Retirement Villages (Exempt Schemes) Amendment Regulation 2022

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Leeanne Enoch MP, Minister for Communities and Housing, Minister for Digital Economy and Minister for the Arts, provide this human rights certificate with respect to the *Retirement Villages (Exempt Schemes) Amendment Regulation 2022* made under the *Retirement Villages Act 1999*.

In my opinion, the *Retirement Villages (Exempt Schemes) Amendment Regulation 2022*, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Section 63 of the *Retirement Villages Act 1999* (the Act) requires a scheme operator to pay a resident's exit entitlement 18 months after the resident terminates their right to reside in the retirement village. Similarly, section 63A – 63I of the Act requires a scheme operator to enter into and complete a contract to purchase a former resident's freehold retirement village unit 18 months after that resident terminates their right to reside in the village. These are commonly referred to as mandatory buyback requirements.

On 20 October 2021, the *Housing Legislation Amendment Act 2021* amended the Act to introduce Part 3 Division 5B, which provides a framework to exempt resident-operated retirement villages from mandatory buyback requirements in the Act.

Section 70D of the Act provides that the Minister may recommend to the Governor in Council the making of a regulation which declares an exemption applies to a retirement village where the Minister is satisfied that:

- each residence contract under the scheme is based on a freehold interest in an accommodation unit that is the resident's freehold property; and
- the exemption would be appropriate because of the extent to which—
    - the residents are in a position to control or influence the affairs of the scheme operator in relation to the operation of the scheme; and
    - for any of the accommodation units, the scheme operator's assets and ability to generate income are likely to be insufficient to purchase the resident's freehold property.

The Act also provides that the Minister may have regard to any relevant matter when deciding whether an exemption for a scheme would be appropriate, including—

- whether, for a scheme in which the retirement village land is land included in a community titles scheme, the common area of the retirement village is common property under the community titles scheme, or a lot owned by the body corporate under the community titles scheme
- the extent to which, other than as required by the Act, the scheme operator has any control over, or involvement in, the sale of a former resident's accommodation unit
- the extent to which, other than as required by the Act, a former resident is required to refurbish, reinstate or renovate the former resident's accommodation unit before it may be sold
- the extent to which the scheme operator makes any profit from fees or charges payable by residents
- whether any amount is payable to the scheme operator on the sale of an accommodation unit.

Peninsula Park Retirement Estate and Peninsula Gardens Retirement Village are two resident-operated retirement villages operating in Queensland. In October 2021, representatives of the scheme operators for Peninsula Park Retirement Estate and Peninsula Gardens Retirement Village each sought an exemption from mandatory buyback requirements.

Peninsula Park Retirement Estate and Peninsula Gardens Retirement Village are both retirement villages where residents own and are in control of the retirement village scheme. Both retirement villages are registered and operate as a community titles scheme under the *Body Corporate and Community Management Act 1997*. Neither retirement village derives significant profit from the operation of the scheme and does not have sufficient operational income to fund mandatory buybacks. These retirement village also do not directly involve themselves in the sale or marketing of accommodation units, and do not charge exit fees greater than is necessary to cover administrative expenses.

Following applications by, and assessments of, Peninsula Park Retirement Estate and Peninsula Gardens Retirement Village, and taking into account the considerations established under the legislation, I have recommended to the Governor in Council that a regulation declares the following retirement villages exempt under section 70D of the Act:

- Peninsula Park Retirement Estate
- Peninsula Gardens Retirement Village

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

The following human rights are relevant to the Regulation:

- Property Rights (section 24)

Property rights may be considered to be limited by the regulation. These limitations are discussed below.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

a) <u>The nature of the right</u>

Property Rights (Section 24 of the Human Rights Act 2017)

The right to property protects the right of all persons to own property (alone or with others) and provides that people have a right not to be arbitrarily deprived of their property. Deprivation in this sense has been held to include the substantial restriction on a person's use or enjoyment of their property. Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights, money and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

A former resident's property rights may be limited by declaring that an exemption applies to a retirement village under section 70D of the Act. Where a retirement village is declared exempt, section 70E of the Act provides that sections 63(1)(c) and 63A of the Act do not apply to the scheme operator of an exempt scheme. Consequently, the scheme operator of an exempt scheme is:

- no longer obliged to pay the exit entitlement of the former resident to the person entitled to receive it on or before the day that is 18 months after the termination date or any later day fixed by the tribunal by an order under section 171A of the Act and
- is no longer required to enter into and complete a contract to purchase the former resident's freehold property under section 63A of the Act.

The removal of these requirements may have the effect of limiting the former resident's property rights in respect of the disposal of the former resident's freehold property.

(b) <u>The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

The purpose of declaring retirement villages exempt from mandatory buyback requirements in the Act is to reduce the financial and administrative burden on resident-operated retirement villages where residents of the village own and control the operation of the retirement village scheme.

These retirement villages do not have the income to fund mandatory buybacks or the resources and expertise to make applications to the Queensland Civil and Administrative Tribunal to seek an extension of time for mandatory buybacks on the grounds of financial hardship.

The framework to exempt resident-operated retirement villages implements the recommendations of a review of mandatory buyback requirements by a four-member independent panel with expertise in law, gerontology, business and finance. This panel found that despite protections in the Act, seniors in resident-operated retirement villages were experiencing distress, insecurity and emotional impacts as a result of the buyback requirements.

(c) The relationship between the limitation and its purpose, including whether the limitation helps achieve the purpose

Residents in a resident-operated retirement village are uniquely impacted by mandatory buyback requirements in the sense that they benefit from the certainty provided by the protections of a mandatory buyback in their capacity as a resident (or former resident) but are also subject to the stress and uncertainty of the possibility of a significant liability in needing to fund the mandatory buyback of an unsold unit in their joint capacity as scheme operator of the retirement village.

Providing an exemption to resident-operated retirement villages will not arbitrarily deprive a former resident of their property. Rather it seeks to adjust the respective rights and obligations of the scheme operator and the former resident of a resident-operated village in respect of the disposal of the former resident's freehold property. This is done on an opt-in basis at the request of the scheme operator of the resident-operated retirement village and its residents.

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available ways of achieving the purpose have been identified. Limiting the former resident's right to receive an exit entitlement from the scheme operator or to have the resident's freehold property purchased by the scheme operator is necessary to eliminate the perceived negative consequences of the mandatory buyback requirements on resident-operated retirement villages.

(e) The balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Mandatory buyback requirements exist to provide a predictable maximum waiting time for a resident to receive their exit payment after leaving their unit (unless the village operator can show that making the payment would cause the scheme operator undue financial hardship).

This is an important consumer protection for residents. However, resident-operated retirement villages are uniquely impacted by mandatory buyback requirements because residents in these villages own and control the operation of the scheme for their own benefit, do not derive significant profit from the operation of the scheme, and do not have the expertise or resources of a typical scheme operator to fund buybacks or seek extensions of time for payment from the Queensland Civil and Administrative Tribunal.

On balance, declaring an exemption from mandatory buyback requirements at the request of the named retirement villages strikes a fair and appropriate balance between the limitation on the right to property and ensuring residents in their capacity as the scheme operator of their retirement village are protected from the financial and administrative burden of mandatory buybacks.

Conclusion

I consider that the *Retirement Villages (Exempt Schemes) Amendment Regulation 2022* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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