



**TE ARA
AHUNGA ORA**
Retirement Commission

Retirement Villages Complaints and Disputes: an assessment

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Retirement Villages Complaints and Disputes: an assessment

Prepared for Te Ara Ahunga Ora Retirement Commission

by Sara Jones¹

¹ Independent consultant to Te Ara Ahunga Ora Retirement Commission, BA (Hons) LLB (Hons).

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Project Objectives

1. This Project investigated the current Retirement Village complaints and dispute resolution scheme, considered proposed options for improving the current scheme and makes recommendations on the proposed options for improvement to the current scheme with the purpose of providing insights that will be relevant to the forthcoming legislative review of the Retirement Villages Act.
2. The report on this Project is divided into seven sections as follows:
 - I. Executive Summary – Observations and Recommendations
 - II. Summary of the Retirement Village complaints and disputes scheme;
 - III. Summary of main concerns with the current scheme;
 - IV. Report on recent initiatives by key stakeholders to improve the current scheme;
 - V. Further recent stakeholder feedback on current scheme;
 - VI. The Aotearoa Best Practice Dispute Resolution Framework;
 - VII. Proposed options for improving the current scheme.

I. Executive Summary - Observations and Recommendations

3. Te Ara Ahunga Ora Retirement Commission (**the Commission**) recommended a review of the current scheme to create a clear and simple process for the resolution of complaints and disputes.² The Commission has commenced engagement with stakeholders on what a good scheme would look like for the retirement village industry (**RV industry**). The Commission received further feedback from invited stakeholders at an online workshop hosted by the Commission in May 2022 and at a meeting with dispute panellists in February 2022.
4. Based on both the further feedback received from stakeholders and an investigation and analysis of some of the options for improvement of the current scheme, this report makes the following observations and recommendations.
5. **Observes** that the current scheme does not sufficiently meet the Principles and Standards set out in the Aotearoa Best Practice Dispute Resolution Framework published by the Government Centre for Dispute Resolution (**GCDR**).
6. **Observes** that any scheme for the RV industry has to cater for a wide range of complaints and disputes. A scheme must be flexible enough to deal efficiently with minor complaints and robust and rigorous enough to handle more complex disputes that involve questions of law and fact. A scheme must also include an effective mechanism to allow for the early resolution of complaints before they become disputes.
7. **Observes** that recent initiatives by key stakeholders, including the RVA's "Fair Way Trial" and the RVR's 0800 Confidential Support Line, provide further support to residents with concerns and complaints, and in the case of the RVR initiative, some advocacy type services. These initiatives increase the number of people a resident can contact about a complaint but ultimately direct a resident back to the current scheme to have their complaint resolved.
8. **Recommends** that further consideration is given to how an "Ombudsman/industry type dispute resolution scheme" can be specifically tailored for the RV industry including:
 - what complaints it would deal with;
 - how it would be funded;
 - who would provide it, with consideration given to the use of independent disputes resolution providers in New Zealand;
 - how the dispute panel process established by Part 4 of the Retirement Villages Act 2003 would work in with such a scheme including, whether the scheme could replace this process altogether;
 - how it would work in with the process for resolving disputes with health and disability service providers under the Health and Disability Commissioners Act 1994;
 - how an advocacy service for residents would fit with such a scheme;
 - how the scheme could be structured so that it discourages any frivolous and vexatious complaints; and
 - how the scheme could ensure that statutory supervisors are still across serious issues that arise as disputes.
9. **Recommends** that all proposed schemes are assessed against the GCDR Best Practice Guidance on Dispute Resolution for developing a dispute resolution scheme.
10. **Recommends** the introduction of an effective advocacy service for residents that is funded by the RV industry rather than established by legislation.

² Retirement Commission, "Retirement villages legislative framework: Assessment and options for change Submissions Summary and Recommendations 2021", at page 21.

II. Current Retirement Village complaints and dispute resolution scheme

Legislative Framework – Retirement Villages Act 2003 (the Act)

11. The Act confers on residents three basic rights relating to complaints and disputes. These rights are set out in the Code of residents' rights at Schedule 4 of the Act as follows:
 - “4. *Right to complain: You have the right to complain to the operator and to receive a response within a reasonable time.*
 5. *Disputes: You have the right to a speedy and efficient process for resolving disputes between you and the operator or between you and other residents of the village.*
 6. *Use of support person or representative: You have the right, in your dealings with the operator or other residents of the village, to involve a support person or a person to represent you. The cost of involving a support person or person to represent you must be met by you.*”
12. The Act sets out the framework to meet these residents' rights. The two forms of dispute procedures under the Act include:
 - a complaints facility for each retirement village set up by operator;³ and
 - a formal dispute resolution process established by Part 4 of the Act.⁵
13. The Act places a statutory duty on operators of retirement villages to operate and make known to their residents a facility for dealing with their complaints.⁶ The minimum procedures and requirements for operators in setting up and operating the process for dealing with residents' complaints are set out in the Retirement Villages Code of Practice 2008 at clauses 31 to 36 (**COP**).
14. The COP requires operators to set up a complaints process for their village(s) that includes:
 - a written procedure that allows residents to contact the operator informally about a concern or issue;
 - a “Complaints Facility” for the resolution of formal complaints. The operator must have and use a written complaints policy for dealing with an issue or concern that a resident wants to raise as a formal complaint. The policy must include details about the procedure for resolving a formal complaint and an explanation of the procedure for referring an unresolved formal complaint to the more formal dispute resolution process established under Part 4 of the Act.
15. The Commission has published a diagram that sets out the procedure established by the COP for resolving complaints, see appendix 1. This diagram has been incorporated into the COP and many operators refer to this diagram on their websites.
16. Complaints dealt with by an operator's complaints facility are resolved by the agreement of the parties with assistance from the statutory supervisor or a mediator, if required. The complaints facility does not provide a final determination of the issue in dispute.

Complaints facility for each retirement village

13. The Act places a statutory duty on operators of retirement villages to operate and make known to their residents a facility for dealing with their complaints.⁶ The minimum procedures and requirements for operators in setting up and operating the process for dealing with residents' complaints are set out in the Retirement Villages Code of Practice 2008 at clauses 31 to 36 (**COP**).

Dispute resolution process

17. The dispute resolution process commences when either a resident or operator requires that the dispute is resolved by this process and gives the other party to the complaint a dispute notice.⁷ The right to commence the dispute resolution process is a statutory right given to both resident and operator by the Act. The outcome of the dispute

³ Section 50 of the Act.

⁴ Section 51, sch 3 cl 1(c), sch 5 cl 6, Retirement Villages Code of Practice 2008, cls 31 – 36.

⁵ Sections 52 - 75 and Retirement Villages (Disputes Panel) Regulations 2006.

⁶ Section 51.

⁷ Section 52.

resolution process is a final determination or decision from the disputes panel on the merits of the dispute.

