days after entry the resident's contractual obligation to pay a bond ceases to exist.

To remove any doubt, the LIV proposes that the Act be amended to specifically provide that if an accommodation bond agreement has not been entered into before or within 21 days after entry, no bond is payable.

The LIV is also aware of cases where a provider has failed to disclose to a resident that a particular payment charged (for example, periodic payments) amounts to paying a bond. Here, the Scheme seems to have focused only on whether the type of payment is within the scope of the Act and has not considered surrounding circumstances – that the resident may have been misled about the nature of the payment, that there was no agreement to pay any bond and that no bond agreement was entered into. As long as the type of payment is within the scope of the Act, the Scheme has not required the provider to refund monies even though the resident was unaware the payment related to a bond and no bond agreement was entered into.

The Information Sheet also states that “You have up to 21 days after entering an aged care home to enter into the bond agreement”. However, it appears that some providers have taken this to mean they have up to 21 days after entry in which to mention for the first time either the amount of bond payable, or even that a bond is payable.

In the LIV's view, where a provider has failed to disclose to a prospective resident that the terms of entry include payment of a bond of a specific amount, or an amount to be calculated on an agreed formula, there is no contractual obligation on the part of the resident to pay any bond. That is, the place has been offered by the provider and accepted by the resident without any agreement regarding the payment of a bond. The Scheme should not require the resident to pay an amount sought by the provider that was previously undisclosed and is only mentioned after entry.

Contractual difficulties can also arise when providers are dealing with people moving into residential care who may lack capacity to enter into contracts on their own behalf. In these situations, it is important for providers to make sure that they are negotiating with people with appropriate authority, for example, a financial enduring power of attorney. Otherwise, accommodation bond agreements with people who lack capacity or appropriate authority will be unenforceable.

4 Payment of interest

A resident has the option to choose by which method the bond is to be paid – that is, by lump sum, periodic payments or a combination of lump sum and periodic payments. Where a resident does not have sufficient funds to pay the bond immediately, interest may be charged on the bond amount from the day of entry until it is paid, so long as the resident has agreed to this.

The maximum amount of interest a provider is permitted to charge a resident if the bond is not paid in full on the day of entry for the quarter commencing 1 October 2008 is 11.31% per annum. The LIV submits that consideration should be given to a lower interest rate to prevent undue monetary pressure on residents at a time of increased vulnerability. The LIV suggests that residents should be paying an

amount equivalent to the Australian federal central benchmark interest rate, which is currently 4.25% per annum.

5 Reducing the amount of bond

The maximum bond a provider may ask a resident to pay is an amount that when subtracted from an amount equal to the value of the resident's net assets at the time of entry leaves the resident with assets of at least a specified amount known as the resident's "minimum permissible asset value". This amount is currently \$35,500. The LIV is aware that particularly in the current economic climate problems are occurring when the realised net value of a resident's assets is less than their value or estimated value at the time of entry. If the provider refuses to reduce the bond, the resident may be left with less than \$35,500 in assets and/or with some of the bond still owing. There is currently no requirement in the Act for a provider to reduce the amount of the bond after a resident's assets have been realised to enable the resident to be left with \$35,500 in assets. Some providers have indicated they will charge interest at the current maximum rate of 11.31 % pa on any bond shortfall for the duration of the resident's stay in the facility.

A further problem is that some prospective residents are finding it harder to get into care where providers require them to agree to pay the maximum bond the provider may ask for based on the current value of their assets, but the prospective residents anticipate that the realised net value of their assets will be less than their current value. Naturally, prospective residents are reluctant to agree to pay a bond amount that they anticipate they will not be able to pay.

The LIV is aware that a person may apply to the Secretary of the Department for a determination that payment of a bond, or payment of a bond of more than a specified maximum amount, would cause the person financial hardship. However, there is no certainty that the Secretary would make such a determination in any particular case. Where a person has already agreed to pay a bond based on the value of their assets at the time of entry, or needs to enter care before the Secretary has considered their application and is under pressure to agree to pay a bond based on the current value of their assets, the person is left in the unsatisfactory position of not knowing whether they will be left with \$35,500 in assets or whether they may have to pay interest indefinitely on a bond shortfall.

The LIV submits that the Act be amended so that after a resident's assets have been realised, the provider is required to reduce the bond to an amount that would leave the resident with at least the relevant "minimum permissible asset value".

6 Proposals

The LIV submits the following proposals for the Department's consideration:

1. That extensive education be provided to the community regarding aged care services and residents' rights and responsibilities when considering moving into residential care with particular emphasis on financial arrangements including accommodation bonds.
2. That the Act be amended to require providers to recommend to prospective residents (or their representatives) that they obtain independent legal advice prior to agreeing to pay a bond.

3. That the Act ensures adequate protections for residents in circumstances where, even if aware of their rights, residents are unwilling to exercise them, for example, the right to negotiate bond amounts. This could be due to fear of being turned away from aged care accommodation in a situation where Australia's population is rapidly ageing and there is an undersupply of such accommodation.
4. That providers be required under legislation to disclose all relevant information regarding accommodation bonds, including the maximum amount of bond a resident may be asked to pay and a resident's right to negotiate their bond, to empower residents to make informed choices.
5. That the Act clarifies contractual issues in relation to accommodation bonds. In particular:
 - (i) Where no enforceable agreement (whether written or oral) is entered into regarding payment of a bond prior to the resident's entry into residential care, there is no liability for the resident to pay any bond. This point should be made clear in the Act and followed by the Scheme; and
 - (ii) That the Act be amended to provide that if an "accommodation bond agreement" is not entered into before or within 21 days after entry, there is no liability for the resident to pay any bond, that is, that no bond is payable where the provider has failed to comply with section 57-2(1)(e). In situations where a common law contract existed, it is arguable that the common law contract has been varied due to the provider's failure to fulfil its statutory obligations and, therefore, there is no valid contract. In that event, there would be no requirement for the resident to pay any bond.
6. That the Act clarifies the consequences for providers who fail to comply with other accommodation bond obligations under the Act. Currently, the Department does not necessarily act upon failures by providers to comply with these obligations or compel providers to pay refunds to residents. On this basis, the LIV proposes an amendment to the Act that states that if the provider does not comply with the bond rules, it is not permitted to charge a bond.
7. That the Act be amended to enable the Scheme to deal with minor non-compliance issues by providers – for example, situations where there are no serious consequences and which did not result from bad faith.
8. That the Scheme determines financial disputes not only by reference to whether the type and amount of the payment in question comes within the scope of the Act, but also considers all facts relevant to the complaint such as whether there was any contractual obligation to make the payment in question or any misrepresentation.
9. That interest rates a provider is permitted to charge a resident if the bond is not paid in full on the day of entry be lowered to the equivalent of the commercial rate.
10. That the Act be amended so that where the net value of a resident's assets when realised is less than their value or estimated value at the time of entry, the provider is required to reduce the bond to an amount that would leave the resident with at least the relevant minimum permissible asset value.