

22 December 2020

The Honourable Tony Pagone QC
Chair
Royal Commission into Aged Care Quality and Safety
GPO Box 1151
ADELAIDE SA 5001

By email: ACRCfinalsubmissions@royalcommission.gov.au

Dear Chair

Counsel Assisting's final submissions – recommendation 102

The Law Council of Australia (**Law Council**) writes in relation to recommendation 102 – liquidity requirements – of the Counsel Assisting's final submissions. This response is supplementary to the Law Council's letter dated 12 November 2020 and reflects views received since then.

The Law Council's specialist National Elder Law and Succession Law Committee (**NELSC**) welcomes the recommendation that the proposed Australian Aged Care Commission should be empowered under statute to impose liquidity requirements on approved providers of residential aged care which hold refundable accommodation deposits (**RADs**). It considers a clear and enforceable liquidity requirement to be a way to ensure that residential care providers are able to repay RADs promptly as and when required.

The Law Council is concerned by occurrences of protracted delays with the refund of RADs by providers.¹ Currently, paragraph 52P-1(4)(a) of the *Aged Care Act 1997* (Cth) (**the Act**) requires that a RAD be refunded by a provider within 14 days after the day on which the provider is shown the probate of the will of the care recipient or letters of administration of the estate of the care recipient. In situations where a resident moves from one service to another, paragraph 52P-1(4)(b) of the Act provides that the RAD must be refunded as follows:

- if more than 14 days' notice of leaving is given – the day on which the provider ceased providing that care;
- if the care recipient notified the provider within 14 days before the day on which the provider ceased providing that care – within 14 days after the day of notice; and
- if no notice of leaving is given – within 14 days after the day on which the provider ceased providing that care.

¹ See eg, Rachel Lane, 'What you probably don't know about RAD refunds' (11 August 2019) <<https://www.smh.com.au/money/planning-and-budgeting/what-you-probably-don-t-know-about-rad-refunds-20190809-p52fgj.html>>.

Part 7 of the Fees and Payments Principles 2014 (No.2) (**the Principles**) also deals with refunds. Clause 69(2) of the Principles requires providers to pay penalty interest where the RAD is not paid within the above refund periods.

Despite this, members of the NELSC are aware of instances where families have waited up to two years for repayment. For the care recipient, this may involve recovery of the debt through costly court proceedings or waiting for a government guarantee to be activated.²

Accordingly, the Law Council recommends that it becomes a condition of an approved provider's licence that RADs be repaid to the person who is legally entitled to receive it within 60 days of the legal obligation arising, unless there is a reasonable excuse. It considers that the imposition of additional consequences on the provider for non-compliance (ie, the potential loss of licence and not just civil enforcement of a debt) will create a stronger incentive to repay RADs within, at least, 60 days. The Law Council hopes that the Royal Commission is in a position to take the above into account as it progresses its final report.

Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at leonie.campbell@lawcouncil.asn.au, or Ms Sarah Swan, Research Officer, on (02) 6246 3703 or at sarah.swan@lawcouncil.asn.au in the first instance, if you require further information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President

² See the Accommodation Bond Guarantee Scheme (Guarantee Scheme) under the *Aged Care (Accommodation Payment Security) Act 2006* (Cth).