
Recommendations to the Minister for Building and Construction

Retirement Villages Code of Practice 2008

August 2016

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Introduction

1. The Commission for Financial Capability (the Commission) carried out a monitoring project in 2015 to assess the effectiveness of formal dispute resolution under the Retirement Villages Act 2003. The report was published June 2015 and highlighted:

- The formal dispute resolution process was not considered user-friendly for all residents.
- A lack of alternative dispute resolution options (primarily mediation) as an alternative to using the dispute panel.
- A need for greater advice and support for residents in dispute resolution, and better information about the dispute process and agencies with roles and responsibilities relating to retirement villages and dispute resolution.

2. In September 2015 the Commission held a stakeholder forum to discuss improvements to the complaints facility provisions of the Code of Practice.

3. Public notification of first proposed variations was Gazetted on 17 December 2015. 17 submissions were received up until 14 March 2016. The Commission then decided to make comprehensive improvements. A re-drafted set of proposed variations was Gazetted on 2 June 2016, and the Commission received 16 submissions up until 14 July 2016.

4. The 2016 proposed variations to the 2008 Code relate to:

- Clause 31 - Resident access to operator and statutory supervisor
- Clauses 32 – 36 – Provisions relating to the Complaint Facility

5. Sixteen submissions received on the second notification of variations to the Code were made up as follows:

No.	Responses from:
5	Individual residents / members of the public
2	Specific village residents' committees or associations
2	National or regional residents' associations
1	Operators' association
4	Alternative Dispute Resolution providers
1	Statutory supervisor
1	Grey Power advisory group

Additionally, the Commission discussed the proposed variations with representatives from:

- Retirement Villages Residents' Association of New Zealand
- Retirement Villages Association
- Meadowbank Retirement Village Residents' Association
- Financial Markets Authority
- Covenant Trustees
- Public Trustee
- Trustees Executors

Executive Summary

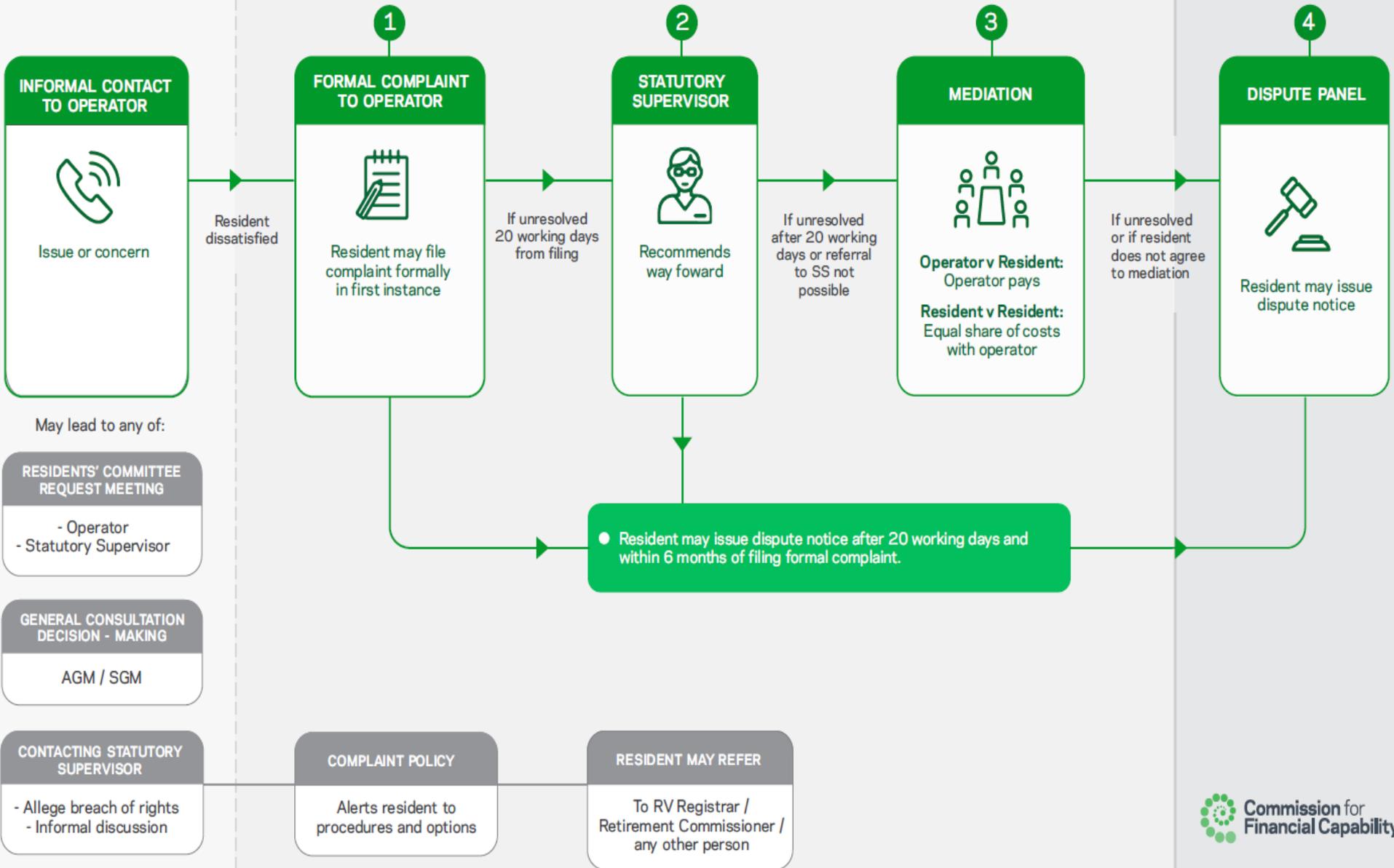
As a result of submissions and advice received, the Commission is recommending:

