



**TE ARA  
AHUNGA ORA**  
Retirement Commission

# Other Stakeholder Submissions

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112415251	Grey Power Federation	Yes		No		Yes	Yes		<p>Grey Power Federation is pleased that CFFC has produced the white paper on Retirement Villages. Our main concerns are</p> <ol style="list-style-type: none"> <li>1. The appointment of the Statutory Manager is of concern to our members. As the village owner pays the managers fees they feel that the Statutory Manager could be biased toward management when dealing with residents complaints. There needs to be a clear line of independence for the Statutory Manager so that both parties to a complaint have no direct financial connections to the Statutory Manager.</li> <li>2. There are serious financial problems for residents when they terminate an occupation rights agreement.</li> </ol> <p>We strongly support a guaranteed timeframe for buybacks with a provision for interest being paid by the owner from the date of termination. The value of any capital gain should be shared equally by the owner and the resident and this must be included in the revision of the act as well as amending clause 53 of the code of practice.</p> <p>We do not agree that weekly fees continue to be paid after the termination of the ORA. These fees should stop on the day of termination of the ORA. With no weekly village fees being paid would be an encouragement for village owners to complete settlement more quickly than it takes some owners at present. We support change to agreements due to the level of care required by the resident where this requires a move to a different unit for a higher level of care to be provided.</p> <p>Grey Power New Zealand Federation supports the submission of the Retirement Village Residents of New Zealand</p> <p>We would also request that the comments made in Consumer NZ research</p>

									<p>paper dated 2 February 2021 be considered.</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
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12 February 2021

Commission for Financial Capability  
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Auckland City 1143

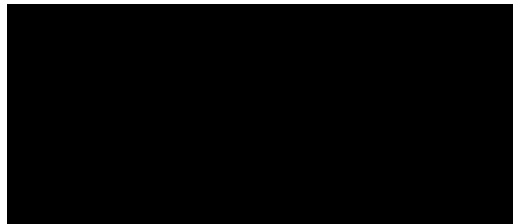
By email: [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

**SUBMISSION on "Retirement villages legislative framework:  
Assessment and options for change 2020"**

**Introduction**

Thank you for the opportunity to make a submission on the White Paper "Retirement villages legislative framework: Assessment and options for change 2020". This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

Contact:



**Responses to questions**

***Question 1: Has this White Paper canvassed the issues fairly and accurately?***

1. We welcome the commission's White Paper and consider it has accurately outlined the majority of issues facing consumers in this sector. Existing legislative protections are failing to provide adequate protection for consumers and a review of the Retirement Villages Act, regulations and code of practice is overdue.
2. We consider current rules are slanted heavily in favour of village operators, leading to adverse outcomes for residents. These issues are also emerging in other jurisdictions, forcing legislative protections for consumers to be increased. The same needs to happen in New Zealand.

***Question 2: Are there any important points that are missing?***

3. Consumer NZ recently carried out a review of retirement village contracts offered by six major operators. Our review found contract terms that we consider privilege the village and risk leaving residents unfairly out of pocket. Terms include those that:
  - make residents responsible for maintenance of, and repairs to, the village's chattels, including the appliances in their unit, plumbing and electrical fittings
  - deny residents the opportunity to benefit from any capital gain when their

licence is sold, despite being required to contribute to the property's upkeep

- result in residents being charged penalty interest if they make any payments a few days late, while the village retains discretion to decide whether it will pay interest on money owed to residents
  - attempt to exempt the village from liability for damage that the village may cause to the residents' possessions
  - give the village wide-ranging discretion to decide what residents can and can't do, including whether they can have guests to stay, make improvements to their unit and raise reasonable objections to village developments.
4. Our recent survey of village residents also identified low ratings for satisfaction with occupation right agreements, in terms of readability and fairness of terms. Of the 1680 respondents:
    - just 44 percent thought the agreement was "very easy" or "somewhat easy" to read and understand,
    - only 18 percent rated the terms and conditions as "very fair" and 26 percent as "somewhat fair".
  5. The top three complaints among survey respondents were as follows:
    - 63 percent were unhappy their agreement didn't allow them to get any capital gain when their unit was sold.
    - 29 percent thought the deferred management fee charged by the village was too high.
    - 24 percent said the agreement required them to use the village's nominated tradespeople, preventing them shopping around for better rates.
  6. Attached is the article we published on our contract review and survey. We would be happy to provide additional information if it would assist the commission's work.

***Question 3: Do you agree that a full review of the retirement villages framework is needed?***

7. We agree a full review of the retirement villages framework is needed. There are major consumer protection gaps that need to be addressed in this sector. We therefore support the commission's recommended option to conduct a policy framework review.
8. The vulnerability of many residents living in retirement villages, and the potential for significant financial harm resulting from unfair terms and conditions, provide additional grounds for reviewing the current framework.
9. Specific attention should be given to the dispute process. Since publishing our review, we've been contacted by residents reporting unfair treatment by operators. These residents often feel they have no practical avenue to raise concerns, given the cost and time involved in using the formal dispute process.
10. We recommend the commission consider whether changes to the dispute process should be prioritised, given the well-established problems with the process.

**ENDS**



**Kapiti Coast Assn Inc**

**PO Box 479**

**Paraparaumu 5254**

**The Retirement Commissioner  
C/o The Commission for Financial Capability  
Wellington**

Dear Madam

Thank you for the opportunity to submit on the on the white paper on Retirement Villages.

**Who Are We**

Kapiti Coast Grey Power (KCGP) is an autonomous association that is a member of the Grey Power NZ Federation. It has 3000 members living within the boundaries of the Kapiti Coast District Council.

**The Kapiti Coast District Demographics**

27% of the residents in Kapiti are over the age of 65 and many live in nine villages established in the district.

**Why does KCGP have an Interest?**

We have members resident in villages and a significant number of members who may be contemplating residency. KCGP coordinated the various residences submission during the consultation to the Code of Practise and the Federation was very active in Christchurch after the earthquake in obtaining changes to the code. The issues in the white paper are not a surprise to KCGP as residents have contacted us on all the issues covered and more.-

**Our Submission**

**In response to your questions**

**Q 1** Has this white paper canvassed the issues fairly? **YES**

**Q 2** are there any points missing? **Yes**

2.1 missing point;

KCGP is surprised by the number of Government Departments involved in the administration of Retirement Villages Act and believes the structure should be



reviewed to improve the administration of the Act and to improve residents' ability to understand the roles and rights of each party to an ORA.

**Q 3** Do you agree that a full review of the Retirement Village Act **YES**

**Q 4** Are there issues still to be addressed? **YES**

The role of the Retirement Commissioner should be broadened to establish one point of control and to match the powers of other Commissioners. The Retirement Commissioner should have full responsibility for the Retirement Villages Act.

The current increase in property prices will be creating windfall profits for Village owners and making it difficult for low income residents who may for personal reasons need to move to another village. Other jurisdictions provide for a share of capital gains.

Currently the Statutory Supervisor is appointed and paid for by the Village Operator. KCGP believes that in order for this to be an acceptable practice the appointment process should be shared with the Retirement Commissioner. The Village Operator would continue to pay for the service.

**Q 5** Is there anything else you would like to say? **YES**

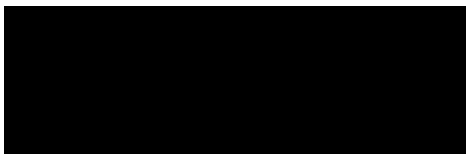
The code of practise should also be reviewed. A recent example of the code being ignored is the sale of Kapiti Village to Metlifecare with consulting the residents



**You may publish this Submission**

## Submission on Retirement Villages Legislative Framework

Contact Person:



### 1.0 Background

Citizens Advice Bureau New Zealand (CABNZ) Ngā Pou Whakawhirinaki o Aotearoa welcomes the opportunity to comment on the *Retirement Villages Legislative Framework Assessment and Options for Change 2020*.

The purpose of our organisation is to:

- Ensure that individuals do not suffer through ignorance of their rights and responsibilities or of the services available; or through an inability to express their needs effectively — Me noho mataara kia kua te tangata e mate i tōna kore mōhio ki ngā āhuatanga e āhei atu ana ia, ki ngā mahi rānei e tika ana kia mahia e ia, ki ngā ratonga rānei e āhei atu ana ia; i te kore rānei e āhei āna ki te whakaputa i ōna hiahia kia mārama mai ai te tangata.
- Exert a responsible influence on the development of social policies and services, both locally and nationally — Kia tino whai wāhi atu ki te auahatanga o ngā kaupapa ā-iwi me ngā ratonga ā-rohe, puta noa hoki i te motu.

We support the principle of partnership reflected in the Treaty of Waitangi - e tautoko ana Ngā Pou Whakawhirinaki o Aotearoa i te mātāpono o te pātuitanga e ai ki Te Tiriti o Waitangi.

We work to empower individuals to resolve their problems and to strengthen communities. The person-to-person service provided by over 2,500 Citizens Advice Bureau (CAB) volunteers is unique in New Zealand. From 83 locations around New Zealand, the CAB provides individuals with a free, impartial and confidential service of information, advice, advocacy and referral. Ka mahi mātou ki te whakakaha i ngā tāngata takitahi ki te whakatika i ā rātou ake raruraru, ki te whakakaha hoki i ngā hapori. He mea ahurei i roto o Aotearoa te ratonga kanohi-ki-te-kanohi e whakaratohia e ngā kaitūao 2,300 o Citizens Advice Bureau (CAB). Mai i ngā takiwā e 84 puta noa i Aotearoa, e whakaratohia ana e te CAB ki ngā tāngata takitahi he ratonga koreutu, tōkeke, matatapu hoki e pā ana ki te mōhiohio, te tohutohu, te tautoko me te tukunga.

We use our experience with clients to seek socially just policies and services in Aotearoa New Zealand.

## 2.0 CAB Clients and Retirement Villages

Every year the CAB assists around 250 clients with in-depth enquiries around Retirement Villages. Many of the enquiries that clients contact us about are similar to the issues that are raised by the discussion paper on the retirement village legislative framework. Some of the most common issues clients come to us about include:

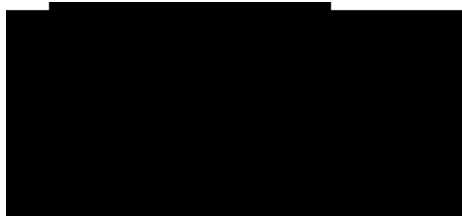
- Wanting to understand the legal structure/implications of moving into a retirement village.
- Wanting advice about how to make a complaint about a retirement village or expressing concern about how a complaint has been dealt with.
- Concern about unexpected or unexplained charges, particular in relation to transferring to other services or fees after termination of ORAs.
- Concern about poor communication from the village administrators
- Concern about time to resell the right to occupy a unit after someone moves out
- Poor processes for when people need to move to more intensive levels of care

Some of these enquiries raise significant concerns for us about the fitness of the current regulatory framework. We are particularly mindful that many of the clients who contact us are vulnerable because of their age and financial situations, and therefore it is essential that there is adequate protection against exploitation.

We therefore support the option to conduct a full review of the policy framework.

Thank you for this opportunity to comment. Please contact me if you have any questions, or want any clarification about our submission.

Yours sincerely



2021/02

25 February 2021

Commission for Financial Capability  
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19 Victoria Street West  
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By email: [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

Tēnā koe

### **Retirement Villages Legislative Framework: Assessment and options for change 2020**

Tōpūtanga Tapuhi Kaitiaki o Aotearoa, New Zealand Nurses Organisation (NZNO) welcomes the opportunity to comment on the Retirement Villages Legislative Framework: Assessment and options for change 2020.

NZNO is the leading professional nursing association and union for nurses in Aotearoa New Zealand, representing 51,000 nurses, midwives, students, kaimahi hauora and health workers on professional and employment matters. NZNO embraces Te Tiriti o Waitangi and contributes to the improvements of the health status and outcomes of all people of Aotearoa New Zealand through influencing health, employment, and social policy development.

