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By email: [rvreview@justice.vic.gov.au](mailto:rvreview@justice.vic.gov.au)

Retirement Villages Act Review  
Consumer Affairs Victoria  
GPO Box 123  
MELBOURNE VIC 3001

Dear Madam/Sir

## Retirement Villages Amendment Bill 2022 Exposure Draft

Thank you for the opportunity for providing the opportunity to comment on the Retirement Villages Amendment Bill 2022 Exposure Draft (the **Exposure Draft Bill**).

We consider that the Exposure Draft Bill to represent a positive step forward in consumer protection for residents of retirement villages. As you know, Consumer Action Law Centre (**Consumer Action**) has long worked with other retirement housing advocates on this issue, and our advocacy has focused on four key asks:<sup>1</sup>

1. Establish a retirement housing ombudsman
2. Put a stop to excessive fees
3. Introduce mandatory minimum training and accreditation standards
4. Reduce the complexity of contracts.

While this submission responds to the consultation guide outline of the Bill, we will refer to how the Bill meets our campaign asks in this response. In summary, we consider:

- the approach to Guiding Principles can be improved to make them more useful consumer rights;
- in place of the proposed Chief Dispute Resolution Officer, there should be established an independent Housing Ombudsman, which would include resolution of retirement village disputes;
- there is a need to improve the jurisdiction, processes and accountability of the external dispute resolution mechanism;
- there is no need to allow for an exclusion mechanism from the requirement to publicly listed on the retirement villages register;
- there should be public consultation on the proposed standard-form contract terms and conditions; and
- the legislation should require disclosure information to be consumer-tested for its effectiveness for the target audience;

A summary of recommendations is available at **Appendix A**.

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<sup>1</sup> See: [https://www.older tenants.org.au/sites/default/files/victoria\\_votes\\_election\\_asks\\_compressed.pdf](https://www.older tenants.org.au/sites/default/files/victoria_votes_election_asks_compressed.pdf)

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### About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

## Guiding principles

Consumer Action generally welcomes the guiding principles proposed by clause 5 of the Exposure Draft Bill (new section 1A of the *Retirement Villages Act 1986*, the **Principal Act**).

In relation to the substance of the principles, we offer the following comments

- Proposed sub-section 1A(2)(a) could be amended to state: “a resident’s preference to remain in *or leave* a retirement village should be respected.” One of the key problems facing residents relates to departure, and issues arising include: not understanding the cost of departure including exit entitlements; barriers placed on departure such as onerous refurbishment obligations; and limited control over the sale of a village unit. A principal which respects the resident’s preference to leave a village is as crucial as one respecting their right to remain.
- Proposed sub-section 1A(2)(c): this provision may be enhanced by more clearly recognising residents’ agency and capacity to make decisions about their personal life, financial affairs, and property, rather than decisions merely being made ‘consistently with the[ir] will’. The provision is written as if someone else is making the decisions, rather than the resident or the person they appoint to act on their behalf.

The Consultation Guide states that these principles will apply “in administering the RV Act and when providing accommodation and services in a retirement village”. We think that the Exposure Draft Bill could be clearer about the import of these principles. Beyond the requirement that “proprietors, operators and residents of retirement villages ... give effect to the principles”, the only provision of the Amendment Act that references the principles relates to termination (proposed clause 16A). It remains unclear if these principles amount to enforceable rights that a resident could use in any claim against a retirement village operator or proprietor.

If the principles are not intended to operate as rights, the Exposure Draft Bill could at least be clear to say that they are relevant in the determination of complaints, whether through internal dispute resolution, external dispute resolution (the proposed Complaints Dispute Resolution Officer) or through the Victorian Civil & Administrative Tribunal (VCAT).

**RECOMMENDATION 1.** Amend the principles in proposed section 1A as set out by our submission.

**RECOMMENDATION 2.** Clarify whether the principles in proposed section 1A amount to enforceable rights.

**RECOMMENDATION 3.** Amend the Exposure Draft Bill so that it is clear that the principles in proposed section 1A are considered in relation to complaints.