- A new progressive, step by step procedure for formal complaints which includes the option of mediation before the dispute panel and increases the chance of earlier resolution.
- Including the following diagram to explain the Complaint Facility. This makes the Complaint Facility user-friendly and helps residents recognise a mix of options may be used in support of each other.
- When a formal complaint remains unresolved, an operator will have to offer mediation to a resident to consider using. For mediations between a resident and operator, the operator will pay the mediator's costs.
- Minimum policy requirements to improve information a resident receives about procedures and a range of contact people a resident may talk to about making a complaint or discussing a complaint already made.
- Operators will report Complaint Facility data to the Retirement Commissioner every six months. The Commission will gain a better understanding of complaints being made and resolved or not, and whether there are any trends or issues to be addressed by the industry.

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Recommendations

Pursuant to s90(4) Retirement Villages Act 2003, the Commission makes the following recommendations on proposed variations to the Retirement Villages Code of Practice 2008 ('the Code').

The proposed variations are fully explained in Appendix II.

1. The Commission recommends the Complaints facility provisions of the Code are varied to include clauses 31 – 36 (attached – Appendix I). The changes require:
 - a. **New six-monthly reporting:** operators must report to the Retirement Commissioner six-monthly on Complaint Facility data and any other matter the Retirement Commissioner may determine (Clause 32). This enables the Retirement Commissioner to identify trends that may be of concern for the industry and know reliably the number of complaints being made and resolved or not.
 - b. **New formal complaint procedure:** operators must implement a progressive step by step procedure for resolving formal complaints remaining unresolved after twenty working days (Clause 35). The Code will include a new diagram to help explain the step by step procedure. The steps will not preclude a resident's statutory right to use dispute panel procedure after twenty working days from filing a formal complaint have passed. The step by step procedure in Clause 35 includes:
 - i. an option to refer an unresolved formal complaint to the statutory supervisor and,
 - ii. if still unresolved, requiring an operator to offer mediation to a resident before proceeding to the disputes panel.
 - c. **Responsibility for a mediator's costs:** an operator will be responsible for paying the mediator's costs for mediations between an operator and a resident (Clause 36). This enables residents who agree to mediation to access an alternative dispute resolution agent with less financial strain. In mediations between residents, an operator must share the mediator's costs equally with the residents involved. Cost-sharing in this type of dispute incentivises residents to take responsibility to resolve a dispute if choosing mediation and may help avoid dispute panel procedure.

- d. **Improved complaint policy:** operators must have a written complaint policy (Clause 33) and ensure it includes:
 - i. information on a range of informal and formal options, contact people available to a resident to talk about making a formal complaint or complaint already made, and
 - ii. an explanation of the procedure for referring an unresolved complaint to the disputes panel; and
 - iii. a requirement to offer a written copy of the complaints policy to a resident who advises they wish to make a complaint, and
 - iv. a requirement to have a copy of the policy accessible in a common area for a resident or intending resident at any time, and on any website or intranet; and
 - v. a requirement to offer to explain steps in the complaints facility to a resident or intending resident and make use of a new diagram tool when explaining steps to a resident or intending resident.

These policy requirements help operators meet dispute resolution best practice principles developed by the Government Centre for Dispute Resolution, and help residents to recognise a mix of options may be used in support of each other.

- e. **Recording formal complaints:** a resident may require an operator to help write a formal complaint for a resident if the resident is unable to write it and if a resident's personal representative or another person authorised by a resident is not available (Clause 34). This helps a vulnerable resident who may want to file a formal complaint promptly to have the option of allowing the operator to record the complaint, confirm the operator has recorded it correctly and receive a reference copy.
- 2. The Commission recommends the variations come into force three months after any approval under section 90(5) of the Retirement Villages Act 2003. This period allows:
 - a. the Ministry of Business Innovation and Employment to update printed and digital versions of the Code,
 - b. the Commission to publish approved variations and raise awareness of them in the industry, and

- c. operators to update their Complaint Facility policies and any other operational matters to comply with the variations.
3. The Commission recommends the variations be reviewed two years from the date they come into force to ensure they are working as intended.

Conclusion

The proposed variations reflect best practice principles for dispute resolution. They respond to key issues that emerged from the Commission's monitoring report and stakeholder forum in 2015.

The Commission will gain a better understanding of complaints being made and resolved or not, and whether there are any trends or issues to be addressed by the industry.

Yours sincerely,



Diane Maxwell

Retirement Commissioner

8th August 2016

APPENDIX I
Comparative table of current and proposed provisions
Code of Practice 2008

This Complaint Facility part of the Code of Practice has been re-written as below.