Furthermore, we share the intent of the Ministry of Health's definition of equity which equally applies to NZNO work across professional, industrial and member activities.

In response to specific questions identified by the consultation:

Q 1 Has this White Paper canvassed the issues fairly and accurately? Yes

Q 2 Are there any important points that are missing? No

Q 3 Do you agree that a full review of the retirement villages framework should be undertaken? Yes

Q 5 Is there anything else you would like to say? Yes. Our commentary follows

The NZNO supports the recommendations documented in the Retirement Villages Legislative Framework: Assessment and Options for Change 2020 paper. The following includes a policy review that:

- Considers options to improve the resale and buy-back process.
- Considers options to restrict the charging of weekly fees after a resident vacates a unit.



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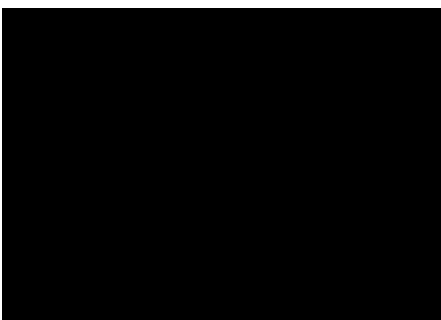
- Considers how to improve and standardise information about transferring into higher levels of care.
- Addresses the Code, including the Occupation Rights Agreement (ORA) provisions, with a view to establishing best practice and to balance operator control and residents' rights.
- Looks at the complaints function to simplify and formalise a clear and simple process.
- Considers whether changes are required to better support retirement village residents' welfare.
- Analyses future trends and considers whether consumer protections are strong enough to adapt to change, and further investigate whether different models should be encouraged.
- Tackles disclosure statements with a view to producing simplified and accessible documentation.
- A framework evaluation that explores the extent to which the presence of care changes the nature of a retirement village from a housing proposition to a health proposition. It should also explore whether the definition of a retirement village needs modifying to include a wider range of lifestyle developments.

Furthermore, *New Zealand's demography is changing, especially in Auckland, with a large growth in Asian population.* These changes bring opportunities for culturally focused villages in the future as well as risks that the prevailing business model will not appeal to broader ethnicities. What considerations are being given to Maori and Pasifika populations and implications for the wider family and whanau? What options are available to these groups within the current and proposed retirement villages legislation?

This consultation has not discussed issues relating to staff employed within retirement facilities. Is this an oversight or outside of this consultation? The NZNO recommends that staff (nurses and health care assistants) employed in retirement facilities are paid an equitable wage that reflects the work undertaken and is comparable to those working in District Health Boards (DHBs).

Thank you for the opportunity to be involved in your consultation process.

Naku noa na



3 March 2021

The Commission for Financial Capability  
PO Box 106-056  
**AUCKLAND 1143**

Email: [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

### **Submissions on White Paper: Retirement Villages Legislative Framework**

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Our short submissions on the White Paper are informed by our role as an approved independent dispute resolution scheme which investigates complaints from consumers about financial service providers.

We investigate complaints about all types of financial services and products (except banking), including consumer credit, insurance, financial advice, KiwiSaver, estate administration, and transactional services. In the year ended 30 June 2020 we commenced 383 formal complaint investigations and completed 298 investigations.

Our submissions below are focussed on the White Paper's discussion on complaints.

#### **Recommendation to establish a central dispute resolution scheme**

The White Paper recommends establishing a central dispute resolution scheme that could deal with all complaints raised by the end consumer (those living in retirement villages and their families).

In our view, the challenge in establishing such a scheme is that there are a myriad of reasons why complaints can arise. At the comparatively lower level, for example, there could be a dispute between two residents in a village, or a minor dispute between the resident and the village. At the other end of the spectrum, there could be a systemic care failure/elder abuse issue within a retirement village. Most relevantly to FSCL, there could also be complaints about a financial service provided by a village operator or a statutory supervisor.

#### **Duplication of forums risk**

In our view, there are two factors to consider here. The first factor is that the most consumer-friendly approach would likely be having one central dispute resolution

scheme that could deal with complaints across the full spectrum. However, to a certain extent, establishing such a scheme would be 're-inventing the wheel'.

To unpack this a little further, our understanding is that there are two common financial services that operators and supervisors provide:

- 1) Operators grant loans to residents.
- 2) Occupation right agreements (ORAs) are a type of financial product offered by the operator.

We understand that operators need to be registered on the FSPR and presumably with a dispute resolution scheme to provide credit under a credit contract. In addition, the statutory supervisors are all registered FSPs.

This means that consumers already have access to the financial dispute resolution schemes for financial complaints about operators/statutory supervisors. Establishing another dispute resolution scheme could result in a duplication of forums, which is to be avoided.

#### **FSCL cannot assist in resolving non-financial disputes**

The second factor to consider is that FSCL's remit does not extend to resolving non-financial disputes. For non-financial disputes, we agree, it would be beneficial for a retirement village dispute resolution scheme (an 'RVDRS') to be established.

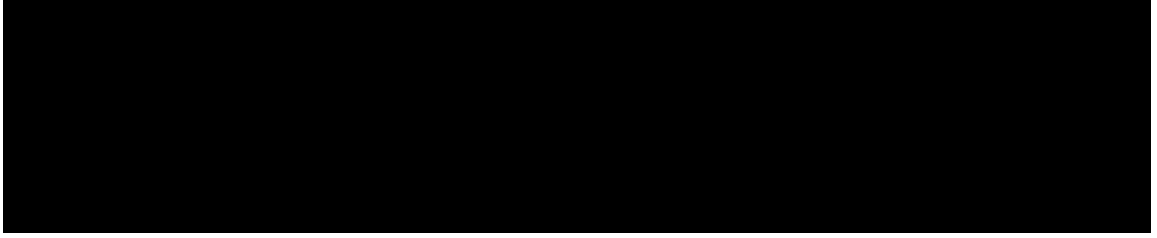
#### **Our suggestions**

We suggest that if an RVDRS is established, and assuming it would be the CFFC that would administer the scheme, the CFFC could enter into an MOU with the four financial dispute resolution schemes. The MOU could set out that if a complaint is received by the RVDRS which is about a financial service provided by an operator or a statutory supervisor, the RVDRS would refer the complaint to the relevant dispute resolution scheme.

In addition, if a complaint has several heads (for example, a complaint about both financial and non-financial issues), the MOU could set out that the RVDRS and the relevant financial dispute resolution scheme would work collaboratively to assist in resolving the complaint in its entirety.

To that end, we suggest it would be beneficial for FSCL and the CFFC to meet to discuss this letter in more detail. Please contact Stephanie Newton or me directly to arrange a time to meet, either in person, or via Teams or similar.

Yours sincerely





25 March 2021

Te Ara Ahunga Ora | Commission for Financial Capability  
Wellington

**By email:** [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

Tena koe,

**Re: Retirement Villages Legislative Framework: Assessment and Options for Change 2020**

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on Te Ara Ahunga Ora | Commission for Financial Capability's White Paper, *Retirement Villages Legislative Framework: Assessment and Options for Change 2020 (White Paper)*.

The Law Society's Property Law Section has reviewed the White Paper and provides responses to consultation questions that raise practical concerns or issues of workability.

**Q1** Has this White Paper canvassed the issues fairly and accurately?

Yes. The White Paper canvasses the issues fairly and accurately, acknowledging the tensions between operators, residents and statutory supervisors. It also recognises that the existing regime has become weighted in favour of retirement village operators' business models and considers how it could be evened up to take better account of residents' needs and interests.

**Q2 Are there any important points that are missing?**

Yes.

**Q2.1 If you replied Yes, please describe the missing points.**

*More detail and transparency are needed about all elements that feed into wider policy settings for the sector*

The White Paper proposes a full policy review. However, the paper does not explicitly address the essential issue of New Zealand's need for a well-functioning private elder care sector with sufficient capacity to meet demand, and in the context of the proposed full policy review should do so. Specific issues are identified but the paper does not expressly address:

- the growth in need for private residential and care facilities to cater for a growing population aged 65 years and over; and
- whether the public health system is able to cope with the increased numbers and specialised care requirements.

It is essential the private retirement village regime (and related elder care facilities) functions well for all involved, and with capacity going forward. These concerns are alluded to in the paper, but are not dealt with in detail.<sup>1</sup>

### *Exploring whether a separate Retirement Commissioner is required*

The White Paper acknowledges the limited remit of the Retirement Commissioner under the current framework,<sup>2</sup> but options to address this – such as a standalone Retirement Commissioner (separate from the Commission for Financial Capability), similar in scope to other Ombudsmen roles – are not explored in depth:

“The RC’s functions and powers under the Act are limited compared to those available under legislation empowering equivalent commissioners or ombudsmen. Extending the RC’s remit or engaging another agency with specific powers would provide more certainty for residents and their families.”

The Retirement Commissioner’s currently limited role and powers appear to be inadequate to respond to significant demand growth in the retirement and care facility sector. In addition, the current oversight regime (involving the Ministry of Housing and Urban Development, Ministry of Business, Innovation and Employment, Minister for Building and Construction, and the Registrar of Retirement Villages) is overly complex, and statutory supervisors are funded by operators.

The number of residents going into retirement villages over the next 15 to 20 years warrants a dedicated crown entity being established. This could be a dedicated Retirement Commissioner or Retirement Ombudsman with a team similar to the Ombudsman’s office, focused on being the sole watchdog of the retirement industry and dealing with disputes in retirement villages and monitoring operator performance. This would streamline processes and provide greater transparency and certainty for residents.

### **Q3 Do you agree that a full review of the retirement villages framework should be undertaken?**

The Law Society agrees that a full policy review is required to deal with the issues outlined in the White Paper. The other options outlined in Part 9 of the paper would not adequately address the issues.

The review should involve a taskforce with industry representatives, in addition to officials from the Ministry for Housing and Urban Development and Commission for Financial Capability. A multi-stakeholder approach drawing on perspectives of experienced people involved in the sector would provide balance to the review, alongside the expertise of officials.

From the perspective of the legal profession, the Law Society hopes that the outcome of the review would enhance lawyers’ ability to provide clear advice to clients who are retirement village residents (or potential residents) as to:

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<sup>1</sup> Te Ara Ahunga Ora | Commission for Financial Capability’s White Paper, *Retirement Villages Legislative Framework: Assessment and Options for Change 2020*, at p36: “The policy review could also consider possible impacts from other policy settings in relevant areas such as health, building, and other forms of housing.”

<sup>2</sup> White Paper, at p5; see also p17: “The RC’s functions and powers under the Act are not as extensive as those available under legislation empowering equivalent commissioners or ombudsmen, such as the Children’s Commissioner, Health and Disability Commissioner, Privacy Commissioner, or the Banking Ombudsman. The Banking Ombudsman has power to investigate disputes between customers and banks or non-bank financial service providers.”

- a) the rights and obligations that arise when they acquire an interest in a retirement village; and
- b) how disputes in the retirement village context can be resolved quickly and effectively.

The need for clear advice is heightened given that clients are elderly and may not be confident dealing with legal documents and processes.

The Law Society specifically endorses the following recommendations from the White Paper being included in the review:

- a) How to improve and standardise information about transferring into higher levels of care.<sup>3</sup>
- b) A review of the complaints function to simplify and formalise a clear and simple process.<sup>4</sup>
- c) Disclosure statements with a view to producing simplified and accessible documentation, including online resources.<sup>5</sup>
- d) Legislative clarification reducing cross-referencing between the Act, Regulations, and Codes to make the regulatory framework easier for consumers and operators to understand.<sup>6</sup>

In addition to the above, the legal workability of a number of aspects of the retirement village process could be improved, for example:

- a) Plain language requirements or default standardised documents for the Occupation Rights Agreement, disclosure statements etc. Other suggestions include a compulsory glossary of terms, highlighting key terms, or a contract that provides a standard form of general conditions with Word form schedules to be completed with specific details or variations.
- b) Expanded requirements for disclosure and certification from solicitors attending clients on signing of Occupation Right Agreements (similar to banking solicitor certificates or Enduring Power of Attorney certificates confirming that key terms were discussed).
- c) Improved and standardised disclosure regarding termination, payment obligations until resale and procedures for increases to weekly/ongoing costs.