## Stronger dispute resolution pathways

### Model for external, alternate dispute resolution

While we welcome the underlying intent of clause 56 of the Exposure Draft Bill, which seeks to enact a new Part 6D in the Principal Act on disputes, we are concerned by the model adopted in Division 1, being the Chief Dispute Resolution Officer (**CDRO**).

Consumer advocates have long supported an industry ombudsman for the resolution of consumer complaints. The reason that we support an ombudsman model is as follows:

- industry ombudsman schemes are typically a condition of holding a relevant licence or registration, so all businesses in an industry must participate in the scheme;
- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;

- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;
- the ombudsman scheme process provides flexible solutions to disputes but also has 'teeth' because the ombudsmen can make findings binding upon the trader;
- ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source;
- ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers' interests; and
- ombudsman schemes are subject to regular independent review to ensure it is meeting its objectives and requirements.

These roles have been confirmed in the *Benchmarks for Industry-Based Customer Dispute Resolution*<sup>2</sup> which provide that industry ombudsman schemes must deliver the following principles

PRINCIPLE	DESCRIPTION	PURPOSE
<b>ACCESSIBILITY</b>	The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers	To promote access to the office on an equitable basis.
<b>INDEPENDENCE</b>	The decision-making process and administration of the office are independent from participating organisations	To ensure that the processes and decisions of the office are objective and unbiased, and are seen to be objective and unbiased
<b>FAIRNESS</b>	The procedures and decision making of the office are fair and seen to be fair	To ensure that the office performs its functions in a manner that is fair and seen to be fair
<b>ACCOUNTABILITY</b>	The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators	To ensure public confidence in the office and allow assessment and improvement of its performance and that of participating organisations
<b>EFFICIENCY</b>	The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum, and regularly reviewing its performance	To give the community and participating organisations confidence in the office and to ensure the office provides value for its funding
<b>EFFECTIVENESS</b>	The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance	To promote community confidence in the office and ensure that the office fulfils its role

<sup>2</sup> See: <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>

We welcome some aspects of the proposed CDRO model, including its ability to conduct conciliation, to obtain necessary information and documents, to facilitate settlement agreements (including power to address non-compliance with settlement agreements), and to make binding orders. We also welcome proposed section 38ZT which enables a binding order to be enforced in the Magistrates' Court.

However, we hold little confidence in this model's conduct of dispute resolution in a way that meets the above benchmarks, without clearer requirements in the regard. We note, by comparison, section 1015A of the *Corporations Act* which, for the purposes of the Australian Financial Complaints Authority, requires consideration of the benchmarks listed above. In the Explanatory Memorandum<sup>3</sup> for this legislation, it states:

*When considering whether the EDR scheme is 'accessible', the Minister may consider matters such as:*

- *whether the scheme will make it easy for consumers and small businesses to lodge a complaint;*
- *whether the scheme will be actively promoted to ensure that consumers and small businesses are aware of the scheme's existence;*

...

*When considering whether the EDR scheme is 'independent', the Minister may consider matters such as:*

- *whether the decision-making will be independent; and*
- *whether there will be sufficient funding for the scheme.*

*When considering whether the EDR scheme is 'fair', the Minister may consider matters such as whether the complaints handling procedures of the scheme will accord with the principles of natural justice and industry best practice.*

*When considering whether the EDR scheme is 'accountable', the Minister may consider matters such as:*

- *whether the scheme will be committed to dealing with and reporting systemic issues to the relevant regulators;*
- *whether the scheme will provide for an independent assessor, and*
- *whether the scheme will provide for regular consultation with stakeholders and be subject to regular independent reviews.*

*When considering whether the scheme is 'efficient' and 'effective', the Minister may consider matters such as:*

- *the adequacy of the coverage of the scheme, including dispute limits and compensation caps;*
- *the time limits for bringing complaints under the scheme; and*

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<sup>3</sup> See paragraphs 1.52 – 1.58.

- *the processes that the scheme will have in place to ensure compliance with its determinations and the remedies that can be provided under the scheme.*

We understand the perceived barriers to establishing an independent office of a retirement village ombudsman include the cost of such an office and perceived low levels of complaints.

