



31 July 2017

By email: lucy.vaughan@justice.vic.gov.au

Consumer Affairs Victoria
Department of Justice & Regulation
Level 17, 121 Exhibition Street
Melbourne VIC 3000

Dear Ms Vaughan,

Review of internal dispute resolution processes under the Retirement Villages Act 1986

Thank you for the opportunity to comment on the Options Paper relating to the review of internal dispute resolution processes under the *Retirement Villages Act 1986* (**the Act**).

General comments

We welcome Consumer Affairs Victoria's (**CAV**) interest in improving internal dispute resolution processes in retirement villages, and believe that the reforms suggested will likely result in some improvement. However, we maintain that a root-and-branch review of retirement village regulation is needed. Without significant reform of retirement village regulation, as recommended by the Parliamentary Inquiry into the retirement housing sector,¹ the minor changes recommended in the Options Paper to internal dispute resolution procedures are unlikely to have any major overall benefit to residents.

At a minimum, we believe the following reforms are needed:

- the establishment of an ombudsman to resolve disputes between retirement housing operators and residents;
- stronger regulation of fees and charges, particularly exit fees;

¹ Legal and Social Issues Committee, *Inquiry into the Retirement Housing Sector: Final Report*, March 2017, available at: <http://www.parliament.vic.gov.au/lpic/inquiry/432>.

Consumer Action Law Centre

Level 6, 179 Queen Street
Melbourne Victoria 3000

Telephone: 03 9670 5088
Facsimile: 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

- greater clarity and consistency in governing legislation and contracts; and
- robust training and accreditation standards.

We note that consistency in governing legislation refers not only to consistency across retirement housing types, but also with other state regimes.

The importance of safe and affordable housing to older people cannot be overstated. There is also a dramatic power imbalance between residents and operators that needs to be addressed by significant legislative reform and enforcement action.

The ‘happy resident’ myth

The underlying assumption of the Options Paper and the Discussion Paper released prior to the roundtable in April² appears to be that the vast majority of residents are satisfied, and that disputes are reasonably rare. This language has been used by industry for many years to ward off regulation, and is based on so-called ‘independent’ surveys.

The main survey relied upon by industry is the McCrindle Baynes Village Census survey. This survey is not ‘independent’ as claimed, but is funded by a retirement industry publication. Further, McCrindle Research left research body Australian Market & Social Research Society (**AMSRS**) after the ABC’s Media Watch raised questions about the company’s methodology. AMSRS launched an investigation into McCrindle Research over several studies, which Media Watch alleged had much smaller response rates than claimed.³ The move meant that McCrindle employees can no longer claim to be a Qualified Practitioner of Market Research, which is the market research industry’s ‘most rigorous accreditation system.’⁴ Regardless of questions of reliability of these industry surveys, indicators of ‘satisfaction’ are in any case not useful indicators of whether there are sufficient protections for residents.

Contrary to industry claims, recent evidence would suggest that there is widespread dissatisfaction amongst residents and their families. The contributors to this submission receive dozens, if not hundreds, of complaints from retirement housing residents and their families every year. The Parliamentary Inquiry received 766 submissions and heard from 90 witnesses, who were mainly residents. We have been informed that a recent GetUp petition demanding better regulation of retirement villages received over 25,000 signatures. Fairfax also reported that one Aveo whistleblower described industry surveys as ‘highly questionable’, saying only a fraction of

² Consumer Affairs Victoria, *Review of internal dispute resolution processes under the Retirement Villages Act 1986 – Discussion Paper*, March 2017.

³ Media Watch, *Episode 26: Researching the Researcher*, 17 October 2011, available at: <http://www.abc.net.au/mediawatch/transcripts/s3341830.htm>; Cathie McGinn, *McCrindle leaves research body after Media Watch expose*, 13 June 2012, available at: <https://mumbrella.com.au/mccrindle-leaves-research-body-after-media-watch-expose-96316>.