As a general comment, it is evident that all parties would benefit from having a streamlined set of regulations and efficient dispute resolution processes. Practitioners advising retirement village operators (and the like) would also benefit by being able to easily assess the relevant rules and provide advice on their clients' rights and obligations.

#### **Q5 Is there anything else you would like to say?**

The Law Society would welcome information on timelines for next steps, and considers the review should be undertaken with a degree of urgency.

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<sup>3</sup> Ibid, at p 25.

<sup>4</sup> At p 27.

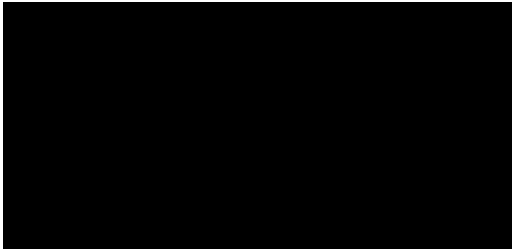
<sup>5</sup> At p 32.

<sup>6</sup> At p 36.

We hope these comments have been helpful. If further discussion would assist, contact can be made in the first instance via the Law Society's Law Reform and Advocacy Manager, [REDACTED]

[REDACTED]

Naku noa na,





**Submission to the Commission for Financial Capability's White  
Paper on the Retirement Villages' Legislative Framework:  
Assessment and Options for Change 2020**

**31 March 2021**

## About the NZACA

1. This submission is from the New Zealand Aged Care Association (NZACA), the peak industry body for the aged residential care (ARC) industry in New Zealand. We represent over 37,000 beds of the country's rest home industry, or about 93% of the total supply. Our members' services include four categories of care, rest home, hospital, dementia and psychogeriatric, as well as short-term care, such as respite.
2. Our members range from the very small stand-alone care homes from as little as six beds in more remote areas of the country right through to the larger care centres of more than 100 beds, some of which are co-located with retirement villages.
3. Advocating and lobbying to government to shape policies and create an environment that helps our members provide outstanding quality care for older New Zealanders is at the heart of what we do. We provide leadership on issues that impact on the success of our members, for example, the annual contract negotiation with District Health Boards (DHBs), the pay equity settlement and workforce recruitment and retention.
4. We produce valuable research, professional development opportunities, information and publications to help our members make informed business decisions, improve capability and keep them up to date with industry developments. We also run the annual industry conference, which is the showcase event for New Zealand's aged care sector.
5. Any enquiries relating to this submission should be referred to [REDACTED]  
[REDACTED]

## Overall comment

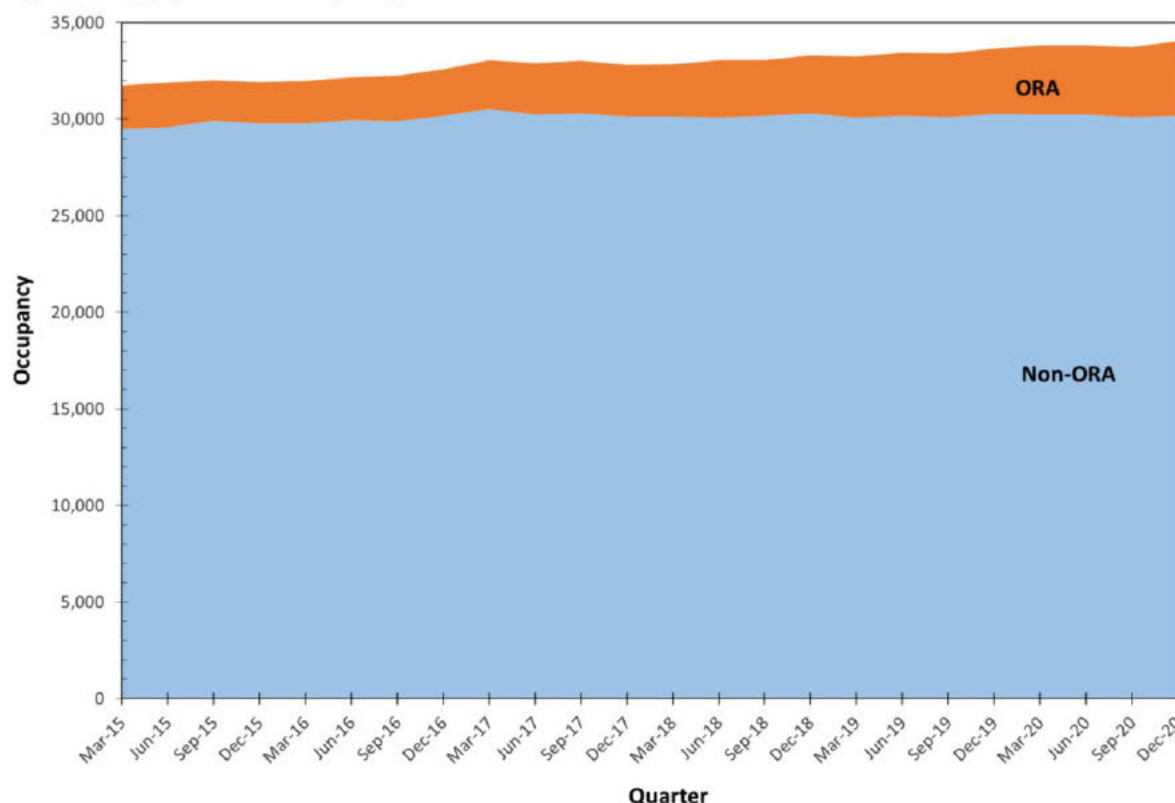
6. This submission is in response to the White Paper from the Commission for Financial Capability (CFFC) on the Retirement Villages' Legislative Framework: Assessment and Options for change 2020. The NZACA thanks the CFFC for this opportunity.
7. The assumption is made in this submission that inclusion of explanations or definitions of terms relating to retirement villages and the Retirement Villages Act 2003 are not necessary.

### *The interface of care and residence*

8. As stated in the white paper, many consumers confuse retirement villages and rest homes. Some intending and current residents do not recognize that a different framework applies to an aged residential care facility, even where that facility is co-located with a retirement village.
9. The legislative framework for aged residential care is separate from that of retirement villages. The Retirement Villages Act 2003 covers all legislation relating to the licensing and operating of retirement villages; the legislative framework for the ARC sector comes under the Health and Disability Services (Safety) Act 2001, the Residential Care and Disability Support Services Act 2018 and associated regulations, including the Health and Disability Services Standards 8134:2008 and the Code of Health and Disability Services Consumers' Rights. ARC providers also have an annually reviewed contract (the Age-Related Residential Care Services Agreements) with their local District Health Board to provide specific care to the resident.

10. Nevertheless, the Retirement Villages Act 2003 and the legislative framework around ARC do cross over where someone who is living in a retirement village under an occupational rights agreement (ORA) is also receiving care. While this is a small percentage of the total number of beds in ARC, it is also where the largest growth of bed category has occurred over the last five years. (See Figure 1 below for a comparison of ORA versus non-ORA beds in ARC.)

**Figure 1: Supply of Rest home, Hospital and Dual Service Beds**



Source: TAS ARC Quarterly Reporting Survey, December 2020

11. ORA bed numbers are broken down as follows in Figure 2.

**Figure 2: Breakdown of ORA bed numbers and facilities providing beds by service**

	ORA Beds	Facilities providing beds
ORA Rest Home Only	2,519	96
ORA Hospital Only	19	2
ORA Dual Service	1,332	53
<b>Total</b>	<b>3,870</b>	

Source: TAS ARC Quarterly Reporting Survey, December 2020

#### *Funding of care*

12. Where a person aged 65 or over is assessed by their DHB to require rest home, hospital, dementia or psycho-geriatric care in an ARC facility, they may be eligible for a Residential Care Subsidy – a government subsidy that pays for the cost of care. If they are not eligible, they will have to pay for care out of their own income and assets. However, the government limits how much that cost towards care will be – known as the “maximum contribution”.

13. On entering ARC, the resident signs an admission agreement with the provider, laying out the costs, level and expectations of service. The fee for any assessed level of need includes a small element to cover the accommodation requirements for delivering the contracted care i.e., bed space and bathroom facilities.
14. Earlier models of ARC stipulated a minimum space of 9m<sup>2</sup> per resident, with access to toileting and bathroom facilities (which were typically communal facilities). Generally, residents shared a room with up to five other people. While innovation has seen models change to a private bedroom for each resident, the maximum contribution now allows for very little more than a room measuring 11m<sup>2</sup> with shared facilities.
15. As funding to the sector has not met the pace of increased costs of care nor the lift in expectations from residents who now enter aged care, operators have worked hard to find ways to meet incoming residents' expectations of a private room, a private ensuite with toilet and shower, as well as a room large enough to allow personal effects and perhaps even a kitchenette. These premium suites can measure up to 60m<sup>2</sup>.

*The regime's flexibility allows the sector to cater for a widely diverse demographic*

16. Traditionally, ARC providers have charged an "accommodation supplement", above the maximum contribution, for those residents that wanted a premium room. Another way to meet the capital cost of building this type of accommodation, is by enabling access to the room through an ORA.
17. While accommodation supplements are attractive to families that have the ability to make regular co-payments from income, the ORA model works better for those who may have easier access to capital than income. Not only do offerings of this form meet the expectations and needs of many who now enter care, they have also added to the choice that is on offer across the sector to a widely diverse demographic.
18. It is important to note that without either the ability to have an accommodation supplement paid or an ORA created, this substantial lift to the quality and choice of accommodation that some in the sector can now offer would not have occurred. The regime's flexibility allows this to happen, and further regulation would seriously constrain this choice.

*Disclosure regime*

19. An ORA in the ARC sector will be issued in compliance with the Retirement Villages Act 2003 and will be subject to all the requirements that pertain to a registered operator of a retirement village.
20. Where a retirement village resident transitions into aged residential care (following a needs assessment), but remains under an ORA, they must sign a variation on their existing ORA or terminate their existing ORA and sign a new one. They must also sign an admission agreement – a contract between themselves and the care provider – that is reviewed annually.
21. As is shown in paragraph 20 above, there is considerable legal paperwork involved for the resident to transition under an ORA from retirement village living into aged residential care is large. Commonly, the transition happens as a result of a sudden medical event. Relations are



usually involved in assisting the resident to make the transition and this is generally a very stressful and somewhat bewildering time for both the resident and their relatives. There is a lot of compliance to understand at this time.

## **Conclusion**

22. The age residential care sector is comprehensively regulated through the Health and Disability Services (Safety) Act 2001, the Residential Care and Disability Support Services Act 2018 and associated regulations, including the Health and Disability Services Standards 8134:2008 and the Code of Health and Disability Services Consumers' Rights. Operators are audited regularly as part of the accreditation regime and should any issues arise regarding the care of a resident, there is a robust procedure for complaints. Added to this, the Ombudsman will begin monitoring ARC facilities from 1 July 2021 as part of New Zealand's obligations under the United Nations Optional Protocol to the Convention Against Torture (OPCAT) to prevent torture and other cruel, inhuman or degrading treatment and punishment.
23. As stated previously, transition from a retirement village into care can be a stressful time. However, residents and their families do take comfort from transferring their ORA from the village to a care facility. It is a known structure that they are familiar with and in which they have confidence.
24. The NZACA appreciates the current ORA system as being relatively straightforward and would reject any system that would make it more complex.
25. The NZACA looks forward to discussing this submission with the Retirement Commissioner.
26. Any enquiries relating to this submission should be referred to [REDACTED]  
[REDACTED]

END

Anthony Harper

31 March 2021

Commission for Financial Capability  
Auckland

By email: [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

## Submissions On White Paper - Retirement Villages Legislative Framework: Assessment And Option For Change 2020

Our firm has the largest specialist legal practise for retirement villages in New Zealand. We have a team of 12 that provide both settlement services and advice to operators, statutory supervisors and occasionally to residents. We act for a wide variety of operators including not-for-profits with small numbers of units, privately-owned villages and groups, large not-for-profits and large listed entities. These operators represent a range of ownership models and financial offers.