18. In general, a resident can only give a dispute notice after they have referred the complaint to their operator's complaints facility and 20 working days have elapsed since referral to that facility.⁸ An operator can only give a dispute notice after they have notified the resident concerned of the dispute, it has made reasonable efforts to resolve the dispute with the resident and 20 working days have elapsed since the resident was notified.⁹ There is no requirement for either party to a dispute to wait for the matter to be referred to a statutory supervisor or to mediation before they can issue a dispute notice.
19. The Act prescribes the types of disputes for which both the resident and operator may give a dispute notice.¹⁰ When a dispute notice is given, the operator has a statutory duty to appoint a disputes panel to resolve the dispute. The operator is required to consult with the other parties to the dispute before making an appointment.¹¹
20. The disputes panel may conduct the dispute resolution process in any manner it thinks fit however it must comply with the requirements of the Act and applicable regulations.¹² The procedure of the disputes panel closely aligns with that of a court proceeding and provides parties with a determination of the dispute. Parties can be legally represented before the disputes panel. Under the Act, the parties have the right to appeal a decision of the disputes panel to a higher court.¹³

Disputes involving an alleged breach of Code of residents' rights

21. A Code of residents' rights at Schedule 4 of the Act (**CORR**) provides residents with specific rights that are in addition to the rights set out in an Occupation Right Agreement.

22. If a resident alleges a breach of any right set out in the CORR, the Act specifies who a resident can contact. These contact persons include the operator, the village's statutory supervisor, the Registrar, the Retirement Commissioner, the disputes panel or any other person.¹⁴ Further, the operator is required to set out in their complaints policy an explanation of the procedure for a resident to contact the statutory supervisor about an alleged breach of the CORR as an alternative to, or in addition to, making a formal complaint.¹⁵ The disputes panel can also consider an alleged breach of the CORR.¹⁶ Apart from the dispute panel, the Act does not give any other person any specific powers to resolve a dispute involving an alleged breach of the CORR.

Functions of Statutory Supervisor, Retirement Commissioner and Registrar of Retirement Villages

23. The legislative framework also gives specific functions to the statutory supervisor, the Retirement Commissioner and Registrar of Retirement Villages in the complaints and disputes scheme. A summary of the roles of these people in the complaints and disputes scheme is set out in appendix 2.

Costs

24. Where a dispute is between an operator and a resident, the operator is responsible for paying the costs of the mediator's services. Where the mediation is between residents, the operator and the residents involved share the costs of the mediator's services equally.¹⁷ When a statutory supervisor becomes involved in a formal complaint they charge the operator a separate fee on a time and attendance basis and this fee is separate to the annual fee that is charged to operators.¹⁸
25. Where a complaint is heard by the disputes panel, unless the dispute panel decides

⁸ In relation to disputes relating to an operator's breach of a resident's Occupation Right Agreement in disposing of a residential unit, a dispute notice cannot be given before 9 months after the residential unit has become available to the operator for disposal.

⁹ Section 52.

¹⁰ Section 53 (resident) and section 54 (operator).

¹¹ Sections 59-62.

¹² Sections 64-75 and Retirement Village (Disputes Panel) Regulations 2006.

¹³ Section 75.

¹⁴ Section 33.

¹⁵ Retirement Villages Code of Practice 2008, cl 33(2)(e).

¹⁶ Section 53(1)(d).

¹⁷ Retirement Villages Code of Practice 2008, cl 36(2).

¹⁸ Email Covenant Trustee to Sara Jones 23 June 2022 in response to request for clarification on the payment of a statutory supervisor's fees for their involvement in formal complaints.

otherwise, the operators meet the costs of the disputes panel irrespective of whether the operator is a party to the dispute.¹⁹

26. The operator and resident(s) are responsible for paying any costs they incur in preparing for and attending any meetings with the statutory supervisor or attending any mediation or disputes panel hearing. The CORR specifically gives the resident the right to involve a support person or a representative in their dealings with the operator or another resident, with the cost met by the resident.²⁰

Retirement Villages Association Complaints Process and Disciplinary Authority

27. The Retirement Villages Association of New Zealand Incorporated (**RVA**), which represents operators, also offers the RV industry a facility for dispute resolution. This process operates alongside the complaints and dispute procedures set up under the Act. This process can receive complaints from a broad range of people including residents, family members of residents, statutory supervisors and RVA members.²¹
28. The RVA complaints process offers another pathway for dispute resolution where the procedures under the Act have resulted in an “unsatisfactory” result for a complainant. The complainant can ask the RVA’s Complaints Committee to consider the issue and recommend a response. In addition to considering the complaint, the RVA Executive can also refer the matter to the RVA’s Disciplinary Authority who is responsible for hearing complaints against RVA member villages which have failed to

comply with the Code of Practice, which consistently fail their audits or behave in a manner that brings the industry into disrepute.²²

Complaints to Health and Disability Commissioner

29. The Act specifically provides that a resident cannot give a dispute notice concerning any health services or disability services or any facilities to which the Code of Health and Disability Services Consumers’ Rights under the Health and Disability Commissioner Act 1994 applies.²³
30. Residents who receive health or disability related services from their operator and have a complaint or concern about that service have, in addition to their contractual rights under their Occupation Right Agreement, rights under the Code of Health and Disability Services Consumers’ Rights.²⁴ Where a resident has a concern that their operator has not complied with their rights under this Code can make a complaint directly to the Health and Disability Commissioner’s office. A complaint to the Commissioner is dealt with in accordance with the process set out in the Health and Disability Commissioner Act 1994 and a resident can also seek the assistance of a health and disability consumer advocate to help them resolve their complaint.²⁵
31. It is **recommended** that any Retirement Village complaints and disputes scheme should include clear guidance to residents about the separate complaints process that applies to complaints about health and disability related services that they receive from or through their operator.

¹⁹ Retirement Village Code of Practice 2008, cl 36(3).

²⁰ Sch 4, right 6.

²¹ See <https://www.retirementvillages.org.nz>

²² https://www.retirementvillages.org.nz/Site/Residents/Disciplinary_Authority.aspx

²³ Section 53(2).

²⁴ Submission Health and Disability Commissioner to White Paper to the Commission, 3 May 2021.

²⁵ Refer <https://retirement.govt.nz/retirement-villages/complaints-and-disputes/disputes-process/>.