CURRENT PROVISIONS	PROPOSED PROVISIONS
<p>COMPLAINTS FACILITY</p> <p>Note: in clauses 32 – 36 if a retirement village has a certificate confirming that it is exempt from appointing a statutory supervisor then any reference to a statutory supervisor in these clauses will not apply.</p>	<p>COMPLAINTS FACILITY</p> <p>Note: In clauses 31 – 36 if a retirement village has a certificate confirming that it is exempt from appointing a statutory supervisor then any reference to a statutory supervisor in these clauses will not apply.</p>
<p>31. Resident access to operator and statutory supervisor</p> <p>Access to operator or operator’s contact person</p> <p>1. The operator must have, maintain, and implement a process so that residents can contact the operator or their contact person about concerns and issues. The process must allow the operator or the contact person to acknowledge and respond in writing within a reasonable time, depending on the subject. The operator must tell residents in writing about any change to this process.</p> <p>2. The operator must give residents written details of the name of a contact person, when they are available, and how to contact them. Right 2, Code of Residents’ Rights</p> <p>Access to statutory supervisor</p> <p>3. The operator must have a process for residents to contact the statutory supervisor about an alleged breach of a right or to make a complaint. The operator must tell residents about any change to the process, including providing a contact name and details</p> <p>4. The operator must tell residents in writing of the name of the statutory supervisor and how to contact them. Right 2, Code of Residents’ Rights</p>	<p>31. Resident may raise an issue or concern informally</p> <p>1. The operator must have and use a procedure so that a resident may contact the operator, or its designated contact person, informally about a concern or issue, at any time.</p> <p>2. The operator must provide in writing the contact details of its designated person and when that person is available. <i>Right 2 Code of Residents’ Rights.</i></p> <p>3. The resident must receive an acknowledgment and a response, each in writing and within a reasonable time.</p> <p>4. This procedure (outlined in (1)) does not prevent a resident from making a formal complaint under clauses 34 – 36 in the first instance.</p> <p>5. The operator must tell residents about any change to the procedure mentioned in clause 31, including changes to contact names and details.</p>
<p>32. Procedure for making and acknowledging complaints by residents</p> <p>1. The operator must have a written procedure for dealing with complaints by residents about the</p>	<p>32. Complaint Facility Objective and Monitoring</p> <p>1. A resident may have an issue or concern about the village, the operator, another resident or other</p>

retirement village, the operator, or other residents of the retirement village. The operator must give a written copy of the complaints procedure to residents and intending residents on request. Section 51

2. The procedure for making, receiving, and resolving complaints must enable complaints to be resolved simply, fairly, and quickly.

3. The complaints procedure must also:

a. state that residents can ask the operator's contact person (and provide contact details) for information about their rights. Code of Residents' Rights

b. refer to the resident's right to complain to the village's statutory supervisor (and provide contact details) or to the Registrar of Retirement Villages (and provide contact details). Code of Residents' Rights

c. state that information about residents' rights and complaints and disputes procedures is published by the Retirement Commissioner

d. refer to the resident's right to involve a support person or people to represent them (at the resident's cost). Right 6, Code of Residents' Rights

e. state that complaints do not have to be made in writing. All complaints, however made, must be recorded and responded to as if they had been received in writing.

f. state that complaints may be made to the operator's contact person

g. state what the village's complaints procedures are, including any other help the operator will give to residents. Operators may offer residents a mediation service for informal discussions as an alternative to either the complaints or disputes process.

h. provide for the complaint to be promptly acknowledged by the operator or contact person in writing, including complaints received other verbally

i. state that the resident or operator may require that a dispute be resolved by a disputes panel Section 52

j. state the types of dispute, including breaches of the Act, for which a resident may give a dispute notice. Section 53

matter that the resident wants to raise as a formal complaint, either:

a. without first raising the issue or concern informally; or

b. if the resident previously raised the issue or concern informally, because the resident is dissatisfied with the response or the progress towards resolution.

2. The objective of an operator's Complaint Facility is to enable every formal complaint to be resolved in a way that is resident-appropriate, objective and fair, quick and cost-effective for the operator and the resident.

3. Operators must report to the Retirement Commissioner six-monthly, in an agreed format, in relation to formal complaints for each village:

a. the number, nature and outcome;

b. any other matter relating to the operation of the complaints facility that the Retirement Commissioner may require.

<p>k. if a complaint is about the resident’s occupation right agreement, state that the proposed action on the complaint will be suspended until the complaint is resolved. There may be occasions when the operator, after consulting the statutory supervisor, decides that it is in the best interests of the village as a community to continue with the proposed action.</p>	
<p>33. Informing resident of the progress of the complaint</p> <p>1 The operator must ensure that the resident who has made a complaint is regularly kept informed about its progress.</p>	<p>33. Formal Complaints policy</p> <ol style="list-style-type: none"> 1. The operator must have and use a written complaints policy for dealing with an issue or concern that a resident has raised as a formal complaint. 2. The complaints policy must be written in plain English and include: <ol style="list-style-type: none"> a. the option a resident has to request that the village’s residents’ committee, if there is one, call a meeting with the operator or statutory supervisor under clause 30, and b. the option a resident has of raising an issue or concern informally with the operator or its contact person under clause 31 at any time; and c. an outline of the procedure for making and resolving a formal complaint as set out in clauses 34 to 36 below; and d. contact details for people or agencies a resident can talk to about a wish to make a formal complaint or a formal complaint already made. These people may include the statutory supervisor, the Registrar of Retirement Villages and the Retirement Commissioner; and e. an explanation that the complaints policy does not prevent a resident from bringing an alleged breach of the Code of Residents’ Rights to the attention of those people, agencies or any other person; and f. an explanation of the procedure for referring an unresolved formal complaint to the disputes panel, as set out in clause 35 and 36,