⁴ *Ibid.*

residents fill them in. This was a 'theme echoed by residents across the country who believe the surveys are flawed.'⁵

The huge number of complaints being received is despite the well-established barriers to making complaints for older people, indicating there are major systemic problems in this industry. We have outlined the importance of housing to older people and the many barriers to making complaints in our previous submissions.⁶

The Discussion Paper itself seemed to suggest there were major problems in retirement villages. The compliance audit referred to suggested that 94% of villages sampled had at least one compliance breach, appearing to directly contradict the suggestion there are minimal complaints and problems in this industry.⁷ Furthermore, while the Discussion Paper said most residents are 'happy', elsewhere it notes that managers say *'managing residents' expectations where... they may express disapproval or displeasure with management decisions or another resident's behaviour, can form a daily part of their role.*⁸

We therefore challenge the assumption that most residents are 'happy' or 'satisfied', and that complaints or disputes are rare. A more systemic and 'truth telling' approach is needed to ensure that robust dispute resolution procedures are in place to meet the needs of both residents and operators, particularly given the new generation of Baby Boomer residents that have begun entering villages.

The role of internal dispute resolution

Regardless of their size or business, retirement housing operators need to be able to handle complaints or disputes internally in an efficient, timely and effective manner. Effective internal dispute resolution processes also provide an opportunity to hear resident concerns and expressions of dissatisfaction and address them genuinely and efficiently. Complaints should not be seen as a 'burden' but as an opportunity to improve. We believe that internal dispute resolution is an opportunity to improve business systems and services. Good internal dispute resolution procedures are therefore beneficial to both residents and operators.

In our view, retirement villages should be complying with *AS/NZS10002:2014 Guidelines for complaint management in organizations (the AS)*. The industry should not be cherry-picking, but complying with the standards in their entirety. These standards are used in other consumer markets, including financial services and credit.⁹ The AS has been drafted broadly so that it can

⁵Adele Ferguson, *Aveo retirement village investigation has put sector under a spotlight*, 1 July 2017, available at: <http://www.smh.com.au/business/comment-and-analysis/aveo-retirement-village-investigation-has-put-the-sector-under-a-spotlight-20170630-gx2490.html>.

⁶ For example, see Consumer Action Law Centre et. al., *Submission: Proposed re-make of Retirement Villages Regulations*, 31 March 2015.

⁷ Consumer Affairs Victoria, *Review of internal dispute resolution processes under the Retirement Villages Act 1986 – Discussion Paper*, March 2017, p. 4.

⁸ Ibid, p. 5.

⁹ Australian Securities and Investments Commission, *Regulatory Guide 165 - Licensing: External and internal dispute resolution*, July 2015, available at: <http://download.asic.gov.au/media/3285121/rq165-published-2-july-2015.pdf>.

apply to any industry in which consumers participate and be implemented by a business of any size. The NSW Ombudsman has also developed a Model Complaints Policy for businesses,¹⁰ which we believe should be considered as part of best practice in the industry.

Internal dispute resolution in markets where there is a serious imbalance of power between the parties, such as in retirement housing, is inextricably linked to external dispute resolution and access to justice issues. We acknowledge that external dispute resolution is outside the scope of this review, but it must be understood that appropriate access to justice (especially ombudsman schemes) is crucial to improving internal dispute resolution standards, as binding external dispute resolution services provide an incentive to resolve disputes internally. At the moment, most residents have nowhere to go if their complaint isn't resolved as taking a complaint to the Victorian Civil and Administrative Tribunal (**VCAT**) is too expensive, complex and time consuming. This means retirement housing operators have limited motivation to resolve disputes internally.

Option 1A: Introduce a definition of 'complaint' into the Act and clarify requirements around recording complaints

We agree that the definition of a 'complaint' in the AS should apply to retirement village internal dispute resolution procedures. We believe that there is no need to distinguish between an 'informal' and a 'formal' dispute. If a complaint, as defined by the AS, is not resolved to the resident's satisfaction within 72 hours then the internal dispute resolution processes should apply. This would not be a major departure from the current requirement for a manager to create a written record of a complaint within 72 hours.