III. Concerns with the current Retirement Villages complaints and disputes scheme

32. The Commission has investigated and reported on stakeholder concerns with the current complaints and disputes scheme.²⁶ The main concerns with the current scheme are:
- complaints from residents are under-reported as residents not complaining as they do not want to make a fuss, or believe that they will not be listened to, or bullied if they do complain;
 - supports power imbalance between operators and residents. In general, operators are more likely to engage legal counsel earlier on in the process than residents. No effective advocacy service for residents within the current scheme;
 - roles of the statutory supervisor and dispute panellists as independent arbitrators in the current scheme is questioned given both roles are appointed by and directly paid for by the operator;
 - does not include an independent investigative function of complaints (such as in financial industry dispute resolution schemes);
 - too complex for residents to easily navigate;
 - too long for complaints and disputes to be resolved (either by agreement of the parties or by determination of disputes panel);
 - dispute resolution process set up under Part 4 of the Act is adversarial and can be intimidating and very stressful for residents to engage with;
 - is required to deal with a wide range of complaints and disputes. The concern is that the current scheme may function better for residents if complaints are categorised at an early stage and dealt with differently depending on the subject matter of the complaint;
- where an alleged breach of the Code of residents' rights, the Act gives residents the right to notify that breach to a number of different parties. However the Act does not give the notified parties any power to act on a breach or provide redress (except a disputes panel where a dispute notice is issued);²⁷ and
 - the number of government agencies and office holders who residents can contact about their complaints who have no statutory powers to assist in resolving the complaint. These contacts can only provide a resident with guidance on how to make a complaint under the current scheme.
33. The Commission has recommended a review of the current scheme to create a clear and simple process for the resolution of complaints and disputes and has begun engagement with key stakeholders on the issue.²⁸
34. Stakeholders with a resident and consumer rights focus, such as the Retirement Village Residents Association of New Zealand (**RVR**), are very supportive of this review work. The RVA and Covenant Trustee are also supportive, however, consider that the current scheme appears to meet the needs of the majority of residents. As such they have advocated to the Commission that before any major reform of the scheme is undertaken, independent research is required to assess the level of resident discontent with the current scheme.²⁹ The Commission's 2015 Monitoring Reports on the disputes process and the submissions it received on its White Paper have in the Commission's view clearly identified the need for reform. The Commission is now focused on considering different proposals to improve the current scheme³⁰

²⁶ Refer CFFC, Retirement Villages Legislative Framework: Assessment and Options for Change 2020, pages 16 - 19; Retirement Commission, Retirement Village legislative framework: Assessment and options for change Submissions Summary and Recommendation 2021, page 22; Bev James, "Retirement Villages Act 2003 Monitoring Report Disputes Process Report 2: The Practice, Experience and Views of Dispute Resolution", 30 June 2015, pages 5-17; Retirement Village Complaints and Disputes Resolution Online Workshop 11 May 2022 hosted by the Commission;

Online Meeting between Commission and dispute panellists 25 February 2022.

²⁷ Section 33.

²⁸ Above, n 1.

²⁹ Academic research on this same issue has been conducted in the Australia to record Victorian retirement village residents' experiences of dispute management and satisfaction levels related to dispute resolution processes. The research identified resident concerns that have similarities to the concerns raised in the New Zealand context. Refer Dr Sue Malta, Susan Williams and Frances Batchelor "An ant against an elephant: Retirement village residents' experiences of disputes and dispute resolution", Australian Journal of Ageing, Vol 37 No 3 September 2018, 202-209.

³⁰ Above, note 1; Bev James, "Retirement Villages Act 2003 Monitoring Project: Disputes Process Report 1: International Comparison of Disputes Processes and Collation of Best Practice Resources and Report 2: The Practice, Experience and Views of Dispute Resolution" prepared for Commission for Financial Capability, 30 June 2015.

IV. Recent initiatives by key stakeholders for improving the current scheme

Retirement Village Association

Retirement Village Early Resolution Scheme (Fair Way Trial)

35. To primarily address the concern that residents are too scared to make complaints under the current scheme, the RVA are currently running the Fair Way Trial that provides residents and managers in 10 Auckland villages (approximately 2100 people, who are referred to as “visitors” by the service) with a free, confidential and independent service to raise concerns and complaints with an independent dispute resolution practitioner and receive guidance from the practitioner on the best way to have their issue resolved within the current scheme. The service aims to complement the current scheme rather than supplant it.³¹
36. Fair Way Resolution Ltd who are contracted by the RVA to provide the service describe the service as about “people coming with a problem and leaving with a plan”.³² The essence of the service is to provide “conflict coaching” to a visitor to the service that allows them to identify and reflect on the issues relating to their complaint and empower them to act to resolve their complaint within the current scheme.³³ Fair Way specifically states that its service does not seek to facilitate a resolution of the complaint or provide the visitor with an advocacy service.³⁴
37. The trial commenced in December 2021 and is intended to run to November 2022. Fair Way reported to the RVA at the end of the first 6 months of operation of the service. In the 6 months of operation, the service has received eight calls, all from residents.³⁵ Fair Way have explained that a new service always takes some time to establish itself and the reported slow up-take of the service may be due in part

to publicity issues about the service. Fair Way have also reported that some users of the service and village management do not appear to understand the purpose of the service, with the users wanting a practical tangible support to further their “complaint” rather than a helpful ear to discuss possible options with them.³⁶

Retirement Villages Resident’s Association of New Zealand

38. The RVR have also undertaken initiatives to improve the current scheme for residents that include:³⁷
 - established on their website a formal complaints web form that aims to assist residents in filling out and sending a formal complaint to their operator;³⁸
 - in December 2021 set up RVR’s 0800 Confidential Support Line currently being trialed with RVR members; and
 - conducted a recent survey of RVR members that provided data on residents’ feedback on their personal experiences with making a complaint under current scheme (May 2022).³⁹

RVR 0800 Confidential Support Line

39. The main objective of this service is to provide support to RVR member residents who have complaints and in doing so also gather data about resident complaints that can then be shared (on an anonymised basis) with the Commission. It is envisaged that this data will in turn assist government agencies in their decision making around the reform that is needed to the current scheme.
40. The service is accessed by a resident calling an 0800 number (0800 787 699) and is run primarily by volunteers that live in retirement villages. The service connects a

³¹ Fair Way Resolution Ltd to RVA report on “Retirement Villages Resident Advisory Service”, April 2022, page 9.

³² Fair Way Resolution Ltd slides presented at 11 May Online Workshop

³³ The Government Centre for Dispute Resolution defines conflict coaching as a set of skills and strategies used to support peoples’ ability to engage in, manage, or productively resolve conflict. In this process, the conflict coach works one-on-one with someone experiencing conflict with another person. Conflict coaching enables the coachee to talk about the conflict with a neutral third party (the conflict coach), consider options for managing the conflict, and design an approach to discuss the conflict with the other person. Refer <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/glossary-of-dispute-resolution-terms/>.

³⁴ Above, note 30.

³⁵ Above, note 30, page 3.

³⁶ Above, note 30, pages 4-5.

³⁷ RVR Complaints Initiatives 2021-2022 Slide Presentation for Retirement Commission – RV Complaints and Disputes Online Workshop – May 2022.

³⁸ <https://www.rvrnz.org.nz/formal-complaint/>.

³⁹ Nigel Matthews Chief Executive (Interim) of the RVR presented the results of this survey at the 11 May Online Stakeholders Workshop. Above, note 36, slides 9 to 20.

resident to a person who listens to their concern, assists the resident in clarifying the issues and discusses with the resident what action the resident might like to take, including discussing the option of making a formal complaint. The service also offers assistance to a resident in collating and assembling information to file a formal complaint, if that is what the resident wishes to do.

41. The RVR has provided the Commission with some data which gives details of the operation of this service for the period 9 February 2022 through to 8 April 2022. In this period, the service recorded 25 calls from member residents who raised concerns about a range of matters including COVID restrictions, charges/fees and transfer rights. Six of the callers specifically requested further support from the service to resolve their issues in the form of up-front advocacy and a further five callers requested background support

with their complaint. It is also clear from the data that the service is offering advice to callers about the process of raising formal complaints with operators.