	<p>by issuing a dispute notice, and on the disputes panel's ability to award costs; and</p> <p>g. an explanation of the procedure for a resident to contact the statutory supervisor about an alleged breach of the Code of Residents' Rights as an alternative to, or in addition to, making a formal complaint under clauses 34 – 36.</p> <p>3. The operator must keep a written copy of the complaints policy in a common area for residents or intending residents to access and view at any time, and make available an electronic copy on the village's website and a resident-accessible intranet, if it has one.</p> <p>4. The operator must offer to give a written copy of the complaints policy to a resident who advises the operator it wishes to make a formal complaint, and at any other time to an intending resident or resident upon request.</p> <p>5. The operator must offer to explain the steps in the complaints facility to a resident or intending resident who receives a copy of the policy, and is encouraged to use the diagram provided after clause 36 as a communication tool.</p>
<p>34. Procedures for resolving and deciding complaints. Resolving complaints</p> <p>1. The operator must follow the retirement village's complaints procedure.</p> <p>2. Operators may offer residents a mediation service for informal discussions as a first step to resolving the complaint.</p> <p>3. If a complaint is about the resident's occupation right agreement, any proposed action on the subject of the complaint must be suspended until the complaint is resolved. This is unless the operator, after consulting the statutory supervisor, decides that it is in the best interests of the village as a community to continue with the proposed action.</p> <p>4. If a complaint is resolved by mutual agreement, the resolution must be recorded and then signed by, and</p>	<p>34. Making a formal complaint</p> <p>1. If a resident wants to raise an issue or concern as a formal complaint, this may be done by either:</p> <ul style="list-style-type: none"> a. the resident writing the complaint; or b. if a resident is unable to write the complaint, a personal representative or another person authorised by a resident writing it for the resident; or c. if neither of those options is available, then the operator writing the complaint at a resident's request, based on what the resident tells the operator at the time the resident makes the complaint; and d. in both b or c the writer or operator must then read the complaint back to the resident

<p>copied to, all parties. Deciding complaints where resolution is not possible.</p> <p>5. The operator must have a procedure for deciding complaints where resolution through the retirement village's complaints system is not possible.</p> <p>6. Complaints that are not resolved through the complaints system can be referred to a disputes panel. Resolution of a dispute by a dispute panel is provided for in Part 4 of the Act and associated regulations. The operator is obligated to meet the costs of dispute resolution. Sections 48–75 and the Retirement Villages (Disputes Panel) Regulations 2006</p>	<p>to confirm it is recorded correctly and give the resident a reference copy to keep; and</p> <p>e. in every case, the resident needs to sign and date the complaint and give it to the operator or the operator's contact person.</p> <p>2. The operator must provide a written acknowledgement of a formal complaint within five working days of receiving it.</p>
<p>35. Time limits for making and notifying the decision about the complaint</p> <p>1. The operator or person dealing with a complaint on behalf of the operator must make and notify a decision on the complaint as soon as reasonably practicable. In any event it should be within 20 working days of the complaint being made.</p>	<p>35. Procedure for resolving formal complaints</p> <p>Where a formal complaint is made by a resident, the following procedure will apply. <i>(The procedure is set out in a diagram after clause 36.)</i></p> <p>1. The operator will first work directly with the resident to resolve the complaint to the resident's satisfaction.</p> <p>2. The operator will suspend taking any proposed action that is the subject of the complaint until the complaint is resolved. However, the operator may, after consulting the statutory supervisor, decide it is in the best interests of the village as a community to continue with the proposed action while the dispute about the action is being resolved.</p> <p>3. If a formal complaint is resolved by mutual agreement, or by reference to the statutory supervisor under (4) or by reference to a mediator or independent third party under (6), the resolution must be recorded in writing and include:</p> <ul style="list-style-type: none"> a. what actions if any are required to be taken by whom and by when; and b. any agreement about costs and any other terms; <p>and must be dated and signed by all parties and copied to all parties</p> <p>4. Where possible the complaint should be resolved to the resident's satisfaction under (1) above within [20] working days of the operator receiving it. If not, the operator must, on behalf of</p>

the parties, refer it to the statutory supervisor and ask the statutory supervisor to work with the parties to provide the parties with an impartial perspective and recommend a way forward.

5. If the complaint is not resolved under (4) within [20] working days of being referred to the statutory supervisor, or if it is not possible to proceed under (4) above, then the operator must provide the resident with the option of mediation.

6. If the resident agrees to mediation:

- a. the operator will, on behalf of the parties, refer the complaint to an agreed independent mediator; and
- b. the mediator must be a member of an alternative dispute resolution agency which is approved by the Retirement Commissioner and listed on the Retirement Commissioner's website. Alternatively, the parties have the option to agree on another independent third party; and
- c. if the parties cannot agree on a mediator the operator will, on behalf of the parties, ask the Retirement Commissioner to select one for the operator to engage.

7. If the resident does not agree to mediation, or if the complaint is not resolved to the parties' satisfaction within [20] working days of the referral to a mediator or other third party, the resident may issue a dispute notice which would require the complaint to go to a disputes panel for resolution.

8. Nothing in clause 35 limits either the resident's right to take the complaint to a disputes panel at any earlier time permitted under the Act, or the right of the resident and the operator to agree to mediation at any time during a dispute panel process.