On costs, we consider that there should be limited cost differences between the CDRO and an ombudsman office. In fact, there are incentives within an ombudsman scheme to reduce costs. This is because there is a link between complaint numbers and costs, thus there is an incentive to reduce complaints and thus costs. This link does not appear to exist in the CDRO model.

On the level of complaints, we are yet to see any detailed data about the modelling of complaint numbers. What we do know is that where similar schemes have been established in the past (i.e., the Domestic Building Dispute Resolution Victoria), far higher numbers make complaints to the new service compared to previous dispute options. Moreover, we note there are related recommendations for an ombudsman to cover social housing disputes<sup>4</sup>, and residential tenancy disputes.<sup>5</sup> As stated by the Social Housing Regulatory Review Interim Report:

*The Victorian Access to Justice Review has noted that ombudsman schemes appear to employ the best elements of alternative dispute resolution: they are accessible, low cost, flexible, offer support and can address power imbalances. Industry ombudsmen operate for a range of essential services, such as telecommunications, energy and water, and public transport. Such schemes are generally well supported – for example a review of the Electricity and Water Ombudsman of Victoria found that it enjoyed strong support from both consumer organisations and providers.*

*Ombudsman schemes are more likely to be suitable where:*

- *essential services are involved*
- *the market has large firms and limited competition, leading to significant power imbalances*
- *consumers have difficulty in exercising their rights*
- *there are a large number of disputes.*

*Housing fits these criteria as it is an essential service, there are significant power imbalances, and tenants have difficulties in exercising their rights. This leaves a question as to whether the scale of disputes is sufficient to justify a standalone complaints body. There are reasons why a standalone body may be preferred. A standalone body could focus its expertise exclusively on housing matters, which means it may be able to handle disputes more effectively, and tailor its services to social housing tenants.*

We consider that a standalone independent Housing Ombudsman covering retirement villages, residential tenancies and social housing would be a cost-effective way to resolve disputes.

**RECOMMENDATION 4.** In place of the CDRO, establish an independent Housing Ombudsman, which would include resolution of retirement village disputes.

<sup>4</sup> An independent Housing Ombudsman is presented as an option in the Social Housing Regulatory Review Interim Report, <https://engage.vic.gov.au/social-housing-regulation-review>

<sup>5</sup> Tenants Victoria has recommended a new residential tenancies alternative dispute resolution scheme, independent of government and VCAT: <https://tenantsvic.org.au/articles/tenants-victorias-top-3-state-election-asks/>

**RECOMMENDATION 5.** If the CDRO model is maintained, require it to adopt the benchmarks for industry-based customer dispute resolution schemes.

### **CDRO processes**

Proposed section 38X(5) puts a time-limit on applications to the CDRO, being no later than 6 months after payment of all or any part of the resident's exit entitlement. This limit is also imposed on applications to VCAT: section 38ZW. It is unclear why this limited time limit is being imposed, and it seems out-of-step with usual limitations periods which provide for claims to be made within 6 years' of any claim. A six-year time limit also applies to AFCA, and other EDR schemes have longer time limits<sup>6</sup>. We consider that the time limit should be extended.

**RECOMMENDATION 6.** Do not limit the complaints to the CDRO or VCAT by short limitation periods.

Proposed section 38Z gives the CDRO wide discretion to decide a complaint is not eligible for conciliation, for example, where they consider VCAT should deal with the dispute. We consider that there should be accountability around the use of this discretion including the provision of written reasons, and public transparency as to how this discretion is to be exercised (i.e., only if VCAT is a more appropriate forum).

**RECOMMENDATION 7.** Ensure accountability about the CDRO's discretion to exclude complaints from conciliation

There is nothing in proposed Division 7 of new Part 6D that requires public transparency of orders made by the CDRO. We consider that this is a clear oversight and the final orders of CDRO need to be published. This contributes to accountability of the dispute service, and aligns with other dispute forums like VCAT and EDR schemes. This limitation is inconsistent with the benchmarks for dispute resolution (described above), and could have the potential to lead to perceived bias within the CDRO, undermining its function. In this regard, we are particularly concerned about the restrictions placed on the CDRO by virtue of proposed section 38ZZD, which limits the CDRO's sharing of information.