RVR Members Survey

42. The RVR have conducted a recent short survey of its members using Mailchimp with the objective of understanding their member's personal experience with making a complaint and to survey their views on the complaints process and the resolution of complaints. The RVR presented the results of this survey at the Commission's Online Workshop on 11 May 2022. The RVR reports they had 1207 respondents to their survey. In summary, the RVR claims the results of this survey provide evidence that the overwhelming majority of the RVR members surveyed were not satisfied with the complaint process or with how their complaints were resolved by the process.⁴⁰



⁴⁰ Above, note 38.



V. Further recent Stakeholder feedback on the current scheme

Feedback from dispute panellists on dispute resolution process established by Part 4 of the Act

43. The Commission has engaged with some of the dispute panellists and they have provided their views for improving the dispute resolution process.⁴¹

44. The main concerns identified with the current process include:

- process too complicated, formal, costly and requires parties to obtain legal representation;
- disputes panel is not perceived by residents as independent given the operator both appoints the member(s) that will sit on the disputes panel and pays their fees;
- no legislative sanction for disputes panel to provide procedural advice to parties to a dispute or provide a preliminary or interim opinion as to the merits of a case that may aid early resolution of the dispute;
- disputes panel unable to make their own investigations of the issues and recommend other dispute resolution options, such as mediation, that may be more suitable for reaching a resolution;
- process needs to be tailored against the backdrop that disputes often relate to a resident's home and private living space and often involves the interplay of complex social relationships involving residents and a retirement village's management and staff.

45. The dispute panellists recommended various improvements to the process including:

- introduction of an "investigator" or a "conciliation step" into the process.⁴² This step would precede the disputes panel's consideration of a dispute. Ideally the investigator role would be separate from the disputes panel so that the parties can give full and frank disclosure to the investigator/

conciliator. The process for an investigation could be as follows:

- issue of dispute notice;
 - investigator/conciliator meet with parties, clarify the issues and provide a report on the merits of the dispute and recommendations to aid early resolution (this report could be known as a preliminary determination);
 - parties have opportunity to accept or reject preliminary determination. If accepted by both parties then it would become a binding determination enforceable in the courts. If either party rejects the preliminary determination, then the dispute goes before the disputes panel for determination and the more formal process set out in the Act follows. There would be cost consequences for a party who rejects a preliminary determination which is ultimately upheld by the disputes panel.
 - in the absence of introducing an investigator/conciliator into the process, introduction of something akin to a judicial conference where at an early stage the disputes panel discusses with the parties how best the case is dealt with, that could include allowing for a pre-hearing settlement conference;
 - a small administrative body (possibly sits within the Ministry of Justice) established to receive and co-ordinate the receipt of dispute notices and appoints disputes panel. Alternatively, the Commission to receive dispute notices, appoint the disputes panel and pay the panel with funds received from the operator.
46. In summary, the disputes panellists see a clear need for the formal dispute resolution process to be changed to include an investigation/conciliation step. This change will better serve residents and the nature of disputes that arise in a retirement village

⁴¹ Meeting between Commission and dispute panellists held on 25 February 2022..

⁴² Conciliation is a process with wide variations in meaning and includes informal discussions held independently between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute and also combined processes in which an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement. The conciliator may have an advisory role but not usually a determinative role. See <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/glossary-of-dispute-resolution-terms/>

setting. It will also provide a dispute resolution process for residents that is focused on finding a solution that preserves relationships and is procedurally less formal and legalistic. The introduction of this step in the dispute resolution process would require an amendment to the Act and Regulations.

47. A further option that could be considered, that may not require legislative change, would be introducing a pre-disputes panel hearing settlement conference into the disputes panel procedure. The Act provides that the disputes panel may conduct the dispute resolution in any manner it thinks fit.⁴³ The disputes panel could possibly rely on this provision to enable them to amend their procedure to allow for a pre-hearing settlement conference. A pre-hearing settlement conference would give the disputes panel an opportunity to give an early indication of what decision it is likely to make in order to aid the parties in coming to a settlement before a formal hearing is set down.

Other proposals for change raised at online workshop 11 May 2022

48. At the online workshop further suggestions were made by stakeholders as to what would make a good scheme.⁴⁴ These suggestions are summarised below.

Education

49. A focus on the education and upskilling of village managers and operators on preventing disputes and dispute resolution techniques, could also improve the current scheme for residents. There is a recognition that managers have complex and challenging roles and operators can do more to support their managers in this area. A solution could include simple and clear guidance on complaints handling, and information and training about the disputes process for managers and staff.⁴⁵

Good scheme recognises nature of communal living

50. Operators and managers are sometimes called to deal with disputes where different residents have different expectations as to what is a satisfactory resolution of the issue in dispute. Often the satisfactory resolution of a complaint or concern raised by one resident will not meet with the approval of

another resident(s). As such a good complaints and disputes scheme for the industry needs to recognise the nature of communal living that retirement villages offer and include mechanisms that will ensure all parties to the dispute are listened to and heard before decisions are made that may not meet the expectations of all residents. Furthermore, a good scheme must support the retention and restoration of long-term relationships between residents and the operator.⁴⁶

Mediation step

51. Mediation is a useful tool in resolving disputes and care should be taken before this step is taken out of the retirement village complaints and disputes scheme. It allows all parties to express their view, to be listened to and to be part of an agreed solution. It is an important tool that would be useful in the resolution of complaints that progress to the level of a dispute. A good scheme would require all disputes to go to mediation before escalation for a formal hearing and determination.

Recognition at an early stage of complex and serious concerns that could progress to a dispute

52. The type, range and different levels of seriousness of complaints that arise in retirement villages is a factor to consider in designing any new scheme. A good scheme would include a mechanism that identifies, at an early stage of the process, the complexity and seriousness of each complaint, with only the more serious complaints being dealt with by an “external” dispute resolution process.

Independent disputes resolution provider schemes could be tailored to RV industry

53. The industry could look at schemes provided by independent disputes resolution providers in New Zealand and consider whether they could be tailored to fit the requirements of the industry. Examples of schemes that could be considered include, the scheme for Master Builder disputes which provides a facilitation service that precedes a mediation and the International Student Contractual Disputes Scheme (known as iStudent Complaints) that offers conciliation, mediation, and adjudication services in the resolution of disputes.

⁴³ Section 64.

⁴⁴ Retirement Commission meeting note, Retirement Commission Complaints and Dispute Resolution Online Workshop, 11 May 2022./

⁴⁵ Above, note 29, Report 2, page 15.

⁴⁶ Above, note 29, Report 2, page 6.

Commission's observations on these recent initiatives and stakeholder feedback and recommendation

54. The Commission recognises the work that the key stakeholders are doing to gather data about the current scheme and the trialing of new services for residents. The current initiatives, while providing support to residents, may be further complicating the scheme by introducing yet more people a resident can contact to discuss a concern.

55. The Commission observes that key stakeholders are still in disagreement about the performance of the current scheme, but there is general agreement that the scheme could be improved. The Commission's recommendation is that the scheme needs to be reviewed and simplified.⁴⁷ The Commission's view is that the focus should now be concentrated on understanding what a good complaints and disputes scheme for the RV industry looks like.⁴⁸



⁴⁷ Above, note 1.