The two partners in our team have decades of experience working within the retirement village sector and have extensive and deep knowledge of both the current, and prior, legislative regimes.

As such, we feel that our views in these submissions should be given serious consideration. We would welcome the opportunity to discuss our submissions further with the CFFC.

In response to the five key questions for which you are seeking feedback our answers are as follows, with further discussion overleaf.

- 1 Has the White Paper canvassed the issues fairly and accurately? Somewhat.
- 2 Are there any important points that are missing? Yes.
- 3 Do you agree that a full review of the retirement villages framework should be undertaken?  
No.
- 4 If no, are there any issues that still need attention? Yes.
- 5 Is there anything else you would like to say? Yes.

Yours faithfully

[Redacted signature]

[Redacted signature block]

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[Redacted text]

[Redacted text]

[Redacted text]

## **Background**

The White Paper appears to evidence some level of misconception as to the origin and development of the current model and legislative regime.

We note that the current model grew out of retirement villages started by both not-for-profit and commercial operators dating back to the 1970s. As residents did not have an interest in land, had a right to receive money back in the future and to use communal facilities they fell within the definition of both a debt security and a participatory security under the Securities Act 1978. Typically, operators of villages registered prospectuses and prepared investment statements to comply with this regime. During the 1990s and early 2000s villages typically offered licences to occupy and they had a similar commercial model to present day with the difference being that the fixed deduction (DMF) was a lower amount but the operator charged refurbishment costs to former residents, often up to an as new condition of a unit.

The purpose of the Securities Act was to protect all forms of investment, except for those in land where an investor held their own title and chattels owned by an individual. The Act covered a wide range of products such as shares, debentures, forestry partnerships and marina berths. The right to occupy a retirement village unit is not an investment in the traditional sense. As such, villages did not sit easily within that regime and the Retirement Villages Act 2003 (the Act) was enacted to remove villages from the Securities Act and create regulation that was specifically designed to regulate retirement villages, protect residents' rights and to provide a legal framework that is readily understandable by residents, intending residents and operators. This framework is now well understood by all stakeholders and while there is always room for improvement it is fundamentally sound.

A number of comments in the White Paper refer to the framework being in some way an obstacle or a handbrake on delivering retirement housing that is appropriate for the changing composition of NZ's ageing population including providing low cost rental options, but the purpose of the Act was not to cover those issues. Rather, it was a mechanism to place regulation around an extant business model. The Act was only ever intended to be a framework for retirement living options where there is payment of a capital sum. There is no reason why retirement living options that do not include a capital payment cannot be developed outside the framework of the Act.

There is an underlying assumption in the White Paper that there are set differences in the financial models for licence to occupy and unit title villages. This is not the case. There are some licence to occupy ORAs where the resident is responsible for and has the right to control the marketing of a unit and some where residents are entitled to all or a portion of the increase in value on the relicensing of the unit. Equally, there are some unit title ORAs where the operator still controls resale and the resident is not entitled to capital gain. The current legislative regime is flexible enough to allow these different approaches to develop.

One key area that the White Paper does not adequately acknowledge is that changes promoting residents' interests to be repaid as soon as possible, including compulsory buybacks, predominantly place the interests of former residents (or more often their estates) above the financial viability of a village as a whole, and in turn this impacts on the ongoing rights and security of remaining village residents. We have experience of compulsory buybacks working to the advantage of a few individuals but then leading to the overall failure of a village.

## **Resale and buyback times**

The White Paper refers in a number of places to a lack of incentive on operators to resell a unit. We do not agree with this proposition for a number of reasons:

- There is an obligation in the Code of Practice (COP) on operators to begin the process of "promptly" entering into a new ORA and taking steps to market the unit (clause 51(3)). Failure to do this gives a resident a right to make a complaint or file a dispute notice.
- Operators have a financial incentive to relicense an ORA for the unit in order to receive termination payments and (where applicable) any increase in value of the unit on relicensing. Many operators now cease charging both the weekly fees and the DMF accrual following termination of an ORA so this is a powerful economic incentive to relicense the unit as soon as possible so that a new DMF period commences and weekly fees are paid for

the unit. It is often argued that where weekly fees continue to be charged following termination this means that an operator has no incentive to promptly relicense a unit. The ability to recover weekly fees during the resale period is a far lesser financial consideration especially as most weekly fees do not actually cover the costs of operating the village (see below for further discussion on this).

- The reference to operators having "interest-free use of outgoing resident's capital" is a misnomer as it seems to suggest that operators are sitting on a pot of money contributed by all residents. This simply is not the case. The receipt of resident's capital is in the main part utilised to repay the former resident, repay bank debt on new builds, to make contributions to the maintenance and upgrading of village property.
- Operators do not want units to sit empty longer than necessary as it affects the resident dynamic within the village, the operator's reputation and consequently the value of the Village itself.

The White Paper refers to operators giving priority to new builds over resale of existing units. We note that Regulation 11(b) requires that the ORA include a provision that prohibits this and in our experience, operators are very conscious of this obligation. Further, human nature is such, that there is a tendency for prospective residents to favour modern, new units over older units. This is why refurbishment of older units tends to be extensive to make older units more desirable.

The White Paper points to inefficiencies in the resale process. Although we accept that some operators may from time to time not act as promptly as they could, it should be noted that there is a myriad of external factors which impact on the refurbishment resale process. For example, delay in removing the former resident's belongings, delay in finding construction contractors to undertake refurbishment, waiting for building consents for some refurbishments, delays in supply chain for building materials and fittings, and so on.

### **Guaranteed timeframes for buy-backs**

We have strong reservations about this proposal. As mentioned in the White Paper this could cause liquidity issues for some operators.

We have previously acted on the winding up of one retirement village where the ORA had included a mandatory buy back. It was a small not for profit village, and strong competition had arrived in the area. A number of ORAs terminated and new residents could not be found. There simply were not the funds to repay the residents. This caused an issue of the operator not being able to trade while insolvent. No buyer could be found who was willing to buy the village as a going concern. Despite all parties working together to try to find a solution, the only option was to wind up the village and sell it as land and buildings. The residents had to leave and received back less than their contractual entitlement.

Introducing a mandatory buy back requirement could well result in the same outcome for a number of villages. Although this is an immediate risk for small operators, it would also adversely affect the cashflow and stability of medium sized operators and could affect the valuation of larger operators.

### **Interest payable during vacant period**

Paying interest during the resale period is a marketing incentive developed by some of the larger operators to differentiate themselves. So to impose this on all operators would, in effect, mean that the larger operators have been able to drive the contractual terms of all operators. The actual financial benefit to residents of these types of provisions may be negligible in times of low interest rates.

### **Allocation of capital gain**

This proposition simply does not fit within the management of resale and buyback times, and there is very little discussion of the rationale, or analysis of impact, in the White Paper. The suggestion that it is unfair that "capital gain" is not shared with residents, simply indicates a misunderstanding of the retirement village offering. Residents are being offered the right to live in a village for the rest of their lives, to receive agreed services (including no longer having to worry about

maintenance issues), use common facilities and enjoy certainty as to the costs they pay for the provision of their unit and the common facilities. Residents have elected to leave the property market (and realise capital gain on their home) in return for receiving various benefits that they would not receive if they remained in their home in the community. They have also chosen this option to avoid the ongoing costs and organisation required in maintaining property. The benefit in not partaking in property ownership risks has particularly been seen in many cases of leaky retirement village units where all the responsibility and cost of remediation has been borne by the operators and not passed on to residents.

As a corollary of this most operators no longer pass on the risk of a decrease in value of a unit to the resident as they recognise that this is rightly their responsibility and residents and their families should have certainty as to the amount they will receive on termination.

If capital gains sharing were to be mandated we expect that it would lead to a reworking of the offering. Operators would revert back to requiring that residents also share in any capital loss, contribute towards maintenance and refurbishment, and the DMF could be increased in order to ensure adequate reserves to carry out renovation and renewal of village facilities and units. This revenue is critical for operators developing new care facilities. We note that current offerings by operators who do pass on capital gain tend to be in villages which are aimed at a younger cohort and/or may not have such extensive facilities or care.

We are currently in times of large capital gains in the property market and it is not wise to make policy decisions which may actually have a detrimental effect to residents if there were to be a declining market, or even a stagnant market.

If capital gains sharing is to be mandated it should only apply to new ORAs and not to existing ORAs.

### **Restriction of changes to larger operators**

While at first instance the concept of only applying some changes to larger operators looks attractive, in reality we do not consider that this is prudent or workable. It would be very hard to implement and potentially inhibit growth with villages not wanting to develop further if a threshold were put in place. Further it could potentially serve to drive intending residents away from smaller operators therefore putting the sustainability of those villages at risk.

### **Restricting charging of weekly fees after termination**

This is an area where there is already considerable competition in the market and probably there is no need for any legislative change. For very small villages the compulsory cessation of fees could cause real hardship to the operator.

Should there be a change in this area it is essential that weekly fees do not cease for those residents who control the marketing of their own unit.

### **Information requirements for transfer to care**

The CFFC and RVA have worked together to develop best practice disclosure guidelines for the transfer to care; this is not acknowledged in the White Paper. We recommend that these guidelines be reflected in an amendment to the Code of Practice.

### **Treatment of fixed deductions on transfer to care**

We do not consider that a single fixed deduction for the length of a resident's stay in the village should be mandated. It is an operator's right to determine the terms for transfer to a new unit or to the care facility. These terms should be clear and transparent so that a resident has certainty. Restricting the ability to charge a second DMF will potentially result in operators simply removing the right to transfer.

The concept of one DMF while in a village, like the paying of interest for delayed repayment, is a competitive term offered by large operators at their own option and should not be imposed on all operators.

## **Review of disclosure statement content**

We support a review of the information that must be contained in a disclosure statement. The current legislative framework requires repetition of the same information in both the ORA and the disclosure statement which we agree is confusing to residents and has the potential to obscure the key terms of the offer. We support reference to standardised information online rather than being set out in the documents.

## **Additional comments**

The schedule on page 11 is misleading. Residents in a care facility are described as having an Agreement for Residential Care, we assume that this is a reference to an admission agreement. It should be noted that residents in care suites are also required to sign an admission agreement with the operator. The provision of long term residential care in care suites is highly regulated and it is not necessary or appropriate for the Act to be modified to cover the same material. It is also essential that complaints relating to the provision and standard of health care continue to be dealt with as health complaints and not under the dispute panel process.

Page 20 of the White Paper says that operators may apply to the Registrar to be exempted from complying with any of the provisions of the COP but that no applications have been made. Soon after the introduction of the Act we attempted to apply for an exemption but were advised that no regulatory machinery was in place for the Registrar to consider a request for an exemption. If it is decided that changes should be made to the COP to address some of the issues set out in the White Paper then it is important that machinery is put in place to enable exemptions to be granted.

Page 35 raises a concern about existing ORAs having to be amended. If any changes are made ideally the changes should not have a retrospective effect, and if they are, then this should be done in a way that does not pass on any cost to operators or residents, ie by way of COP changes.

The case studies presented in the appendix to the White Paper simply give a one-sided view of things without giving the relevant operator the chance to rebut or respond to the allegations. As such they cannot be said to be proper case studies.