**RECOMMENDATION 8.** Require the orders of the CDRO to be published.

### **More timely exit entitlement payments and better disclosure of exit fees**

The proposal to require a maximum time frame for the payment of an 'exit entitlement', being 12 months after a resident gives vacant possession, should provide greater certainty to residents and their families. We consider that 12 months is still a long period of time to wait for an exit entitlement, and we consider that there should be regulatory incentives for a shorter time frame.

Proposed Division 4 of new Part 5B provides for a resident to apply to VCAT to seek payment of an exit entitlement. We consider that the dispute body (whether the CDRO or, as we prefer, an ombudsman) should consider applications for exit entitlements. This should include disputes around any aged care payments or alternative accommodation payments. This would reduce confusion about the appropriate forum to resolve complaints with retirement village proprietors or operators, and enhance access to justice.

**RECOMMENDATION 9.** Allow applications for payment of exit entitlements to be made to the external dispute body. This should extend to complaints regarding aged care payments or alternative accommodation payments.

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<sup>6</sup> AFCA Rules B4.4.3; TIO time limit is two years from when the consumer became aware of the issue.

## **Clearer and more consistent contracts**

We strongly support the proposal for standard-form contracts, to be set out in regulations, and the prohibition on certain contractual terms set out in proposed section 26D. We look forward to public consultation on the proposed standard-form terms and conditions.

We note proposed section 26E that will allow residence contracts and management contracts to include terms beyond those in the prescribed form, as long as they are consistent with the Act and regulations. It would be helpful to understand the types of terms that might be contemplated by this provision.

We also strongly support proposed section 26F regarding the fairer application of capital gains and losses between the operator and resident, and the regulation of a settling-in period. We consider that the Act should prescribe a minimum settling-in period, which appears to be left to the discretion of the operator in its contract rather than prescribed in the Act.

**RECOMMENDATION 10.** Require a minimum settling-in period to be prescribed by legislation.

## **Fairer contract termination requirements and processes**

We broadly support the proposed amendments regarding contract termination, including the role of the CDRO (or ombudsman) in these processes. We don't have substantive comments.

## **Better defined maintenance responsibilities and obligations**

We broadly support the proposed amendments regarding repairs and maintenance, as well as capital maintenance and replacement. It is appropriate that these matters be prescribed by legislation, rather than left to the discretion of proprietors and operators via contracts. We don't have substantive comments on the provisions.

## **No unreasonable refusal of repairs, alterations etc.**

We broadly support the proposed amendments relating to processes for modifications, reinstatement works, and renovation. The amendments represent a fairer balance between the rights and obligations of the parties. We presume that any disagreement about these processes (including where a resident provides a reinstatement disagreement notice under section 37H), that the complaint can be dealt with by the external dispute body.

## **Better resident participation in decision-making**

We broadly support the proposed amendments regarding resident decision-making, including meetings of residents and the requirement for special resolutions to approve maintenance charges (section 33D) or variation to services or utilities at the village (section 33E).

## **Changes to the register of retirement villages and registration fees**

We support the improvements to the register of retirement villages, however we do not support a regime from exclusion from the Register as is proposed by new part 1A. We are not clear of the policy basis for exclusion from the register. Given there are public accountabilities on retirement village operators, we consider it should be standard for all villages to be placed on the register.

**RECOMMENDATION 11.** Do not include an exclusion regime from the requirement to be publicly registered as a retirement village.

## **New emergency and evacuation planning requirements**

We strongly support the new Division 3 of Part 6A requiring minimum emergency and evacuation planning requirements. We do not have substantive comments.



## Enhanced and streamlined pre-contractual disclosures

We broadly support the proposed amendments to pre-contractual disclosure in new Division 1 of Part 4. These provisions should improve transparency and not overwhelm prospective residents with information. We welcome the Director of Consumer Affairs Victoria approving the form of the information statement. In determining the approved information statement, the Director needs to conduct consumer testing of the form to ensure it is effective for its intended audience.