⁴⁸ View expressed by the Retirement Commissioner, Jane Wrightson, at the 11 May Online Workshop.

VI. Aotearoa Best Practice Dispute Resolution Framework

56. This Framework was designed by the Government Centre for Dispute Resolution to be used as a tool when a government agency is designing a dispute resolution scheme or when reviewing an existing dispute resolution scheme. The Framework is set up for the New Zealand context and is a clear government-wide benchmark as to what a dispute resolution scheme should look like.⁴⁹

57. The Framework consists of 5 Best Practice Principles that flow to 9 Best Practice Standards.

58. At appendix 3 is a table that sets out the Principles and Standards of this Framework and assesses the current scheme against this Framework. A preliminary assessment carried out for the purposes of this report indicates that the current scheme does not sufficiently meet the Principles and Standards set out in the Framework.

BEST PRACTICE PRINCIPLE	BEST PRACTICE STANDARD
1. User focused and accessible	1. Consistent with Te Tiriti o Waitangi 2. Accessible to all potential users
2. Independent and fair	3. Impartial 4. Independent 5. Information is appropriately used
3. Efficient	6. Timely 7. Promotes early resolution and supports prevention
4. Effective	8. Properly resourced to carry out the service
5. Accountable	9. Accountable through monitoring and data stewardship

⁴⁹ Refer <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/aotearoa-best-practice-dispute-resolution-framework/>.

VII. Proposed options for improving the current scheme

59. In its 2021 paper the Commission made some observations on what a good Retirement Village complaints scheme should look like, these included:⁵⁰

- “... the financial consequences of moving out of a village are costly for residents and can result in a feeling of being trapped in a village. This can also put pressure on operators as residents in this frame of mind may increase their levels of complaints. For this reason, it is extremely important there is a robust, unbiased, simple complaints process to ensure issues that arise are addressed in an appropriate manner, which takes into account the need for mutual respect, the power imbalance that exists between residents and operators, the stress unreasonable complaints can place on operators, and which recognises that residents can’t just move away if they are unhappy with the resolution offered by the operator.”
- *“It is relatively common for operators to engage legal counsel to deal with complaints but this route is affordable to fewer residents. There were also concerns expressed in the submissions regarding the role of the statutory supervisor as an independent arbitrator given they are appointed by and funded by the operator. There is no resident advocate built into the complaints system.”*
- *“Other complaints systems that focus on consumer complaints where financial and power imbalances exist (such as finance, insurance and media complaints) may provide some insights into how best to structure an improved complaints system for RVs. Another missing element is an independent complaints investigation function (such as seen in financial disputes resolution schemes). Such a scheme could be funded by operators, but not appointed by them, and would investigate specific issues of substance where the parties are deadlocked or not reaching agreement.”*

Ombudsman/industry type dispute resolution scheme

RVR proposal - “Ombudsman type role”

60. The RVR has proposed that a revised complaints scheme must incorporate an “authorised advocate” for older people with legislative functions to investigate, determine and enforce decisions around complaints without a stressful and drawn-out process.⁵¹
61. The RVR suggested that this “authorised advocate” could be either the Retirement Commissioner or the new Aged Care Commissioner or a Seniors Ombudsman and that the RV industry could implement something like the Banking Ombudsman scheme. The RVR has recently provided the Commission with further details of their proposal and considers that their proposal will include the following features:⁵²
- Independent: an Ombudsman type role that is distanced from operators;
 - Speed: entire process including adjudication completed within 6-12 week period;
 - Be automatic: does not require resident to escalate it. Automatically proceeds to next stage;
 - A binding decision: if unresolved, the Ombudsman type role gives a decision that is binding on the operator including compensation to the resident, where necessary.
62. A flow chart on how the RVR’s proposed complaints process would work is at appendix 4.

RVA response

63. In response to this proposal, the RVA have confirmed that if it is felt, on a cost-benefit basis, that an Ombudsman type role was necessary, then it would work with the relevant parties to ensure the terms of engagement will address the perceived issues.⁵³ More recently the RVA have expressed concerns with the proposed

⁵⁰ Retirement Commission, Retirement Village legislative framework: Assessment and options for change Submissions Summary and Recommendation 2021, page 19.

⁵¹ Retirement Village Residents Association of NZ (Inc), “Framework for Fairness Guidelines for Achieving Best Practice in New Zealand Retirement Villages”, October 2021, page 6-7.

⁵² Above, note 36, slide 23.

⁵³ Retirement Villages Association of New Zealand, “Blueprint for New Zealand’s Retirement Villages Sector”, page 6.

Ombudsman type scheme namely that it may be flooded with minor complaints about village life and would exclude the statutory supervisor who brings a deep knowledge of village life to the resolution of complaints under the current scheme.⁵⁴

64. A flow chart on how the RVA view the complaint process that includes the current initiative of the Fair Way Trial is set out at appendix 5.

Further consideration of an Ombudsman type scheme/industry dispute resolution scheme for the RV industry

65. The Banking Ombudsman Scheme Ltd (**BOS**) is one of four approved disputes resolution schemes established under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.⁵⁵ The BOS's primary aims are to investigate and resolve disputes between banks and their customers and dispute prevention through identifying the causes of complaints and sharing insights with banks, the public and regulators.
66. By way of background there are three other dispute resolution schemes in the financial sector that have been established under the same legislation. These include:
- Insurance and Financial Services Ombudsman Scheme www.ifso.nz
 - Financial Services Complaints Limited Scheme www.fscl.org.nz
 - Financial Disputes Resolution Service www.fairwayresolution.com
67. The BOS's services are provided free to complainants and are funded by the BOS's participants, the banks. The framework for the Rules of the BOS are prescribed by legislation and these Rules govern how the BOS operates. In summary, the Rules set out what complaints are considered, how they are considered by the BOS and the decision-making criteria.
68. A key feature of the BOS is the relatively simple and straightforward process that is available to banking customers to have their complaints investigated by an independent organisation and have a decision issued by the BOS if a resolution

of the complaint cannot be reached with their bank. Further, the BOS is funded by the banks and is free for customers to access and use.

Application to RV industry

69. A scheme with similar features to the BOS could be considered further to replace the current scheme for the resolution of formal complaints and possibly also disputes that proceed to the disputes panel. To implement a similar scheme for the RV industry the Act would require amendment to establish the scheme with further regulations to set out the details and standards of the scheme.⁵⁶
70. This type of Ombudsman/industry dispute resolution scheme would simplify the current scheme by:
- providing residents with a simple and clear pathway on how to have a complaint or dispute resolved once informal contact with their village manager/operator has not resolved the complaint;
 - releasing the statutory supervisor from their role in the formal complaints process so that they can fully concentrate on monitoring the financial position of the retirement village;
 - take out the separate step in the current process of "mediation" and incorporate it into the scheme's format as part of the facilitation of the dispute (ie. a key step of the process in the BOS is the "facilitation" of an agreed resolution between the parties;⁵⁷ and
 - as a determination would be binding on the industry member but not the resident, who could choose to accept or reject the determination, may no longer require a separate disputes panel for the RV industry. A resident could instead engage with the court system if they wished to pursue a dispute further.
71. An advantage of this type of scheme is that it would go some way to addressing the power imbalance between operators/village management and residents. The scheme would:

⁵⁴ Views expressed by RVA representatives at the 11 May 2022 Online Workshop.