Using the AS definition would improve clarity around what constitutes a complaint and when internal dispute resolution procedures should be triggered. It would also encourage retirement village management to deal with complaints to the resident's satisfaction promptly and effectively. We believe the cost of implementation of compliance with the AS would be outweighed by the benefits to residents and operators.

We support clarifying the requirements for recording complaints, which should be in accordance with the AS. The basic requirements of recording and collecting information about a complaint should apply to all complaints that meet the AS definition and are not resolved within 72 hours. As acknowledged by the Australian and Securities Investments Commission's (**ASIC**) regulatory guide regarding internal dispute resolution (RG165), it is appropriate to take into account the size of the business, range of services offered, the nature of the customer base and the likely number and complexity of complaints or disputes when looking at compliance with the AS.

However, as noted above, we believe that retirement housing operators should be complying with the AS in its entirety. This could be enshrined in legislation, or as part of a mandatory Government-approved retirement housing accreditation scheme. A weakness of the current internal dispute resolution requirements under the Act is that management is able to set out its own procedure for

¹⁰ NSW Ombudsman, *Complaint Management Framework*, June 2015, available at: https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0004/25375/Complaint-management-framework-June-2015.pdf.

addressing complaints. Depending on the content of that procedure, a manager may not even be required to respond to a complaint or to deal with the complainant on an ongoing basis. The relevant regulations merely set out record keeping requirements if the manager does in fact choose to correspond with the complainant. We have received reports from residents that some managers do not respond adequately to complaints, or fail to respond at all.

We note that internal dispute resolution requirements must be subject to proactive surveillance and enforcement action by CAV to ensure their effectiveness. Given the limited awareness of the current arrangements, and that residents are currently not entitled to access complaint records upon request, it seems there is little possibility of complaints being lodged in relation to non-compliance with these regulations.

Option 1B: Clarify what constitutes a ‘complaint’ through guidelines and/or protocols, but clarify in the legislation obligations around recording complaints

We prefer Option 1A, for the reasons outlined above.

Option 2: Review and improve the protocols and raise their profile amongst owners and residents

The Protocols¹¹ are not mandatory, and are therefore not able to be enforced by CAV or residents. It appears that there is little understanding or knowledge of the Protocols, perhaps for this reason. The Protocols are not legally binding and have arguably not been followed to date, so we are doubtful the Protocols would be applied broadly by the industry in future. We therefore recommend that instead of remaking non-binding protocols that CAV create mandatory internal dispute resolution standards that comply with the AS, as ASIC has done for credit and financial services licensees (RG165). Credit and financial services providers are required under the *Corporations Act 2001* (Cth) and *National Consumer Credit Protection Act 2009* (Cth) to have internal dispute resolution procedures that comply with the standards and requirements made or approved by ASIC. Under the relevant regulations, ASIC must take into account the AS and any other matter ASIC considers relevant when considering whether to make or approve standards or requirements relating to internal dispute resolution. CAV could take a similar approach.

In relation to the Protocols themselves, we note that this is just one source of information on internal dispute resolution. There are three additional sources: The Act, the *Retirement Villages (Records and Notices) Regulations 2005*, and the Internal Dispute Resolution Guidelines for Retirement Village Owners and Managers (**the Guidelines**). We believe this is confusing and inefficient for residents and operators. It is also not clear who is the intended audience for the Protocols. The Options Papers suggests the intended audience is retirement village operators, making the purpose and effect of the Guidelines unclear. We note that the tone and use of technical language in the Protocols currently make them inaccessible for many residents.

¹¹ Consumer Affairs Victoria, *Retirement villages: Good practice to address key issues*, 2012, available at: <https://www.consumer.vic.gov.au/licensing-and-registration/retirement-village-operators/good-practice-protocols/overview>.