3 May 2021

Jane Wrightson  
Retirement Commissioner  
c/o Rebecca Jenner  
Governance Administrator

By email: [becca@cffc.govt.nz](mailto:becca@cffc.govt.nz)

Tēnā koe Ms Wrightson,

**Enquiry: Retirement Villages White Paper**  
**Our ref: E21HDC00576**

Thank you for the opportunity to comment on the White Paper "Retirement Villages Legislative Framework: Assessment and Options for Change 2020" (the White Paper).

The Health and Disability Commissioner is charged with the role of promoting and protecting the rights of health and disability services consumers, as set out in the Code of Health and Disability Services Consumers' Rights (the HDC Code). While I am able to make general comments and indicate those provisions of the HDC Act and the HDC Code that appear to be particularly relevant to your query, I am not able to give advance rulings on their interpretation and application.

The White Paper highlights a number of important issues within the retirement village sector. Many of the issues raised by the White Paper (such as amendments to Retirement Villages Legislative Framework as it relates to weekly fees, or terms of buy back or resale) are outside of HDC's jurisdiction. However, there are some matters, particularly those relating to provision of health or disability services<sup>1</sup> which I believe I am able to comment on.

*Provision of services and the interface between retirement villages and residential care*

There has been a significant shift in the focus of retirement villages and the services they provide since the Retirement Villages Act (RVA) came into effect in 2003. Many retirement villages have repositioned themselves from providing lifestyle housing for independent older people to providing independent living together with a continuum of care such as rest home care, hospitals and dementia care services. In addition, in recognition of the increasing age and health needs of residents in independent living arrangements, some village operators offer services such as welfare checks and first

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<sup>1</sup> I note sections 32(2) and 92(3) of the Retirement Villages Act which state that nothing in the Code of Residents' Rights or the Code of Practice applies to any health or disability services or any facilities to which the HDC Code applies.

aid services for residents living in independent units. The Commissioner has recently considered two cases where such checks failed to identify that urgent medical attention was required. These cases highlight a grey area in terms of an operator's scope of responsibility for people living in independent living type situations where there is some form of assistance provided as a result of an emergency medical event. I note that health or disability services provided to a resident in an independent unit by retirement village or rest home staff can and do fall within HDC's jurisdiction. This is a determination made on a case by case basis depending on the circumstances of each case. Where such services are provided as part of an agreement, residents have the right under the HDC Code to have those services provided with reasonable care and skill.

In my view the interface between residential care and retirement villages is not well understood by residents and their families. There is little standardisation of terminology, resulting in inconsistencies in definitions and disclosure practices across the sector. There is a specific point of confusion surrounding the use of the terms "care package" or "lifestyle care package" by some retirement villages for additional services that are not part of certified residential care. These terms may suggest to older people and their supporters that there will be a provision of care services (in the event of a medical event for instance), although these terms do not mean the same level of support to the operator.

There is a need for clear disclosure to prospective residents and their families about both the conditions of support in a retirement village setting and the conditions of future access to residential care for those purchasing occupation right agreements for independent villas and serviced apartments. There is a need to make sure older people are protected consistently when they enter into retirement villages or residential care facilities and there is a case for the development of policy relating to retirement villages and the standards and support expected for residents in independent living arrangements experiencing medical events, and as residents transition from independent living to requiring greater support. The policy should extend to looking at the disclosure requirements for residents and their families and whether information about procedures in medical events is sufficiently well covered.

HDC would be happy to provide further submissions on this matter in the event a policy review of this nature is undertaken.

### *Complaints process*

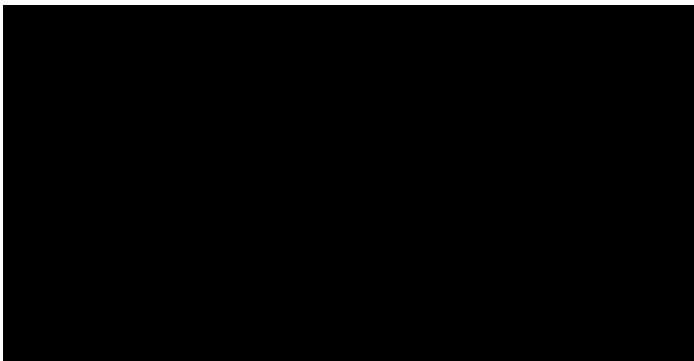
The White Paper highlights the wishes of some residents for the establishment of an ombudsman like agency to investigate complaints about retirement villages and make decisions at an earlier stage. You cite HDC's use of an advocacy service as an example of a system that might be useful in the retirement village complaints context, noting that advocates are appointed for complainants when complaints are made to HDC.

I would like to take the opportunity to clarify how the advocacy service works in practice. Under the HDC Act it is open to HDC to refer a complaint to an advocate for



the purpose of resolving the complaint between the parties. HDC does not refer all complaints to an advocate and can instead take various other actions as set out in the HDC Act. As you may be aware, the establishment of an independent advocacy service to help resolve complaints about health or disability services was one of the recommendations in the Cartwright Report. Advocacy services are currently provided through the Nationwide Health & Disability Advocacy Service. You may find it useful to visit their website at [advocacy.org.nz](http://advocacy.org.nz) for more information about the service. For the period 01 July 2019 – 30 June 2020, 93% of consumers and 93% of providers who responded to satisfaction surveys said they were satisfied or very satisfied with their contact with the advocacy service.

Thank you again for the opportunity to comment on the White Paper. While I must again reiterate that many of the matters discussed in the White Paper are outside of HDC's jurisdiction, I hope you have found the above comments helpful.



**Online submission:**

Q1 Yes

Q2 Yes

See letter from Legal Executives New Zealand emailed separately to [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

Q3 Yes

Q4 Yes

See letter from Legal Executives New Zealand emailed separately to [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

Q5 See letter from Legal Executives New Zealand emailed separately to [consultation@cffc.govt.nz](mailto:consultation@cffc.govt.nz)

**Addendum (see next page)**



26 February 2021

Commission for Financial Capability  
PO Box 106056  
Auckland City  
AUCKLAND 1143

By email: [consultation@cfc.govt.nz](mailto:consultation@cfc.govt.nz)

### **Retirement Villages Act - Proposed Legislative Amendments**

1. The New Zealand Institute of Legal Executives Incorporated (Institute/ our/ we) represents more than 1170 Registered Legal Executives throughout New Zealand.
2. We see the current review of the Retirement Villages Act 2003 (RVA) and relevant regulations as referenced in the Commission for Financial Capability's White Paper *Retirement Villages Legislative Framework: Assessment and Options for Change 2020* (White Paper) as an appropriate opportunity to seek further review of the RVA to allow for Fellows of the Institute to provide independent legal advice to clients, and to witness and certify Occupation Rights Agreements (ORA) under the RVA.
3. We attach background information on the Institute, which includes the criteria for members to attain and retain Fellow status.
4. We consider that the White Paper has canvassed issues impacting on retirement villages, the residents as consumers, and the RVA in a fair and accurate manner. Notwithstanding this, we believe that there are issues that have been overlooked, primarily the restrictions under the RVA relating to the persons who may advise and witness an ORA. Our view is that the current provisions of the RVA and regulations relating to independent legal advice and to witnessing and certifying ORAs can add significant cost and, on occasions, stress to consumers who, as we all appreciate, are usually elderly and more vulnerable members of our society.
5. The key aspect of our submission is that, more often than not, it is Registered Legal Executives who are at the "coalface" of interaction with clients and it is Registered Legal Executives who provide the preliminary advice on the ORA and then sit down with the client and a lawyer to go through the ORA again, for the benefit of both the lawyer and client.

### **Retirement Villages Act 2003**

6. A significant number of Registered Legal Executives practice property and elder law and have clients who are entering into ORAs. The RVA currently requires that:
  - s.27(3) a resident receive independent legal advice before signing an ORA
  - s.27(4) the ORA be witnessed by a lawyer
  - s.27(5) the lawyer who witnesses the ORA must certify that they have fully explained the general effect of the ORA and its implications to the resident.

Under the RVA, 'lawyer' has the meaning given to it by s. 6 of the Lawyers and Conveyancers Act 2006: *lawyer means a person who holds a practising certificate as a barrister and solicitor.*



7. The Registered Legal Executive acting for the client will:
  - have full knowledge of the transaction and the client's affairs
  - prepare the written report on the provisions of the ORA and respond to any preliminary queries
  - act on the conveyance to sell the client's current property
  - ensure the client has a valid will and enduring powers of attorney, which are usually a requirement of village operators under an ORA
  - brief the lawyer providing the independent legal advice to the client
  - attend the meeting with the lawyer and the client.
8. We seek the right for Fellows to provide the independent legal advice and witness ORAs as set out in s.27 of the RVA. A Fellow is required to have a minimum of eight years' experience in qualifying employment as a Registered Legal Executive and will have the knowledge and experience to provide the advice.
9. Fellows understand the significant fiduciary responsibilities associated with providing independent legal advice and witnessing the client's signature to an ORA.
10. It is more efficient and cost effective for a client already meeting with the Fellow on matters associated with the transaction to complete all documentation without involving a lawyer solely for the purposes of advising on and witnessing the ORA.
11. We believe the following amendments are required to the RVA:
  - Interpretation - add the following definition:
    - 'legal executive - a person who -
      - a. is a Registered Legal Executive and a Fellow of the body (incorporated under the Incorporated Societies Act 1908) that immediately before commencement of the amendment of s.27(4) of the Retirement Villages Act 2003, was called the New Zealand Institute of Legal Executives Inc; and
      - b. holds a current annual registration certificate issued by that body; and
      - c. is employed by, and under the direct supervision of, a lawyer.'

This proposed definition substantially follows clause 94A(9) of the Protection of Personal and Property Rights Act 1988.

- Amendment to s.27(4):

'The signature of the intending resident on the occupation right agreement must be witnessed by a lawyer or legal executive.'
- Amendment to s.27(5):

'The lawyer or legal executive who witnesses the signature of an intending resident must certify on the prescribed form (if any) that before the intending resident signed the agreement, the lawyer or legal executive explained to that person the general effect of the agreement and its implications.'

## **Retirement Villages (General) Regulations 2006 ("Regulations")**

12. We believe the following amendments would be required to the Regulations:

Schedule 2 - certificate by lawyer advising intending resident - all references to 'lawyer' be amended to 'lawyer' or 'legal executive'

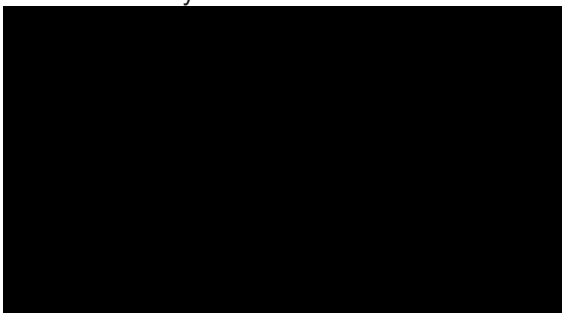
Schedule 4 - 'You must obtain advice from a lawyer or legal executive independent of the operator of the village .....

### **Conclusion**

13. We have canvassed law firms throughout New Zealand and received a significant number of letters from firms in support of the changes we are seeking that would allow Fellows of the Institute in their employment to advise on and witness ORAs. The letters can be made available to you on request.
14. The Institute is also engaging with operators in the retirement village sector, statutory managers, and with the New Zealand Law Society to discuss the issues and to gain the support of those organisations to the requested changes to the RVA and regulations in respect of the rights for Fellows of the Institute to advise on and certify ORAs.

Please do not hesitate to contact us if you wish to discuss any of the points we have raised above. We have responded online to the White Paper consultation survey.