⁵⁵ Refer <https://bankomb.org.nz>.

⁵⁶ See definition of Industry Dispute Resolution at <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/glossary-of-dispute-resolution-terms/>.

⁵⁷ Refer to <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/glossary-of-dispute-resolution-terms/>. Mediation is a process where the parties, with the assistance of external help, create a safe environment where they can address their issues and resolve them if they wish. A mode of mediation that is the most commonly used in regulated dispute resolution schemes is "facilitative". This is where the mediator/facilitator assists the parties to the dispute to, for example, identify the disputes issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute.

- ensure that residents had some control of the process in that if operators do not efficiently address their complaints through an internal village complaints process, residents have the option of referring the matter to the independent scheme for resolution;
- independently investigate the complaint so that residents were not required to instruct their own legal representative.⁵⁸ Residents will have assurance that their concerns will be carefully investigated by a suitably qualified person independent of the operator irrespective of whether an operator chooses to instruct their own legal counsel in the matter.

72. There are a number of aspects of this proposal that require further consideration including:

- whether this scheme would consider all complaints and disputes. In particular, whether there are any types of disputes that would be more suited to resolution by other means such as a formal mediation process and/or determination by tribunal (ie. more complex legal disputes relating to the interpretation of occupation rights agreements).
- how any scheme would work alongside the process for resolving complaints against health service providers under the Health and Disability Commissioner Act 1994;
- analysis of the funding model for such a scheme;
- how the scheme could be structured so that it discourages any frivolous and vexatious complaints;
- how the scheme could be structured to ensure that statutory supervisors continue to be across serious issues that arise as disputes in the villages that they supervise; and
- how the scheme would work in with an advocacy service that gives residents access to a person who can support and represent their interests during the

complaints/disputes process.⁵⁹ An advocacy service is considered further below.

Recommendations

73. It is recommended that further consideration is given to how an Ombudsman/industry type dispute resolution scheme can be specifically tailored for the RV industry.
74. Further, it is recommended that all proposed schemes are assessed against the GCDR Best Practice Guidance on Disputes Resolution for developing a dispute resolution scheme.

Advocacy service for residents

75. The legislative framework acknowledges that when a resident has a dispute with an operator or another resident, they can have a support person or representative in dealing with an operator or another resident that they pay for themselves.⁶⁰
76. The Commission has noted that it is relatively common for operators to engage legal counsel to deal with complaints but this route is affordable to fewer residents.⁶¹ Further, given the power imbalance that can be caused by an operator in a dispute being represented by legal counsel with the resident representing themselves, the Commission recommended that the issue is considered of how best to include resident advocacy into the legislative framework.⁶²
77. A past Monitoring Report of the Commission looked at the role of statutory supervisors and investigated whether the statutory supervisor has some sort of advocacy role for residents. The Report found that the nature of charging and invoicing acts as a barrier to a statutory supervisor taking on an advocacy role. In particular, visiting provincial villages (other than for the Annual General Meeting) can be cost prohibitive.⁶³
78. An advocacy type service has been built into other complaints schemes in New Zealand and these schemes could have

⁵⁸ A key feature of the BOS is that it is designed to be easy and the consumer should not need a lawyer or any other professional to help them with the complaint once the Scheme has started looking into the complaint. Refer <https://assets.bankomb.org.nz/public/Information-sheets/How-we-consider-disputes.pdf>.

⁵⁹ The RVR consider that in addition to the introduction of an Ombudsman type scheme, further funding is provided to an organisation such as the RVR to employ and implement independent advocacy services to residents within retirement villages. Refer above note 51, page 7.

⁶⁰ Section 49 and sch 4, right 6.

⁶¹ Above, note 1, page 17.

⁶² Above, note 1, page 21.

⁶³ Retirement Commission, "Retirement Villages Monitoring Report 2009 - Statutory Supervisors", 18 March 2009, page 9.

application to or provide insights to the RV industry in considering this issue. These include the complaints scheme provided by the Health and Disability Commissioner under the Health and Disability Commissioner Act 1994 and the “Navigation Service” set up by ACC to support their clients through ACC processes.

Health and Disability Commissioner

79. The Health and Disability Commissioner Act 1994 (HDC Act) established the role and functions of the Health and Disability Commissioner and also set up an advocacy service for health and disability service consumers. This service operates independently from all health and disability service providers, government agencies and the Commissioner. It is a free and confidential service provided to health and disability services consumers where advocates will support the consumer in getting their concerns resolved directly with the provider of the service. The service can receive complaints directly and the Commissioner can refer a complaint it receives to the advocacy service. The Commissioner does not refer all complaints to the advocacy service and does have other powers to take other actions regarding a complaint as set out in the HDC Act.
80. The advocacy service is known as the Nationwide Health and Disability Advocacy Service.⁶⁴ An advocate’s primary role is to advise a consumer of their rights, answer their questions and talk them through their options for making a complaint and then support them through the process of making a complaint. Unlike the role the Commissioner may take, the advocates are not investigators or mediators and do not make any decisions on whether there has been a breach of a consumer’s right. However they do provide a valuable support service to consumers throughout the process of having a complaint resolved with the service provider.
81. One of the key advantages of this advocacy service is that it gives consumers more control over the complaint process and results, and enables a better ongoing relationship between the consumer and health provider.

82. This service appears from reports to be well received by consumers. The Health and Disability Commissioner has reported that for the period 1 July 2019 to 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.⁶⁵

ACC Navigation Service

83. The Navigation Service was established by ACC in September 2019 with the purpose of providing a free and independent service to ACC clients that assists them in navigating and understanding ACC schemes and processes and to better understand or dispute an ACC decision. ACC co-designed the Navigation Service with clients and sector experts to respond to the recommendations made by Miriam Dean QC to improve advocacy services for ACC clients. The service does not provide dispute resolution services or advocacy support to ACC clients in review hearings.⁶⁶
84. The service was reviewed internally by ACC in June 2021 in preparation for a contract renewal with the providers of this service. One key recommendation was for the service to allow providers to support ACC clients engaging in the conciliation and review process. This was identified as a need because of the high percentage of ACC clients who wanted support within ACC’s disputes process.⁶⁷
85. The need for client advocacy was a key reason why ACC was challenged to set up this service for its clients. The recent recommendation for change to the service illustrates that vulnerable people who have complex issues not only require advice on how to navigate claims processes but also require an advocate to support them in their dealings with ACC through claims processes where there is dispute.

Application to the RV industry

86. The advocacy service established under the HDC Act is government funded and provides effective and valuable advocacy assistance to consumers in the resolution of their complaints with health providers. If Government were to implement and fund a similar advocacy service for the RV industry, new legislation would be required

⁶⁴ Refer www.advocacy.org.nz

⁶⁵ The Health and Disability Commissioner’s submission to Commission on the 2020 White Paper, 3 May 2021.