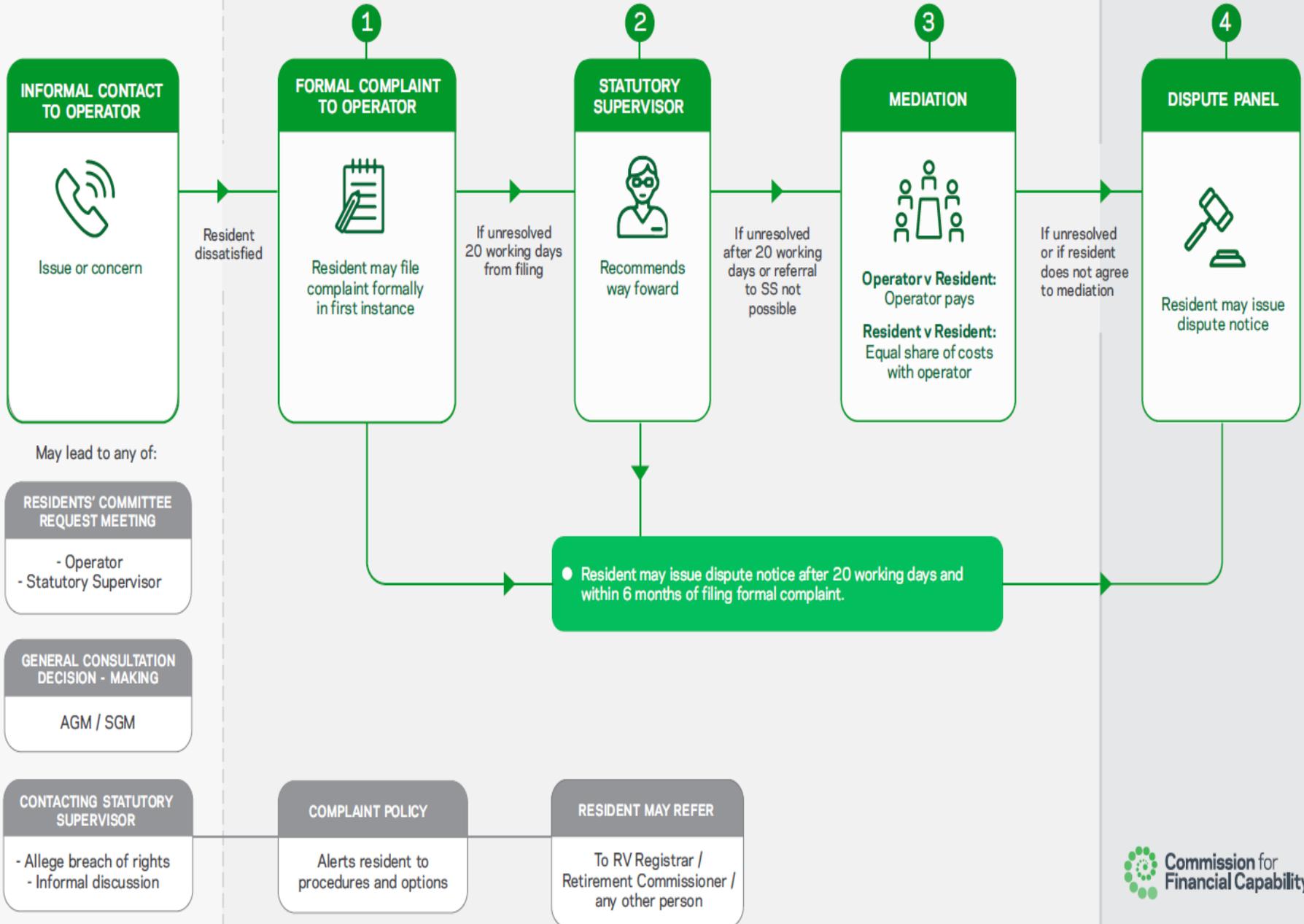
9. An issue or concern raised formally under clause 34 is deemed the first referral to the complaints facility for the purposes of the six-month time period provided in the Act for issuing a dispute notice. (Section 57)

<p>36. Form of notification of the decision about the complaint</p> <p>1. The operator or person dealing with a complaint must inform the parties affected by the complaint of the decision in writing. The following details must be included:</p> <ul style="list-style-type: none"> a. the reasons for the decision b. any action the operator intends to take as a result of the decision c. a statement that no party affected is bound by this decision d. a statement informing the resident of their right to give a dispute notice if: <ul style="list-style-type: none"> i - the resident is not satisfied with the decision ii - 20 working days have elapsed since the complaint was made. Section 52 	<p>36. Costs of mediation</p> <ol style="list-style-type: none"> 1. Each party will be responsible for paying its own costs in relation to preparing and attending any mediation to which the parties agree. 2. For mediation between an operator and a resident, the operator will be responsible for paying the mediator's costs. For mediation between residents, the operator and the residents involved will share the mediator's costs equally. 3. Where a complaint is heard by a disputes panel under the Act, unless the disputes panel decides otherwise, the operator will meet the costs of the disputes panel whether or not the operator is a party to the dispute. The disputes panel is able to award costs in favour of a successful applicant, which may be either operator or resident. <p><i>See diagram of informal and formal options below. Operators are encouraged to use this diagram when explaining a Complaint Facility to a resident or intending resident - Clause 33(5).</i></p>
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APPENDIX II

Code variations explained

Clause 31. Resident may raise an issue or concern informally

Many residents are reluctant to pursue issues or concerns as formal complaints. The option of raising an issue or concern informally with an operator is now a distinct part of the Complaint Facility and makes the Code more user-friendly.

Clause 31 helps a resident understand they have options to raise an issue or concern informally. Clause 31(4) clarifies a resident always has the option to raise an issue or concern as a formal complaint in the first instance.

Locating this informal option within the Complaint Facility part of the Code promotes how a resident can start taking action if the resident is dissatisfied about something. However, raising an issue or concern informally is not a 'first referral' of a dispute to the Complaint Facility.

Under Section 57 Retirement Villages Act 2003, the time limit for a resident to issue a dispute notice is within 6 months "after the dispute was first referred to the complaints facility". Clause 35(9) clarifies an issue or concern raised formally by a resident is the first referral for the purposes of Section 57 of the Act and enabling access to the dispute panel.

A very wide range of issues or concerns might be raised informally by a resident. For example, matters that are domestic by nature (dissatisfaction with garden pruning by staff, noise at a village social function) through to more operational or contractual matters (inadequate disclosure of accounting information at a meeting).