Yours faithfully



## LEGAL EXECUTIVES NEW ZEALAND - BACKGROUND INFORMATION

- The New Zealand Institute of Legal Executives Inc was incorporated in 1975. The institute is governed by a National Council of 13 elected members, six of whom represent regional branches of the institute, and is managed by a full-time executive officer with the support of part-time staff. The institute rebranded to 'Legal Executives New Zealand' (LENZ) in the second half of 2020. The legal name remains the "New Zealand Institute of Legal Executives Incorporated".

LENZ is the professional body for legal executives, representing more than 1360 members throughout New Zealand.

- LENZ members are required to abide by our constitution and code of ethics. We have a disciplinary process and the National Council may suspend or terminate the membership of any member who is guilty of conduct unbefitting a member or who wilfully commits a breach of the rules, or may impose other sanctions such as further supervision or mandatory attendance at appropriate Continuing Professional Development (CPD) activities. In addition, members are subject to the New Zealand Law Society's Rules of Conduct and Client Care.
- We have mandatory CPD policies similar to those of the New Zealand Law Society and require the highest standards of legal knowledge and professional conduct from our members.
- We have four levels of active membership. In descending order, they are: Fellow, Associate, Affiliate and Support.
- Since 2001 Fellows, Associates and Affiliates have been issued with annual registration certificates and are 'Registered Legal Executives'. Registration differentiates these experienced professionals from people who call themselves 'legal executives' but who may not be qualified or have relevant experience.
- Fellows, Associates and Affiliates must all meet 'qualifying employment' criteria and work under the supervision of a lawyer who holds a current practising certificate.
- Before annual registration certificates are issued each year the supervising lawyers of Registered Legal Executives are required to complete a qualifying employment certification to confirm that their Registered Legal Executive is eligible to retain their membership status.
- More than 1170 members are Registered Legal Executives and over 330 Registered Legal Executives are Fellows.
- Since January 2001 completion of what was previously the New Zealand Law Society Legal Executive qualification and is now (since 2017) the New Zealand Legal Executive Diploma, has been mandatory for all applicants for Fellow, Associate or Affiliate membership. The qualification consists of six papers designed to provide legal executives with a sound knowledge of essential elements of the law and the application of those principles in the practice of law.
- In addition, applicants for Fellow and Associate membership are required to have the following minimum experience in qualifying employment:
  - Fellows - at least eight years, including five years as an Associate member
  - Associates - at least five years, including three years as an Affiliate member.
- Membership status is linked to employment. Should a Registered Legal Executive cease qualifying employment, their membership reverts to Support level and they surrender their rights and status as a Registered Legal Executive.
- Registered Legal Executives are entitled to associate membership of the New Zealand Law Society through their LENZ membership. In June 2020 more than 570 Registered Legal Executives were associate members of the NZ Law Society. A number of our members are also associate members of the Property Law Section of the New Zealand Law Society and associate members of ADLS Inc.
- Fellows have the right to take statutory declarations under the Oaths and Declarations Amendment Act 2001.
- Under the Protection of Personal and Property Rights Amendment Act 2007, Registered Legal Executives (Fellows, Associates, and Affiliates with at least 12 months legal executive experience) have the right to explain the implications to donors of, and witness donor signatures to, enduring powers of attorney.



## Submission from Eldernet & Care Publications

# Retirement Villages Legislative Framework: Assessment and Options for Change 2020

### Background to our submission

At The Eldernet Group we are firm in our vision to “support choice and a brighter future for older people”. Founded over 20 years ago by nurse and social worker, Eleanor Bodger, QSO, we continue to be New Zealand’s leading source of information for older people over multiple channels.

Retirementvillages.co.nz is one of our latest offerings and is based on decades of knowledge about how the sector originated, and how it has moved with the times to largely meet the demands of the consumer.

We also continue to operate in the ‘hard copy’ space and produce increasing numbers of the ‘Where From Here - He Ara Whakamua’ handbooks across New Zealand. These guides are distributed via organisations and agencies such as DHBs, Age Concern, dementia support groups, marae-based services, public libraries etc. The Citizens Advice Bureau report of 2020 “Face to Face with Digital Exclusion” provided strong data to compel us to continue this work.

Our funding model is unique - we receive income from listed companies, small owner operators, religious and welfare driven not for profits, District Health Boards, government departments and other sources. This puts us in an unenviable position. How do we ‘speak the truth’ when we could reduce our income by not supporting the positions held by any one of these entities?

The truth is we go back to our “why”. Because we know that we are “supporting choice and a brighter future for older people”.

**Our answers to the questions posed in the CFFC White Paper are answered in short here and we follow this with a discussion of some of the points raised throughout the document.**

Q1. Has the White Paper canvassed the issues fairly and accurately?

Yes, in the main.

Q2. Are there any important points that are missing?

We don’t believe so.

Q3. Do you agree that a full review of the retirement villages framework should be undertaken?

Yes, BUT this is not because the sector does not do a good job at self-regulation (we believe they generally do), NOR because of some bad experiences (we believe these are a minority) but because New Zealand and New Zealanders have changed since the Act and Code were introduced. The current legislation is flawed and



possibly too restrictive for example the definition of what a retirement village is, and we believe new legislation could do better. New frameworks should look to the future, thinking about what happens to villages after the Boomers have passed through, how can we provide for intergenerational living, how will housing stock be repurposed, improved, rebuilt, maintained? For whose benefits? And at whose cost?

Q4. If you replied No to Q3, are there any issues that still need attention?

In regard to current Retirement Village operations, yes. They include resale and buy back terms, weekly fees, simplification, education, and information sharing.

Q5. Is there anything else you'd like to say?

Yes, this follows.

## General comments and observations

Our business and operating procedures mean that we are deeply involved in the Retirement Village sector. We visit all villages across the country in a 20-month period. We attend events such as the RVA conferences and CFFC events. During these times of 'connection' we speak with a broad range of stakeholders, including operators, owners, managers, staff, residents, family members of residents etc. We believe this allows us access to some important insights.

### **From what we have seen and experienced we know that:**

A (considerable) majority of Retirement Village residents are happy with their decision to move into a village. We do consider that some of this may be due to the fact that they need to be happy with their choice as they may have reduced the other options available to them. That said, this cannot undermine the outcomes of these surveys, many of which have been conducted by independent agencies.

The Retirement Village sector is very responsive to market demands, and that various offerings have succeeded or failed based on market forces. Some Retirement Village operators will test the boundaries of what is 'acceptable' and do consider the provision of housing for seniors as a 'business' and explore opportunities within the business-unit accordingly.

The Retirement Village sector is in many ways self-regulating (for example changes made post Canterbury Earthquakes demonstrated this) when it perceives that some behaviours are seen by the majority to be deeply unfavourable to residents. The sector is very aware of its 'social licence' and the need to be seen as 'fair'.

The dissemination of education and information can be done in partnership with social services and proven business operators with knowledge in this space. Some government agencies are replicating the work of businesses who are already working in this space. We would argue that these NGOs are best placed to offer a more 'real world' view. Referral to more central sources of information, rather than replication is desirable.

There is no one size fits all 'village' and operators actively work to differentiate themselves from others, often to the consumer's benefit - examples of this include the 'fixed fee for life' offerings and operators who do offer guaranteed buy backs and fee termination on departure.

### **On reading the White Paper we'd also like to comment that:**

It is not clear whether the CFFC preferred option for a review will focus on only the retirement village sector (and its associated business model) or about adequate housing for all senior New Zealanders.

All business and services should be open to assessment and change (for the better).

Older people should not be treated as ‘vulnerable’ or ‘potentially vulnerable’ consumers. Age does not determine if someone is able to understand and enter into a contract. We must ensure that we all treat older people with dignity and not seek to ‘protect’ them when they are competent adults and free agents.

The Retirement Village model is unique and complicated. This does therefore mean there will be large amounts of ‘paperwork’ to contend with. This does not mean that the sector cannot work to make this less confusing.

We agree with the (high) risk that once a resident purchases into a unit they can easily be priced out of the market both by the Deferred Management Fee (DMF) model and the current rate of increase in property prices. However, residents also have no risk in regard to a property recession or having to account for capital loss.

The Retirement Village sector is not different from many other sectors or businesses in regard to the fact they are covered by/overseen/subject to multiple government agencies and Acts. This alone should not be a reason for transformation of the business model.

Change is (generally) a slow process and whether change comes about by the sector, by Code or Act, changes this sector is not going to be nimble; this is not due to a lack of desire.

Can change accommodate market forces? Who should bear these burdens? Neither the consumer or the operator seem happy to be held to account for greater market forces. Consumers should be protected from risky and poor business practices, but the market should also be free to ‘test the waters’ and to create new offerings. Good businesses also look to minimize risk and exposure.

It was interesting that this document closed with a series of real-life events from residents who had not had good (or legal) experiences with village operators. We consider a more balanced approach would have included some good news stories about the people for whom ‘village life’ has been an overwhelmingly positive experience.

## Specific comments on points raised in the White Paper

### Resale and buy back

We agree that there needs to be some ‘end in sight’ for older people (or their estate) when they vacate a village.

We also appreciate that some operators may not be in a financial position to meet such requirements should the ‘perfect storm’ occur (this is not unforeseeable either - COVID in a village could lead to massive increases in mortality, and therefore a large number of units becoming ‘available’ in a short time frame.)

Regarding the slow sales of refurbished units, could consumer behaviour also be an issue? Is it possible that if a potential resident is offered a choice of a refurbished unit or a new unit that consumer behaviour is to desire that which is ‘new’? Do we need to better understand consumer behaviour to understand why refurbished units may not sell when new units do? Could this be because of cultural norms for example units where someone has died? Or other factors? Understanding buyer behaviour may help explain some of the issues here.

The question here remains how to fairly balance the risk/exposure. Currently it is too far in the operator’s favour, but could it swing the other way?

We consider that a better model may consider if repayment cannot be made (within an agreed term), then interest (on the withheld capital sum) could be accrued.

Capital gain and the share of this is a wide-ranging debate. When considering this one also needs to consider capital loss and the risks associated with this.

### Weekly Fees

As with the above we agree that residents (or their estate) need to know how long these fees will be charged.

Operators set annual operating budgets based on this ongoing income and need some surety of this figure to ensure that they have income to meet associated outgoings (gardener's salary etc.) not all services that are delivered can be stopped after a notice period (for example ending employment).

However, once a resident is not enjoying the benefits of the weekly fee there needs to be a mutually understood timeframe to cease charges.

Many operators already provide assurances of fee cessation in the Occupation Right Agreement (ORA). We believe that a Code change outlining maximum periods, with operators able to offer more beneficial terms in their ORA would be a good solution and an opportunity for operators to differentiate their offering.

### Transfer to care, care and residences, care/village cross over

We agree that this area is complex and difficult to understand. This is due to the fact that there are multiple funding issues and multiple agencies involved as well as a mix of legislation. However as above this does not prevent other business models (outside the Retirement Village sector) from operating.

An important consideration is the probable changes in the Aged Residential Care (ARC) funding model as heralded by the EY 'Aged Residential Care Funding Model Review' (2019) and the restructure of some aspects of the health system as outlined in the Simpson Report (The Health and Disability Sector Review 2020). These funding and system changes may in fact make this area less 'murky' as we perceive there is a desire to separate out the 'care' and 'accommodation' accepts of senior living options.

Pathways to care for residents of villages should be made clear and not encumbered by financial barriers. Standardisation of information and process should be sought. Education and dissemination of information is critical to this.

There are business and NGOs in this space who offer bias free information and education. Education and information pathways do not need to be controlled by either government agencies nor by operator professional bodies.

Regarding multiple transfers in a village, we consider that given that the CFFC state that the DMF is "designed to reflect the benefit the resident received from their use of the facilities in the village during their time there" (p.9 CFFC White Paper) we agree that this should only be deducted at its full rate once. We are aware however that operators consider that the DMF fee also covers refurbishment costs and agree this cost needs to be covered; therefore, an option to cover the refurbishment, should there be multiple refurbishments, could be clearly outlined in the ORA as a 'relocation' type fee which could be negotiated again at the start of each new occupation.