⁶⁶ ACC, “Navigation Services Internal Audit”, November 2020.

⁶⁷ ACC, “Customer Centre Navigations Services Key Recommendations Pack”, June 2021, page 5 Recommendation #4.

to establish the service and set out its functions and service specifications.

87. Lessons from ACC's Navigation Service can provide insights to the RV industry as it considers the need for an advocacy service. To properly support the RV industry's most vulnerable residents the learnings from the Navigation Service show that these residents would benefit from not only guidance about the complaints and disputes scheme, but also from having a person who can advocate for them during the dispute resolution process.

Recommendation

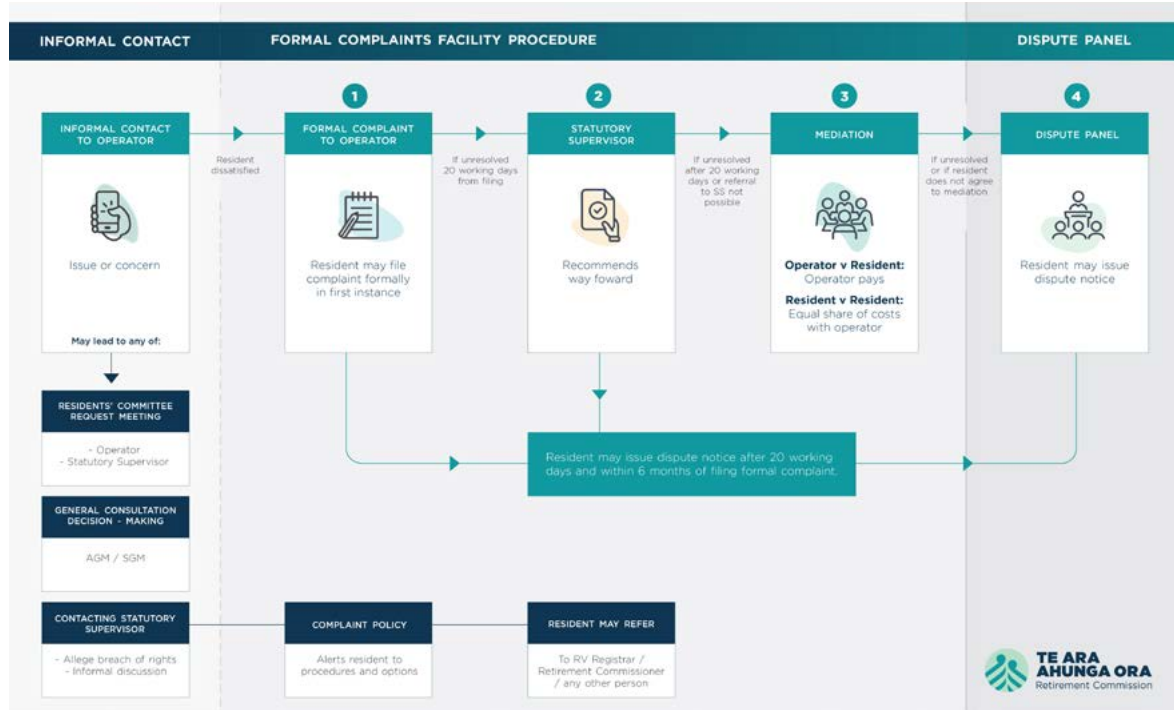
88. Recommend that the RV industry considers whether an industry funded advocacy service could be introduced to serve their residents. There is nothing in the current

legislation that prohibits the industry itself from introducing and funding an independent advocacy service for residents. While the recent initiative of the RVA with the Fairway Trial specifically excludes the provision of advocacy, this could be reviewed and extended to provide an advocacy service.

89. Recommend that an advocacy service is also considered as part of the upcoming review by the Ministry of Housing and Urban Development of the retirement village legislative framework.



Appendix 1: Diagram in Retirement Villages Code of Practice 2008 setting out current Complaints and Disputes Scheme



Appendix 2: Roles of Statutory Supervisor, Retirement Commissioner, Registrar of Retirement Villages in the current Complaints and Disputes Scheme

STATUTORY SUPERVISOR

Operator's Complaints Policy process (COP)

- Complaint Policy may include contact details of statutory supervisor who a resident can contact to talk about a wish to make a formal complaint or a formal complaint already made clause 33(2)(d)
- Operator can consult with statutory supervisor in certain circumstances after resident makes a formal complaint clause 35(2)
- Operator can refer formal complaint to statutory supervisor to work with parties to provide with an impartial perspective and to recommend a way forward clause 35 (4)
- Complaints Policy must include option that resident can request that the village's residents' committee call a meeting with operator and statutory supervisor clause 33(2)(a)

Dispute Panel process (The Act)

- Operator must notify statutory supervisor of certain disputes after dispute notice given section 55(1)
- Resident right to inform statutory supervisor of dispute and for which a dispute notice may be given section 55(3)
- Operator duty to give record of dispute panel decision on request section 71(3)

CORR (The Act)

- Resident can bring an alleged breach of CORR to attention of statutory supervisor section 33(2) and Schedule 4

RETIREMENT COMMISSIONER

Operator's Complaints Policy process (COP)

- Operator to report to Retirement Commissioner six-monthly formal complaints and matters relating to complaints facility that is required by Retirement Commissioner clause 32(3)
- Complaint Policy may include contact details of the Retirement Commissioner who a resident can contact to talk about a wish to make a formal complaint or a formal complaint already made clause 33(2)(d)
- Approve mediators that can be used in formal complaint process and list on website clause 35(6)(a)
- Operators to ask Retirement Commissioner to select a mediator if parties to disputes cannot agree clause 35(6)(b)

Disputes Panel process (The Act)

- Duty to maintain and publish list of persons they have approved for appointment as a member of dispute panel section 58
- Duty to give Retirement Commissioner record of dispute panel decision on request section 71(3)

CORR (The Act)

- Resident can bring an alleged breach of CORR to attention of the Retirement Commissioner section 33(2)
- Publish information on CORR and disputes procedure under RVA and may assist to resolve complaint Schedule 4

REGISTRAR OF RETIREMENT VILLAGES

Operator's Complaints Policy process (COP)

- Complaint Policy may include contact details of Registrar of Retirement Villages who a resident can contact to talk about a wish to make a formal complaint or a formal complaint already made clause 33(2)(d)

CORR (The Act)