Clause 31(3) allows an operator a 'reasonable time' to acknowledge and respond to an informal issue or concern. This retains flexibility for the operator. It would be unnecessarily cumbersome for an operator to provide a written acknowledgment and response within a short timeframe for every informal issue given the potentially wide range of informal issues.

The Code sets a minimum standard of operation, so operators may choose to apply a higher standard of acknowledgement and response for any informal issue or concern a resident raised. The operator could match the time for acknowledging formal complaints under clause 34(2) – being five working days, and resolving formal complaints under clause 35(4) – being twenty working days.

Clause 32. Complaint Facility Objective and Monitoring

Stating objectives in the Code promotes best practice principles developed by the Government Centre for Dispute Resolution and encourages resolution.

Clause 32(3) introduces a new requirement for operators to report every six months to the Retirement Commissioner about the operation of their Complaint Facility. This facilitates the Retirement Commissioner's broad functions under Section 36(1) of the Act.

The Retirement Commissioner will be better informed to identify issues or trends of concern for the industry and know more reliably the number of complaints being made and resolved or not. Some residents' submissions agreed collecting this information could identify issues requiring better outcomes across the industry. Many agreed reporting would help reduce areas of dissatisfaction for residents.

Exact numbers of formal complaints made by residents to operators per annum is not known. The Commission's monitoring report indicates that in 2014:

- 92 complaints came to the attention of statutory supervisors
- 49 complaints came to the attention of three national level organisations - the Commission, Retirement Villages Association and Citizens Advice Bureau, and
- 122 came to the attention of other national level organisations – Age Concern, Consumer New Zealand, Seniorline and Grey Power Federation

Some of these are likely to have been made to more than one organisation.

This represents a relatively low number in an industry with 393 registered villages housing around 37,000 residents. Six monthly reporting about Complaint Facility activity to the Retirement Commissioner is unlikely to impose a burden for operators and could be reviewed after two years.

The Retirement Village Association initially raised concerns about: the end use of reported information, confidentiality, whether information would be aggregated or used so individual villages or people are identifiable, and wondered what useful purpose the information will serve.

In response to these concerns, if the new reporting requirement in clause 32(3) is approved the Commission would:

- establish a generic template all operators can access to file the information,
- develop on-line facilities enabling operators to file information,
- consider software to help aggregate information, and
- analyse the data and publish a summary of the data without identifying any particular person or village.

The Retirement Villages Association submitted it would be happy to work with the Commission to develop a standard reporting form for the sector.

If there was a specific concern or trend arising from any information received through six-monthly reporting, the Retirement Commissioner could consider if it was appropriate to exercise its power under Section 36(3) of the Act to ask an operator or operators a question or to supply more information on a case by case basis.

Clause 33. Formal Complaints policy

Previously complaint policy and procedure provisions were mixed and even duplicated across a number of provisions. Clause 33 clearly distinguishes formal complaint policy requirements. This makes the Complaint Facility easier for a resident to navigate.

An operator must keep a copy of the complaints policy accessible to residents and intending residents at any time. There is now an additional requirement to have an electronic copy available if the operator has a website or intranet for residents. The operator must offer a written copy of the complaint policy to a resident wishing to make a formal complaint.

As a minimum standard, the contents of an operator's complaints policy must refer to the range of informal and formal options a resident has. This helps operators meet best practice principles of customer-focus and accessibility. And it helps a resident to recognise a mix of options may be used in support of each other.

For example, a resident contemplating a formal complaint may first decide to request its residents' committee call a residents' meeting with the operator. It might also contact the Retirement Commissioner or Registrar of Retirement Villages (depending on the issue) to discuss the issue and be better informed to influence an outcome at the residents' meeting.

There is a new requirement for operators to offer to explain the steps in a Complaint Facility to a resident or intended resident who receives a copy of the policy. There was strong support for integrating a diagram into the Code to assist residents develop a strategy for resolving their unique issue or concern in the most appropriate way for them.

Clause 33(2)(f) requires a complaint policy to include information about dispute panel procedure if a formal complaint remains unresolved. This helps a resident filing a formal complaint to understand the two types of dispute procedure mentioned in section 50 of the Act at an early stage.

Clause 34. Making a formal complaint

Submitters commented on the user-friendliness of clause 33. A formal complaint is clearly distinguished from raising an issue or concern informally. Any resident who may be vulnerable or unable to write their own formal complaint may have a personal representative or another authorised person write it. This helps a resident involve a family member, lawyer, advocate from a community agency or someone with power of attorney. As an additional measure, a resident who is unable to write their own complaint may choose to have the operator write it, confirm the contents back to the resident and receive a reference copy to keep.

Clause 35. Procedure for resolving formal complaints

Clause 35 prescribes a progressive step by step procedure for resolving a formal complaint.

The Code incentivises an operator and resident to try to resolve a formal complaint within twenty working days. The operator is also incentivised by having to suspend taking any action that is subject of the complaint until it is resolved, unless it is in the best interests of the village to continue with the action

The Commission's monitoring report and ongoing stakeholder engagement suggests most complaints are resolved quickly and very few unresolved formal complaints proceed to the second tier dispute panel procedure. Between 2007 – 2014, 23 disputes entered the formal dispute panel procedure, 9 were settled or withdrawn and 14 reached a decision. The Commission received no dispute notices in 2015 and has received only two in 2016.

The Commission's monitoring report identified that dispute panel members spent a lot of time identifying issues and acting as de facto mediators when cases are referred to them. One potential benefit from requiring a formal complaint to be referred to a statutory supervisor under clause 35(4) is to help identify issues for mediation or any later dispute panel proceedings.