The issue of having capital held by the operator when the resident requires access to this capital to fund Aged Residential Care is being addressed ad hoc by the sector with some providers offering 'bridging' finance, we consider that an offer such as the current Residential Care Loan offered on freehold properties by the government should be extended to also include those in Retirement Villages.

Finally, the consideration that some changes should be restricted to larger/for profit operators in effect penalises economies of scale and further perpetuates the notion that 'not for profit' = good and 'for profit' = bad - we cannot support this.

### Complaints

The process of making a complaint, about any good or service, is for many an uncomfortable process. Complaints, regardless of how they're delivered, offer businesses opportunities to better understand consumers and provide a better product. How organisations are resourced to deal with these complaints and the regimen in which those complaints are to be managed can greatly impact on the way complaints are received, reported, and resolved.

Complaints processes should always be improved with a view to make it easier for people to make complaints and to ensure that all those involved feel heard. With this in mind we'd support continued development of the complaints system.

Taking a leaf from the mental health approach we believe that the sector should adopt a more open strategy - a "no wrong door" approach to complaints. Like CFFC and many other organisations we too receive complaints about villages. This is not onerous on our business as we simply inform callers/emailers the correct process to follow to make a complaint.

The current process has high reporting compliance from providers and generally good outcomes for residents. By their very nature not all complaints will result in a positive outcome for residents. If the process is made overly simple we believe that the burden of dealing with multiple, possibly frivolous complaints may cause undue expense and stress to operators.

Clarity of process and education should address many of the concerns the CFFC raises in the White Paper about the current (and future) complaints process. Once again, we believe that this information can be made available via a number of existing NGOs operating in this space rather than resourcing government agencies to do the work already being done.

The New Zealand Retirement Village Residents Association (NZRVRA) provides an excellent service for residents and its recent MOU with the RVA will ensure their voice will be heard at the highest levels of the industry's professional organisation.

### Risks with the current business model/consumer issues

We agree that the future of seniors housing, especially for those who are asset and/or cash poor is very worrying.

As it currently does, the risk of the current RV model not being successful sits with operators and is reviewed by statutory supervisors. The RV model does not preclude other operators entering the retirement housing market with new or improved or radical or similar ideas. We consider that the large marketing campaigns directed at seniors to consider purchasing into a village model has changed societal expectations for retirement living, however the reality is that the RV model only suits some of the population (namely those with capital to invest AND a desire to live in such a housing unit).

We strongly support encouraging operators who currently offer housing under the Retirement Village model to consider new models, including those which allow for lifelong renters to be accommodated. We understand that as commercial business operators they cannot be expected to do this at a loss. For any organisation (whether a not-for-profit or for-profit) a lack of available capital to maintain/enhance/refurbish a potential alternate seniors housing offering over time is likely to result in the degradation of the investment and as

such makes for a poor outcome. This will therefore require some creative thinking and potentially innovative funding models.

Many city and regional councils have already made moves to devolve themselves from social housing for seniors. Some discussion about this has considered the reasons behind this as being around the inability to continue to invest in the housing stock and the complex social issues that need to be managed.

When radical changes were made in the Aged Care sector (mainly around certification, and compliance with new codes) the result was a mass exodus of providers from the sector. The massive numbers of not-for-profits providers (mainly religious and welfare) who exited the sector demonstrated that extra costs placed on businesses which 'service' the seniors sector will result in radical change. This demonstrates a worrying precedent. We wonder if an unsatisfactory regime were foisted on the sector that a mass exit of current providers would lead to further housing insecurities for seniors.

We believe that the CFFC's mandate to consider seniors housing requires a larger review of the whole. To wrap this in with any review of the Retirement Village sector is misleading and will not allow for the wide-ranging conversations that we believe society needs to be having about housing for seniors.

#### Legal Framework

Most contracts are filled with jargon. Contracts for village entry are complex. This jargon and complexity does not preclude older people from understanding and entering into such agreements.

We are also aware of work undertaken by the RVA to create a Key Terms Summary which should make it easier to understand some of the critical elements outlined in the ORA.

Using methods mentioned earlier in this submission (education, information sharing, no wrong door approach) the sector and information providers can work together to help understanding of documentation. We also believe that legal practitioners should refer RV contracts to those in the field who are experts and fully understand and are able to explain to intending residents the impact of the documentation.

Online resources can be provided by the multiple NGOs and information providers who already operate in this sector however consideration also needs to be given to those who are digitally excluded (see comments above re Citizens Advice Bureau's work in this area).

Any change in legislation needs to allow more creative options to emerge.



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**RETIREMENT VILLAGES LEGISLATIVE FRAMEWORK:  
ASSESSMENT AND OPTIONS FOR CHANGE 2020**

**Feedback from the Trustee Corporations Association of New Zealand (TCA)**

**Q 1 Has this White Paper canvassed the issues fairly and accurately? Yes / No**

- a) No. Although the White Paper has canvassed the issues fairly and accurately in most respects, there are some inaccuracies which are discussed below in Q1.1.

**Q 1.1 If you replied No, please say why.**

- a) On page 32, when discussing the role of the statutory supervisor, it is stated that residents have the power to remove “operators”. This is incorrect and should refer to the power to remove “statutory supervisors”.
- b) On page 34, it is stated that residents must receive information about matters listed in s34(3) of the Act. This is not accurate in that there is only an obligation to notify residents of these matters if the village does not have a statutory supervisor. If the village has a statutory supervisor, the obligation is to notify the statutory supervisor of these matters. It is only if the statutory supervisor so directs that each resident and intending resident must be notified.

**Q 2 Are there any important points that are missing? Yes / No**

Yes.

**Q 2.1 If you replied Yes, please describe the missing points.**

*a) Insurance (Code of Practice)*

The TCA submits that the insurance provisions set out in clause 22 of the Code of Practice need to be reviewed. The TCA considers that the current provisions of the Code of Practice relating to insurance are out of step with present NZ market conditions in the insurance industry. This view follows discussions with insurance brokers, the RVA and the Insurance Council of New Zealand (ICNZ).

Essentially, the Code of Practice requires operators to have “full replacement cover” to the satisfaction of the statutory supervisor. However, it is no longer possible to obtain open ended area based full replacement policies and insurers require an agreed “sum insured” policy which clearly identifies the maximum loss that could be incurred.

In addition, we understand that looking to the future, operators with large village portfolios may face challenges purchasing full earthquake cover at an acceptable price. As such, some larger operators are looking to take out collective or loss limit policies where they have a wide geographical spread of villages. This effectively means that an owner of several retirement villages may purchase cover up to the replacement value equivalent to the most

expensive loss across the group. As long as these villages are dispersed around the country, such an approach assumes that an event will not cause total losses to all villages at once. This can be a practical and cost effective way to take out insurance. However, the current wording of the Code of Practice may not allow for such collective policies.

The TCA submits that any review of the Act, Regulations and Code of Practice should include a review of the insurance provisions to remove reference to “full replacement” and to make allowance for collective policies in appropriate circumstances.

In addition, the insurance requirements for operators should be reviewed to take into account clause 47 of the Code of Practice, which provides that where a unit is damaged or destroyed and cannot be reinstated (for the reasons set out in clause 47) and the ORA is terminated, an operator is then required to repay the resident 100% of their capital contribution without any DMF deduction.

A concern arises in the event of a natural disaster (such as an earthquake) where the entire village is destroyed, is unable to be reinstated and an operator terminates all ORAs. In such a case the operator is then required to pay out all residents their full capital contribution with no DMF deductions (clause 47(2)(e)). In such an event, most insurers will pay out the indemnity value (to the statutory supervisor) which is the depreciated value and often materially less than the replacement value. In many cases, the insurance indemnity amount is less than the amount required to pay out all the residents and in some cases there can be a substantial shortfall that an operator is required to cover. While some operators have business interruption insurance to specifically cover this shortfall, a number of operators do not and are often unaware of this requirement and their exposure to this potential shortfall, which is also a risk for residents.

The current insurance provisions of the Code of Practice do not require an operator to have insurance cover in place to cover the difference between the indemnity value and the amount needed to repay all residents their capital sums (without any DMF deduction), with business interruption or other types of cover (apart from replacement) being discretionary.

The TCA submits that a review of the insurance provisions in the Code of Practice should require operators to have cover in place to cover this potential shortfall.

*b) Financial reporting to residents (Regulation 9)*

The TCA submits that regulation 9 of the Retirement Villages (General) Regulations 2006 requires review and amendment.

As the regulation currently stands it requires operators to provide residents (within 3 months of the start of each accounting period) a statement forecasting for the period the operating expenditure for the village, all expenditure relating to the village (including amounts repayable to residents, former residents and their estates), all income relating to the village and the amounts of the operating expenditure that must be met by the residents of the village.

The problem with the regulation is that it does not apply general accounting conventions and includes elements of the income statement, cashflow statement and balance sheet. As a result, the forecast cannot be reconciled to anything and is confusing to residents.

Often, the most significant income item is the increase in the revaluation of the village which is not able to be accurately forecasted and is irrelevant to residents.

Independent living residents are generally only interested in details of what their weekly fees are being spent on and that the operator is using the fee for the correct expenses. The reporting is even less relevant to residents with an ORA for a care suite, as they don't pay weekly fees.

The TCA submits that regulation 9 needs to be reviewed and amended, so that forecasts are provided in line with NZ GAAP and focussed on operating income and operating expenses relating to weekly fees. It is suggested that the reporting is not required for residents who do not pay weekly fees.

*c) Duty of auditor to report to the statutory supervisor*

Under the current standard Deed of Supervision, operators are required to provide statutory supervisors with a report from the auditor (to the statutory supervisor) confirming that the financial statements comply with the Deed and all relevant legislation, that in their opinion the financial statements are fairly stated, and that the directors' certificates provided by the operator have been reviewed and that there are no matters that warrant the attention of the statutory supervisor.

However, this is only a contractual requirement and there is no statutory obligation on the auditors to provide this information. As a result, auditors have tended to provide numerous disclaimers around their report, thus reducing the reliance that can be placed on the information provided in their reports.

The TCA submits that any review of the Act should include an amendment in line with s 198 and s 199 of the Financial Markets Conduct Act (for auditors of issuers of debt securities and registered schemes) requiring auditors to provide supervisors of those schemes with certain documents and reports if they become aware of matters that are relevant to the exercise or performance of the powers or duties of the supervisor of the debt security or registered scheme. The TCA submits that auditors should have the same or similar obligations in relation to retirement villages.

*d) Exit payments to residents (Retirement Villages Act 2003)*

*Section 29 of the Retirement Villages Act 2003* requires all payments for the purchase of an ORA to go through the Statutory Supervisor. This is an important protection for intending residents as it ensures that deposits are held independently for the protection of an incoming resident and in the event of cancellation, that the deposit or other monies are repaid directly to the intending resident.



However, there is no similar protection for exiting residents as there is no requirement for statutory supervisors to be involved in the repayment to exiting residents. We presume that village operators or their solicitors make this payment to the exiting resident but often have no involvement or oversight. In the TCA's submission, with the objective of the Act being to ensure resident protection, the Act should be amended to make this a statutory supervisor function so that the outgoing resident or their estate is required to be paid by the statutory supervisor (as an independent third party). This would provide protection for the outgoing resident in that they will be paid from the incoming resident's funds. As matters currently stand, in some transactions statutory supervisors have no oversight over the repayment to an exiting resident or their estate. The TCA submits that a change to the process fits in with the Act's objectives relating to financial oversight.

*e) Fire and emergency procedures (Code of Practice)*

We suggest that the clauses in the Code of Practice dealing with Fire Protection and Emergency management need to be reviewed to ensure reference to and compliance with the Fire and Emergency New Zealand Act 2017 and its regulations. It is noted that the Code still makes reference to the repealed Fire Service Act 1975.