We also strongly support the provisions regarding a free yearly contract check, which would require operators to provide annual information to residents, including reasonable estimates of sale prices and exit entitlements. We also support the right of a resident to seek a free contract check at any time.

We also welcome proposed section 26Y regarding the calculation of deferred management fees. Clarity in the calculation of this fee should enable greater transparency for residents via the contract checks.

**RECOMMENDATION 12.** Require pre-contractual disclosure to be consumer-tested to ensure it is effective for its intended audience.

## Enhanced role for Director, Consumer Affairs Victoria

We support the proposed changes to the role of the Director of Consumer Affairs Victoria, including the application of the Director's powers under the *Australian Consumer Law and Fair Trading Act 2009* (Vic). We also note that the CDRO will have the power to share information with the Director (section 38ZZD) and that the Director can publish reports under section 38ZZG. We consider that there should be specific requirements for the Director to publish regular information about retirement village complaints, including on a named basis about the particular village. Data about complaints informs consumer decision-making. We support the provision enabling the Director to publish guidelines for the management of issues in retirement villages.

**RECOMMENDATION 13.** The Director or CDRO should be required to publish reports outlining data of disputes regarding retirement villages, including on an identified basis.

## Gaps in the Amendment Bill

The primary gap in the Exposure Draft Bill is the failure to include any mandatory minimum training or accreditation standards for retirement village operators and proprietors.

As stated in our submission to the Options Paper, breakdowns in communication, loss of trust and hostility between residents and managers, and poor consumer outcomes, can result from this lack of mandatory training and expertise. Minimum training and qualification requirements for owners, managers and staff delivered by a registered training organisation can improve skills and expertise. We also consider that this training could enhance staff respect and understanding for older people living in retirement villages.

We also support the establishment of a mandatory village accreditation scheme, delivered by an independent third party, to ensure the quality and safety of accommodation provided to residents.

**RECOMMENDATION 14.** Set a requirement in the legislation for mandatory minimum training and accreditation standards.

Please contact [info@consumeraction.org.au](mailto:info@consumeraction.org.au) if you have any questions about this submission.

Yours Sincerely,

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink, reading "Gerard Brody". The signature is written in a cursive, flowing style.

**Gerard Brody** | Chief Executive Officer



## APPENDIX A - SUMMARY OF RECOMMENDATION

**RECOMMENDATION 1.** Amend the principles in proposed section 1A as set out by our submission.

**RECOMMENDATION 2.** Clarify whether the principles in proposed section 1A amount to enforceable rights.

**RECOMMENDATION 3.** Amend the Exposure Draft Bill so that it is clear that the principles in proposed section 1A are considered in relation to complaints.

**RECOMMENDATION 4.** In place of the CDRO, establish an independent Housing Ombudsman, which would include resolution of retirement village disputes.

**RECOMMENDATION 5.** If the CDRO model is maintained, require it to adopt the benchmarks for industry-based customer dispute resolution schemes.

**RECOMMENDATION 6.** Do not limit the complaints to the CDRO or VCAT by short limitation periods.

**RECOMMENDATION 7.** Ensure accountability about the CDRO's discretion to exclude complaints from conciliation

**RECOMMENDATION 8.** Require the orders of the CDRO to be published.

**RECOMMENDATION 9.** Allow applications for payment of exit entitlements to be made to the external dispute body. This should extend to complaints regarding aged care payments or alternative accommodation payments.

**RECOMMENDATION 10.** Require a minimum settling-in period to be prescribed by legislation.

**RECOMMENDATION 11.** Do not include an exclusion regime from the requirement to be publicly registered as a retirement village.

**RECOMMENDATION 12.** Require pre-contractual disclosure to be consumer-tested to ensure it is effective for its intended audience.

**RECOMMENDATION 13.** The Director or CDRO should be required to publish reports outlining data of disputes regarding retirement villages, including on an identified basis.

**RECOMMENDATION 14.** Set a requirement in the legislation for mandatory minimum training and accreditation standards.