The option of issuing a dispute notice is an important one for a resident to know about when deciding to raise a formal complaint. The new diagram helps explain a resident's statutory right to issue a dispute notice may be used potentially to bypass two steps of the procedure options in clause 35: referring an unresolved complaint to the statutory supervisor, and mediation. Clause 35(8) also explains nothing restricts a resident's right to issue a dispute notice regarding an unresolved formal complaint at an earlier time permitted by the Act - which would be twenty working days after first filing the formal complaint.

Clause 35(4) – Statutory supervisor

A number of submitters made similar comments about the step in clause 35(4) requiring an unresolved formal complaint to be referred to the statutory supervisor (if there is one) before having the option of mediation.

Some submitters preferred that mediation be offered earlier, or that a resident should elect either mediation or referral to the statutory supervisor if the operator had not resolved the complaint to the resident's satisfaction within the 20 working day period.

Two clear themes from those submissions are:

1. the statutory supervisor is bias towards the operator, or did not represent the residents' interests, because it was 'employed' by the operator and would only confirm the operator's minimum obligations in the complaint or accede to the operator's position, and
2. the step requirement would incur greater statutory supervisor costs to the operator that would be passed on to residents and could deter residents from pursuing formal complaints

The role of statutory supervisor

1. The first theme is a perception issue some residents have about the role of the statutory supervisor in the Complaint Facility procedure. By contrast, from time to time the Commission receives communications from residents indicating the input of the statutory supervisor on their behalf was critical to resolving an issue with an operator.

Acknowledging the fact an operator pays fees to the statutory supervisor to act in that role, the Act and Regulations position the statutory supervisor as an independent and professional third party. For example, Regulation 49(3) of the Retirement Villages (General) Regulations 2006 prescribes every Deed of Supervision require the operator to accept the statutory supervisor as a representative of the interests of the residents of the village in any matter relating to the village.

Section 42(d) of the Retirement Villages Act 2003 requires the statutory supervisor to perform duties imposed by the Act, regulations and any documents of appointment. A statutory supervisor would be very unwise to neglect its responsibilities to residents under the Retirement Villages Framework. The supervisors must also comply with the Financial Markets Conduct Act 2013 and the license they receive

from the Financial Markets Authority. Anyone with a concern about a statutory supervisor fulfilling its functions could refer it to the Financial Markets Authority.

The perception some residents and submitters have against the role of a statutory supervisor may stem from misunderstanding the nature of the Complaint Facility procedure and regulatory framework, as opposed to the statutory supervisors themselves.

For example, where an operator does the minimum that they are legally obligated to do and a resident has an issue with it, the resident may make a formal complaint. A statutory supervisor (or a mediator under the next step) may then help both parties reach an understanding that doing more than the minimum is the best outcome for both of them in the circumstances. A statutory supervisor has considerable powers in section 42 of the Act to direct an operator to supply residents with specific information or to operate the village in a specified manner. However, a statutory supervisor (or a mediator) cannot force an operator to do more than they are required to just because the resident disagrees with the level of the minimum legal obligations.

To address some of these reservations, clause 35(4) clarifies the statutory supervisor's role when a formal complaint is referred to it. It is to "...to work with the parties to provide the parties with an impartial perspective and recommend a way forward".

Clause 35(4) requires collaboration and a resolution focus. It is intentionally broad to enable a statutory supervisor to influence a resolution between the parties, and not merely to determine whether the operator's actions comply with their legal obligations. Clause 35(4) also enables a statutory supervisor to be cost-effective in the degree to which it works with the parties.

For example, it is foreseeable the statutory supervisor may have been involved with the same issue or concern at an earlier stage, perhaps when the issue had been raised informally by a resident calling the statutory supervisor directly or at a meeting called by a residents' committee. The statutory supervisor might try to offer another explanation to move the parties towards resolution, or indicate it can offer no further guidance and recommend that mediation is a more appropriate option than its own ongoing involvement.

In some formal complaints, particularly resident versus resident disputes, the statutory supervisor may not be able to work with the parties further because of an actual or perceived conflict of interest. In other formal complaints the statutory supervisor might indicate to the parties it needs to take further external legal or accounting advice itself, in order to help the parties move forward. The statutory supervisor may indicate the cost implications of that would be prohibitive.

These are examples of the range of things the Commission understands statutory supervisors currently do.

The Commission liaised with the Financial Markets Authority (FMA) about the extent of the proposals in clause 35(4). The FMA has indicated that the proposed changes reflect activity already expected of the statutory supervisor. The Retirement Villages Association also submitted the stepped proposal in 35(4) codifies what is already happening in practice in many villages and makes good use of the supervisor's experience to help resolve a complaint.

The Commission's proposals help to establish a clearer understanding of the role of the statutory supervisor in complaint procedure without requiring legislative change. The statutory supervisor is an appropriate independent party with specialist expertise in a wide range of retirement village matters. The statutory supervisor is easily accessible to help an operator and resident resolve a formal complaint before requiring an operator to offer mediation to a resident. It is appropriate to implement the proposed variations and review their success in two years.

The costs of the statutory supervisor

2. The second theme relates to a concern for dramatic increase in compliance costs to operators, which might be passed on to residents. This was believed to be a possible outcome of codifying the requirement to refer an unresolved formal complaint to the statutory supervisor.

The Commission noted the view expressed by one statutory supervisor stating clause 35(4) - "working with the parties to provide an impartial perspective and recommend a way forward" - was work that did not form part of the firm's standard supervision fee, and so time and attendance will be an additional charge upon the operator at professional rates.

This particular view was in contrast to experiences shared by other statutory supervisors the Commission liaised with, discussed below. The Commission's view is responding to formal complaints from time to time is a core function for a statutory supervisor.