The language of the Protocols seems to suggest that residents and their families are ‘confused’ or ‘don’t understand’¹² and implies that providing more information or explanation is the solution. However, retirement village operators cannot simply ‘explain away’ unfairness and complaints. Rather, the Protocols (if re-made) should articulate and address the power imbalance between the parties, and focus on ensuring residents are treated fairly and consistently by relevant internal dispute resolution procedures.¹³

There is also no mention of the Australian Consumer Law (**ACL**) in the Protocols. While we query whether the Protocols are the appropriate document to explain the relevant law, if it is to do so then the Protocols should include reference to the ACL. For example, in ‘*changes to services*’, the applicable law includes the ACL consumer guarantees. In ‘*maintenance charges and processes*’, the ACL would apply to buildings that are not fit for purpose or are damaged.

We support industry initiatives that purport to raise standards and improve outcomes for residents, but not as an alternative to a regulatory response. These can (and should) co-exist. The current Lifemark accreditation scheme needs significant improvement before it can be considered as a mature and effective industry standard. In relation to internal dispute resolution, Standard 6.1 is very basic and simply requires operators to have an internal dispute resolution system that meets legal requirements, and to record complaints.¹⁴ A voluntary adoption of the AS definition and requirements would be an improvement.

Option 3: Clarify in legislation avenues for directing complaints about village managers

We agree that clarifying in legislation avenues for directing complaints about village managers would be useful. However, as noted above, we would prefer this was part of an overall mandatory internal dispute resolution framework that complies with the AS. If retirement village operators were required to comply with AS, this would include Guiding Principle 4.5 which relates to objectivity that says that ‘each complaint should be addressed in an equitable, objective and unbiased manner’.

We also note that ASIC RG165, which says that wherever possible, a complaint should be investigated by staff not involved in the subject matter of the complaint or dispute. It recognises that this will not always be possible for ‘small-micro sized businesses’, but this should only be a minority of villages.

¹² For example, pages 10, 14 and 20 of the Protocols: Consumer Affairs Victoria, *Retirement villages: Good practice to address key issues*, 2012, available at: <https://www.consumer.vic.gov.au/licensing-and-registration/retirement-village-operators/good-practice-protocols/overview>.

¹³ Compare with ASIC’s RG165.43.

¹⁴ Property Council of Australia, *Retirement Village Scheme Standards*, July 2015, available at: <http://www.retirementliving.org.au/wp-content/uploads/2013/12/Lifemark-Standards.pdf>.

Option 4: Require approval for 'above CPI' increases to maintenance charges to be obtained through the annual meeting of residents, and facilitate voting by alternative means that attending that meeting in person.

We support this proposal, which we believe would reduce conflict within villages, both between residents and with management. This seems to be a common sense reform that would simplify the rights and obligations of residents.¹⁵ We note that there is a move by the retirement village industry to shift from strata title to loan-lease arrangements, so this issue will need to be considered in the context of this transition phase and for those villages that are still strata titled.

Option 5: Remove the role of residents' committees in resident dispute mediation, and promote alternative avenues available for resident-to-resident dispute resolution, such as the Dispute Settlement Centre of Victoria.

We believe that residents should be able to choose the dispute resolution process they believe would be most appropriate for their needs. If residents are unable to agree on who should resolve their dispute, then we suggest that an independent third party such as the Dispute Settlement Centre of Victoria should be used. Please refer to Residents of Retirement Villages Victoria's separate submission for further comments on this proposal.

Please contact Katherine Temple on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

Yours sincerely



Gerard Brody
Chief Executive Officer
CONSUMER ACTION LAW CENTRE

On behalf of:

Ronda Held
Chief Executive Officer
COTA VICTORIA

Shanny Gordon
Senior Retirement Housing Worker
HOUSING FOR THE AGED ACTION GROUP

¹⁵ This concept is similar to the Fair Go Rates reforms introduced in relation to council rates. Under the Fair Go Rates System, State Government puts a cap each year on the amount councils may increase rates in accordance with the Consumer Price Index. The cap for 2017-18 is 2 per cent. The Essential Services Commission may approve council applications for a higher cap if councils can demonstrate a clear need. See Department for Environment, Land, Water and Planning, *A Fair Go Rates System*, accessed 31 July 2017, available at: <https://www.localgovernment.vic.gov.au/our-programs/a-fair-go-rates-system-for-victorians>.