It is submitted that any changes are reviewed by Fire and Emergency New Zealand to ensure they are appropriate and take into account the new laws and the particular circumstances of retirement villages.

*f) Amalgamation of villages into one registered entity*

The requirements for the way in which separate retirement villages can be merged or amalgamated into single combined entities could be reviewed. Presently the Act is silent on the topic of retirement village mergers and amalgamations, but as the retirement village industry continues to grow and develop, the need for a clearly defined process for effecting rationalisations and cost-effective economies of scale that could be beneficial to the interests of residents and operators alike can be expected to emerge.

**Q 3 Do you agree that a full review of the retirement village framework should be undertaken?  
Yes / No**

No. The TCA does not consider that a full review of the retirement village framework needs to be undertaken. Overall, the TCA considers that the framework works well but does consider that there are issues that need attention, which may require amendments to the Code of Practice, the Act and the Regulations.

**Q 4 If you replied No to Q3, are there any issues that still need attention? Yes / No**

The TCA makes the following comments in respect of the issues identified in Part 6, 7 and 8 of the White Paper:

a) *Resale and Buy-back Times*

Only a small number of villages in New Zealand offer a guaranteed buy-back. When a retirement village resident moves out of a village, normal practice means the resident must wait until their Occupation Right Agreement (ORA) has been sold to a new owner.

However, contrary to the views of some residents that operators may lack incentive to resell quickly (for the reasons as set out in the White Paper), there is mutual benefit to the village operator and the exiting resident to complete that sale as quickly as possible. This is discussed further below.

Each operator approaches the subject slightly differently and there are a number of factors that determine the time it takes to resell ORAs, which include the process used, real estate market factors, different operators' marketing approaches, refurbishment times, and the terms of settlement. It is submitted that the subject and factors are complex.

In Australia, most of the states have introduced guaranteed buy-back requirements as a result of negative press in the last few years. For example, Victoria has a buy-back period of 18 months and NSW has a 6 month buy-back for metro villages and 12 months for regional villages. The implications of these changes are still to be seen and perhaps the real test will come when the housing market slows.

The TCA's comments will focus on the advantages and disadvantages of a guaranteed buy-back regime being applied to the New Zealand retirement village sector and whether such a regime will add value to the resident and operator.

**Advantages**

The main advantage of guaranteed buy-backs is the certainty around the timing of the payment. This could be important for the exiting resident's estate or if the exiting resident requires funds to cover other costs (such as care costs).

For the operator, it has the potential to enhance the proposition of retirement villages overall, especially where an operator has good levels of liquidity. Further, it could help increase the penetration rates for over 75s and probably for younger retirees, making it more attractive to these segments of the market, and thereby growing the market for village operators.

**Disadvantages**

While certainty around cash flow benefits a former resident or their estate, guaranteed buy-backs would have the potential to negatively impact existing residents, the operator and funder (e.g. bank).

Given the nature of the events that result in a buy-back, which are often unplanned (e.g. illness or death), providing a guarantee to the holders of the ORA is, in turn, likely to

create greater uncertainty and serve to disadvantage other connected parties (other residents, funders, suppliers to the village). Examples include:

- Residents - Should existing residents see their village experience poor liquidity because of the challenge of planning cash flow around buy-backs, it may become hard to attract new residents, potentially putting in doubt the long-term viability of the village. While the residents who have left may have received their funds, existing residents would be significantly disadvantaged if their village went into receivership (i.e. early exiting residents may be favoured at the expense of later exiting residents). It is also expected that future residents will face higher costs and less choice when this occurs.
- Operator - We expect operators will require higher levels of capital or buy-back funding facilities from their funder to meet the liquidity implication of guaranteed buy-backs.
- Funder - Funders will have to make assumptions around the level of guaranteed buy-backs and the associated cash requirements. This may reduce the level of development/long-term funding they can or would be willing to provide.

Guaranteed buy-back requirements could also affect price. There is a strong possibility the introduction of guaranteed buy-back requirements could result in higher prices for customers.

Higher entry prices could be seen in unit prices or weekly service fees or an increase in the DMF. This would be the result of higher levels of capital being needed by operators, particularly if they cannot obtain liquidity funding lines from their funders. Banks and other funders will need to factor in the operator's buy-back liquidity requirements and likely levels of buy-backs when undertaking lending assessments.

As a result there is likely to be fewer new entrants into the retirement village market and less competition. Markets with reduced supply and higher barriers to entry usually result in higher prices for customers.

Equally, operators could be forced to make a quick sale of the exiting resident's village unit. This will mean the exiting resident or their family could get a lower capital sum. At the moment, some (although not many) ORA agreements have a clause that requires the resident to cover any capital loss.

Not-for-profit village operators would be impacted because, generally, they do not have a second source of capital. If there was to be a liquidity event because of the level of guaranteed buy-backs, the operator would not be able to seek additional capital from its shareholders. As a result, the operator may not be able to meet its guaranteed buy-back obligations, potentially putting the long-term viability of the village in doubt. Practically, the not-for-profit operator will need to hold higher levels of cash. This will impact

investment into the village or the creation of a new village. Not for profit operators may need to sell their villages, therefore reducing the range of village affordability options and so reduce an important service to the elderly on lower incomes.

For villages operating outside the main centres and in provincial areas, resales can be slower and therefore these villages may need to hold higher liquidity in order to meet their guaranteed buy-back obligations.

Operators often consider building villages in provincial areas because they are attracted by the current operating model. Changes to the model, such as the introduction of buy-backs, may make this investment unattractive and put them off any future investment.

An economic slowdown or pandemic (or both) always has the potential to lead to the financial failure of the operator. A slow economy typically leads to a slower housing market. Historically this has negatively impacted retirement villages by lengthening the time taken to sell or resell village units. If buy-backs were guaranteed, a situation like this could create a significant liquidity issue for operators. As noted above, we anticipate provincial villages would experience a higher impact as units would likely take longer to sell than villages in the main centres.

In an extreme case, where disease or severe illness affects residents in a particular village, it is possible the village operator would face an exceptionally high level of buy-backs. The current coronavirus outbreak is an example of how devastating a virus can be, with older people at high risk. It is very difficult for any business to hold liquidity for this type of event and could result in the financial failure of the operator.

A number of villages do not have a large corporate operator. These villages are run by a committee of residents. Often these villages allow the resident or their estate to run the resale process and, in most of these villages, allow the resident to retain some (if not all) of the capital gain.

If a guaranteed buy-back were introduced the other residents in the village would be required to have a large liquidity facilities/capital to meet buy-back obligations. This would make it unlikely that this type of village could exist and may lead to a reduction in choice for retirees.

### **Conclusion**

So overall, would the introduction of guaranteed buy-backs be positive? Even if guaranteed buy-backs were introduced, the reality is that buy-backs are not guaranteed and payment will depend on circumstances at the time of exit and the financial status of the operator. In a worst case scenario, if an operator failed to repay, a receiver may need to be appointed by the statutory supervisor. The consequence of a receivership is that residents could lose their capital contribution and their homes.

A further consequence of village failures is reputational risk, which would be bad for residents, operators and the industry as a whole. With an ageing population, New Zealand needs more retirement villages. However, guaranteed buy-backs would restrict supply and reduce competition. Alongside this, costs of capital would increase, driving prices up for residents. Guaranteed buy-backs would also reduce innovation and residents' freedom of choice by restricting the type of occupation rights offered.

In a perfect world, it would be ideal for an operator to make an exit payment on exit rather than on sale. Unfortunately, this comes at a cost to the operator and the resident; and could potentially impact supply, the variety of options and not-for-profit operators.

On balance, the TCA submits that the disadvantages of guaranteed buy-backs outweigh the advantages for both residents and operators. A number of large, financially secure operators already offer ORAs with guaranteed buy-back terms. If residents prefer ORAs with guaranteed buy-back they already have the option to choose those villages. Alternatively, it is submitted that buybacks could be an option offered to residents and the operator could price the ORA accordingly.

Rather than making guaranteed buybacks mandatory for all villages, TCA submits that large (to be defined e.g. using the NZ GAAP definition), for profit operators should be required to include guaranteed buybacks as an option for new residents' ORAs. TCA submits that Not for Profit Operators and Small Operators (to be defined e.g. operators who are not large) should be exempt from being required to offer guaranteed buybacks as an option.

*b) Capital gain sharing*

In relation to capital gains, a number of villages do offer capital gain or capital gain sharing. If villages offer capital gain, the initial asking price for entering the village may be higher. The New Zealand retirement village model has traditionally allowed residents to sell their home and buy a comparable RV unit in the same area for about 80% of the sale price of their home. This allows residents to invest (or spend) the remaining 20% during the period of their retirement.

Operators rely on capital gains to maintain and develop the village as well as to provide their investors with a return. In order to maintain the village and its profitability the operator would need to increase the entry price of ORAs. By doing this they will make a higher development margin up front as well as a higher DMF over time (because the DMF percentage is on a higher entry price).

Residents may not be able to afford a higher entry price as they need the capital to spend during their retirement. While capital gains improve the value of the termination payment, they are illiquid. Residents may be able to borrow against the increased value of their ORA but this can be problematic (as shown in the CFFC monitoring report on financial services provided by operators in 2020).

Another risk to residents is that if they receive capital gains, it is likely that operators will also have capital loss provisions in their ORAs.

c) *Weekly fees continuing after termination*

The TCA would support a change whereby weekly fees are reduced by 50% after three months and cease completely after six months. As noted in the White Paper, it appears that a majority of operators already stop charging a weekly fee when a resident vacates their unit. The proposed change would still allow those operators that can afford to do so to stop charging on exit but would still provide income for a reasonable period to those operators in smaller or not for profit villages that rely on the weekly fee.

d) *Transfers from independent units to serviced care or care facilities: information requirements and treatment of fixed deductions*

The TCA would support a review that considers how to improve and standardise information about transferring into higher levels of care.

e) *Code Compliance*

The TCA would support a review of ORA provisions in the Code with a view to establishing best practice and to balance operator control and residents' rights.

f) *Lack of a simple complaints system or authorised advocate*

The TCA would support a review of the complaints function to simplify and formalise a clear and simple process.

g) *A voice for residents*

The TCA would support a review that considers whether changes are required to better support retirement village welfare.

h) *Emerging consumer issues (Part 7)*

The TCA supports a review that analyses future trends, considers whether consumer protections are strong enough to adapt to change, and investigate whether different models should be encouraged.

i) *Understanding the legal framework (Part 8)*

Although a key purpose of the Act is to provide a legal framework readily understandable by residents, intending residents and operators, it is apparent that many residents, despite having received independent legal advice as required under the Act, are overwhelmed by the volume of information they are required to absorb, being a lengthy ORA and Disclosure Statement, the CoRR and the Code of Practice, and do not always fully understand the implications of the transaction they have entered into.

The TCA would support a review with a view to simplification of the documentation involved. In particular, the TCA considers that the Disclosure Statement should be

substantially simplified (to a one or two page document), with emphasis on the important and key points that residents should understand before entering into an ORA.

The TCA submits that the model could be similar to the model required under the Financial Markets Conduct Act 2013 for offers of financial products and managed investments schemes, which requires information about financial products, issuer details and documents such as product disclosure statements (PDS) to be on the Disclose Register. We also suggest that the disclosure document be patterned on a PDS, with regulated controls on maximum word count, specified headings and a requirement for plain English. Any other important information should then be made available in an Other Material Information (OMI) document.

In relation to the other issues raised in Part 8, the TCA further supports a review into the extent that the presence of care changes the nature of a retirement village from a housing proposition to a health proposition and whether the definition of a retirement village needs modifying to include a wider range of lifestyle developments. This is particularly relevant as a number of retirement village operators provide an ORA over a care suite. The current focus of the Act is on independent living, but there are many regulatory requirements that don't fit well into an ORA care suite model (eg. the AGM).

Q 5 Is there anything else you would like to say?

No