This same statutory supervisor also submitted the code could avoid any doubt about responsibility for the cost of a referral to a statutory supervisor by stating that cost is the responsibility of the operator. This suggestion would relieve concerns of some submitters that weekly fees would escalate on the basis the statutory supervisor was charging more for formal Complaint Facility work.

Proposed operator-reporting to the Retirement Commissioner under clause 32(2) would, if approved, give a clearer picture of annual complaint activity. Most resident issues or concerns are believed to be resolved informally before they become complaints. If the low numbers of complaints mentioned earlier is sustained it is reasonable to believe statutory supervisors will not have to charge higher base supervision fees, or additional fees above base fees because of the proposed step by step procedure in clause 35.

The Retirement Villages Association submission appreciated there may be concern the statutory supervisor will charge fees for its role under clause 35(4) that will be passed onto the resident body to meet. The Association noted 35(4) codifies what is already happening in practice, saying if the supervisor believed the matter is the operator's responsibility to resolve, the statutory supervisor can direct relevant costs should be paid by the operator and not passed onto the residents.

A statutory supervisor has general powers of direction under sections 43 and 46 Retirement Villages Act and could direct that a particular cost incurred by an operator is not appropriate for residents to pay. This could include if an operator took an unreasonable stance in a formal complaint which incurred considerable additional time and attendance costs for the statutory supervisor.

Sector comment on the effect of clause 35(4)

In weighing up submissions about cost implications of the step process in clause 35(4) the Commission canvassed the Financial Markets Authority and representatives from two other statutory supervisor firms. The Commission sought to understand what degree of work involving complaint attendances other statutory supervisors factored into their base fee, and sought views whether increases in fees were likely by codifying practice happening already.

The two other statutory firm representatives indicated the proposals sat within the terms of their Deed of Supervision. Their base fees anticipated some degree of time and attendance contact from residents or operators for complaint matters.

Both did not foresee the proposal in clause 35(4) being too different from what happened in practice, and unlikely to create significant additional charges to operators. Both suggested it was possible that statutory supervisors could become involved more as a result of the proposals but it would be difficult to know how much more until the proposals had been in place for some time.

Both agreed there was always a possibility of cases requiring greater time and attendance which could generate additional charges above base fees. The Commission believes this would be the case whether the proposed stepped procedure was implemented or not.

One indicated they would not charge additional fees for complaint-related contact from a resident or operator if the time spent in exchanges was minimal. For larger operators with a number of villages, they would keep an overall view of the amount of contact happening before deciding if the cumulative time spent guiding on complaint matters warranted additional charging.

Both indicated they did not have much complaint related work. One indicated that in over four years of service to a larger corporate operator it had only needed to make two special village attendances to help set a way forward for issues between a resident and an operator. These attendances did incur additional charges to the operator. The other indicated it had up to ten calls from residents directly in the last year, mostly for clarification on an issue rather than involvement in a formal complaint.

The Commission then considered the extent to which statutory supervisor costs may be passed on by operators to residents, if at all.

The Commission understands a statutory supervisor base fee is paid in first instance by the operator and is considered an operating expense most operators would recover through residents' weekly fees. Whether an operator actually passes any additional statutory supervisor cost on to residents depends on the operator's model. Weekly fees cover a range of variables. For example, the Commission understand certain statutory supervisor costs for handling settlements or issuing titles would not be recovered from residents' weekly fees.

Regulation 9(3) Retirement Villages(General) Regulations 2006 require operators to forecast operating expenditure for the village, all income and expenditure for the village and the amounts of operating expenditure that must be met by the residents of the village.

Some larger operators have fixed weekly fees, some increase weekly fees at a rate equal to the CPI annual adjustment, and so there is little possibility of their residents having to meet any increased statutory supervisor base fees or additional fees caused by the Code proposals

Overall, the Commission believes formal complaint activity in the industry is relatively low and there is a low risk of increased compliance costs between operators and statutory supervisors as a result of the proposed variations. As part of the review recommended in two years, the Commission will look directly

at whether the costs of statutory supervisors have increased specifically because of the proposed variations.

Clause 35(5) and (6) - Mediation

The Commission's monitoring report and stakeholder forum demonstrated mediation was strongly supported as the most appropriate alternative dispute resolution option. It needs to be formally implemented in the Complaint Facility.

A key feature of the proposed variations is an operator will be required to give a resident the option of mediation before choosing to pursue a dispute notice with the dispute panel. Currently an operator only has a discretion to offer mediation and few residents appeared to be aware of the option.

The step by step procedure in clause 35 mitigates the risk a resident might raise a vexatious formal complaint in order to refer an issue or concern to a mediator. The cost of a private mediation taking a day could be around \$3000. Referring a properly made but unresolved formal complaint directly to a mediator before the statutory supervisor might increase costs for operators, or increase costs for residents in resident v resident disputes.

Selecting and then engaging a mediator requires additional time and resource for an operator and resident. The proposals require an operator to refer a complaint to an agreed mediator on behalf of the parties. The parties meet their own costs in preparing for a mediation.

Submitters were pleased that the Retirement Commissioner would publish a list of approved agencies offering mediation services and be available to select a mediator if parties could not agree on one for themselves.

There is an alternative option in 35(6)(b) for parties to agree on another independent third party. In some communities a local priest or policeman or other person could be asked to take the role of mediator, often at less cost or no cost.

Clause 36. Costs of mediation

The proposals clearly designate responsibility for costs of mediation and relieve concerns that residents might be unfairly charged for pursuing mediation.

Where a mediation is between an operator and a resident, the operator incurs the mediator's costs. If the mediation is between residents only, the cost of the mediator is shared equally between an operator and the residents involved.