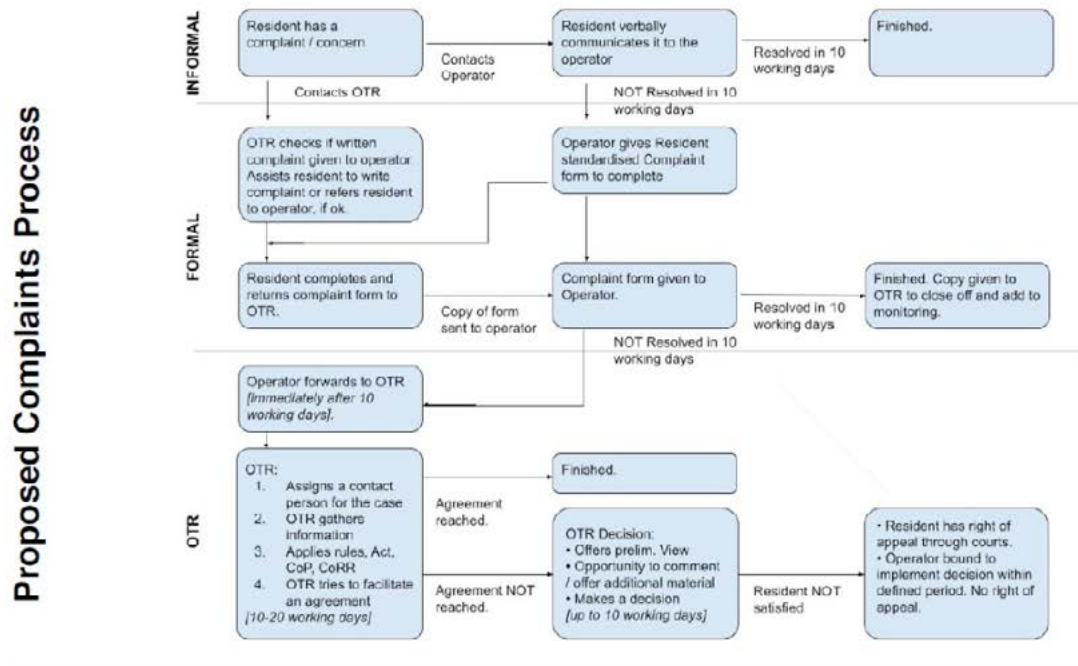
- Resident can bring an alleged breach of CORR to attention of the Registrar of Retirement Villages section 33(2)

Appendix 3: Aotearoa Best Practice Disputes Resolution Framework - Comparison of Current Complaints and Disputes Scheme against GCDR Framework Principles and Standards

Principle/Standards	Assessment of Current Scheme and Issues
1. User-focussed and accessible <ul style="list-style-type: none"> Consistent with Treaty of Waitangi Accessible to all potential users 	<ul style="list-style-type: none"> Some residents too scared to use the scheme to complain as not seen as accessible or fair Residents have too many people they can contact to discuss a concern or complaint that causes unnecessary complexity and confusion Dispute panel is not user-friendly for residents - process is adversarial, intimidating and stressful
2. Independent and fair <ul style="list-style-type: none"> Impartial Independent Information is used appropriately 	<ul style="list-style-type: none"> Operators have financial resources to engage legal counsel compared to residents in a dispute Statutory supervisor appointed and paid for by operator Statutory supervisor, mediation and disputes panel process paid for by operator No independent investigative function of complaints built into the scheme
3. Efficient <ul style="list-style-type: none"> Timely Promotes early resolution and support prevention 	<ul style="list-style-type: none"> No structured early resolution process built into the scheme so to prevent disputes. Insufficient preliminary assessment of disputes to identify issues and the appropriate options for resolution Determination of a dispute takes too long No automatic escalation of complaint built into formal complaints process Process around resolving breaches of CORR lacks clarity
4. Effective <ul style="list-style-type: none"> Properly resourced to carry out the service 	<ul style="list-style-type: none"> No free advocacy service built into scheme for residents. Dispute panel process is adversarial and intimidating and stressful for residents. Whether it is appropriate to have a formal dispute resolution process specifically for Retirement Villages or if parties better served by an existing tribunal process.
5. Accountable <ul style="list-style-type: none"> Accountable through monitoring and data stewardship 	<ul style="list-style-type: none"> Retirement Commission monitors formal complaints and dispute panel process Statutory supervisor some oversight of scheme if requested to be involved No monitoring of the resolution of informal complaints process by operators

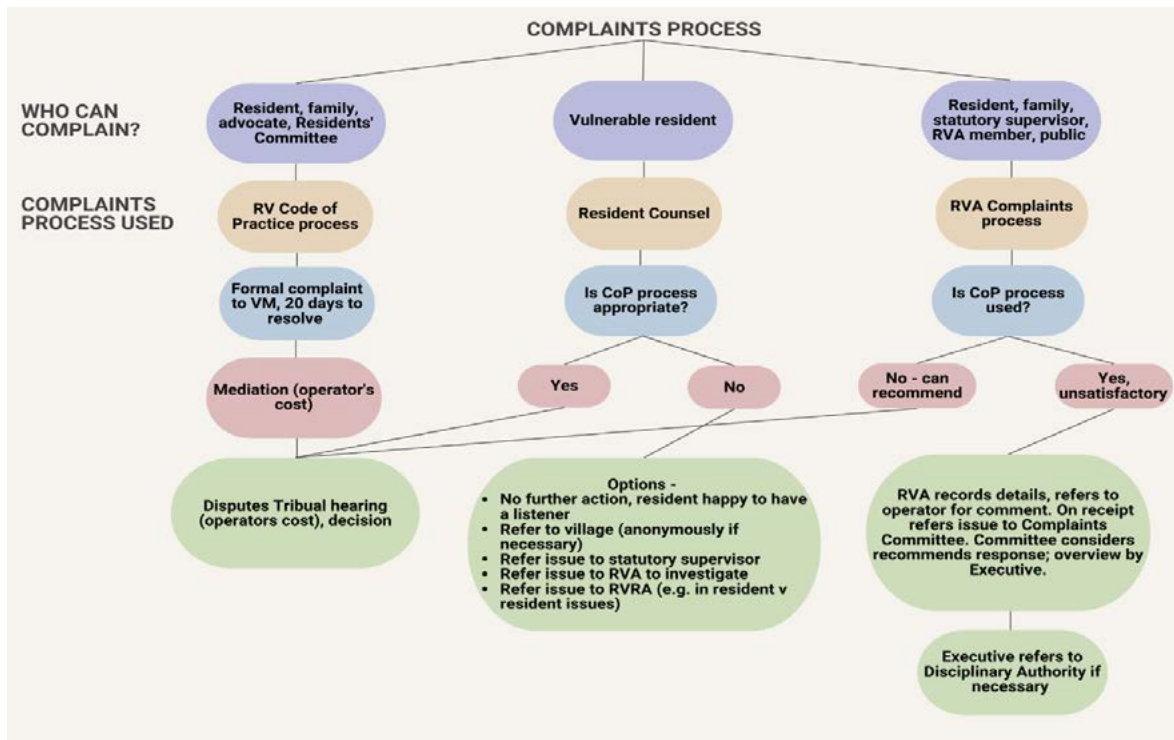


Appendix 4: RVR’s flowchart on proposed Ombudsman type role (OTR) complaints and disputes scheme – Workshop Slides



Appendix 5: RVA's flowchart on the RV complaints process that includes the Fair Way Trial shared at the Online Workshop

Note: the reference to "Resident Counsel" is the service offered by the Fair Way Trial



Te Ara Ahunga Ora Retirement Commission

Level 15, 19 Victoria St W, Auckland and Level 6, 11 Chews Lane, Wellington.
PO Box 106-056, Auckland City 1143. Phone +64 9 356 0052.
retirement.govt.nz sorted.org.nz sortedinschools.org.nz

