

Retirement Villages Complaints and Dispute Resolution Scheme

REPORT AND SCHEME
RECOMMENDATION
JUNE 2025



NEW ZEALAND
DISPUTE RESOLUTION
CENTRE
Te Pokapū Whakatau Tautoko o Aotearoa



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1. Executive summary

Overview

The Retirement Villages Complaints and Disputes Resolution Scheme Investigation report, prepared by the New Zealand Dispute Resolution Centre, outlines a comprehensive framework for a new scheme aimed at improving the handling of complaints and disputes in retirement villages (the **Scheme**).

The report builds on previous studies, including Te Ara Ahunga Ora Retirement Commission's (the **Retirement Commission**) report from 2022 and the MartinJenkins cost-benefit analysis from 2023, and incorporates insights from various stakeholders.

The goal is to create a fair, efficient, and easy-to-use scheme for both residents and operators.

The existing complaints and disputes system does not meet best practice standards, and both the Retirement Commission and the Ministry of Housing and Urban Development (the **Ministry**) want to address these issues as part of broader sector reforms.

Changes to the current complaints and disputes process are being considered as part of the broader review of the Retirement Villages legislation. The review is being led by the Minister of Housing and Urban Development and further information can be found on the Ministry's website at [Retirement Villages Act, regulations and codes - Te Tūāpapa Kura Kāinga - Ministry of Housing and Urban Development](#). The recommendations in this report will inform the Ministry's advice to the Minister.

The report recommends a new Scheme that aims to identify all possible functions and design choices for the Scheme, discusses where the Scheme could be located, evaluates the pros and cons of different options, recommends the preferred option based on principled criteria, and identifies high-level key legislative changes needed.

Initially, operators deal with complaints as part of village management and the service they provide to residents. The aim is to resolve issues as early and amicably as possible. Each operator will have better knowledge than Scheme providers of the residents, their issues, and the available options or solutions that might best meet the residents' and operators' needs and interests, as well as the needs and interests of the village and all its residents and other stakeholders.

Operators should have the opportunity to manage issues before escalation to a scheme. This is the expectation or 'default' setting. However, residents should be able to apply directly to the Scheme if they feel unable or unwilling to engage with the operator for any reason, or after a period (10 working days or longer by agreement) if the issue is unresolved.

We recognise the unique dynamics and challenges of the retirement sector, where residents often cannot easily move out of their villages. Therefore, the Scheme must prioritise restoring and preserving relationships, be accessible, and provide efficient and effective dispute resolution as early and as close to the source of the issue as possible. We expect most issues to be resolved between the operator and resident (and between residents) at this initial stage.

The Scheme will be resident-centric and will support the resident through the process with empathy. The Scheme will not provide an advocacy service to residents. However, a case



manager will be assigned to see the issue through to completion. The case manager will discuss the issue with the resident, identify if there is an issue within the Scheme's scope, assist the resident in navigating the process and framing the issue, and act as a go-between to help the parties find a resolution. We expect most issues escalated to the Scheme to be resolved at this early resolution stage.

When these avenues have been exhausted, a case assessor or senior-decision maker may issue a non-binding evaluation and recommendation, refer the parties to mediation, or make a binding decision.

The Scheme should be accessible and serve the needs of the users and other stakeholders, providing efficient and effective dispute resolution or determination, striking the appropriate balance between cost, speed, privacy, confidentiality, and transparency.

Key features of the recommended Scheme are:

Mandatory

- The Scheme is the mandatory complaint and dispute resolution forum for all issues within its scope.
- The processes are confidential to the parties, although outcomes, case summaries and guidance notes may be issued, with residents' details anonymised.

Complaint handling

- The operator remains the first point of contact for resolving issues and is engaged first before approaching the Scheme. However, the resident can choose to contact the Scheme directly, if they prefer, for whatever reason, not to approach the operator.
- Residents and operators can apply to an independent complaints body (the Scheme) for assistance in resolving their issues. The Scheme offers evaluation, facilitated resolution, mediation, or a binding decision. The Scheme's emphasis is on resolution as early in the process as possible
- Case managers from the Scheme are assigned to help residents with issue handling, carrying out a triage function and helping the residents through the process. They act as the primary point of contact throughout the process.
- No hearings (except in exceptional circumstances), as residents report these as being intimidating – decisions would be made based on the information and documents gathered by the case manager and submitted by the parties

Roles and responsibilities - overview

- **Case manager:** Oversees triage, facilitates early resolution, and manages the complaints process end-to-end.
- **Case assessor:** Makes early-stage decisions and supervises case managers. Handles resolution processes and decisions within specified thresholds.



- **Senior decision-maker:** Deals with complex or serious cases and reviews decisions made by case assessors.

Accessibility

- Multiple intake methods, including phone, email, online forms, postal submissions, and accessibility and language options.
- The Scheme accommodates residents who may feel uncomfortable engaging directly with operators.
- The complaint or dispute may be withdrawn at any time.

Process flow

- Issue raised with the operator.
- Application to the Scheme if unresolved within 10 working days or a longer agreed period.
- Triage and assessment by the case manager. Request further information or, if out of scope, refer the parties elsewhere and assist them in engaging.
- Early resolution/facilitation/conciliation/non-binding evaluation and recommendations, including the case manager acting as a 'go-between' to assist the parties in resolving the issue.
- Mediation, if appropriate, as directed by the case assessor. The resident may decline mediation. The case assessor approves mediated settlement agreements. We expect mediations to be relatively infrequent.
- A verbal or written non-binding evaluation and recommendation by the case assessor. These give the parties a 'reality check'. They indicate how the dispute is likely to be resolved by a binding decision based on the information available at that time. We expect evaluations to prompt settlement in most cases where they are used.
- Binding decisions made by the case assessor or senior decision-maker. These have the weight of a District Court judgment.
- Internal Scheme review for corrections of manifest error or review of a decision if new information becomes available after the decision.
- Confirmation by the Scheme that the parties have complied with orders/directions or agreed settlements, or escalation to the statutory supervisor and Registrar of Retirement Villages and other appropriate authorities.

Shortened time frames

- Shortened timeframes to minimise delays. The operator has a 10-working-day period to resolve the issue with the resident, after which either party may refer the issue to the Scheme for resolution within 25-35 working days.



- The parties may continue engaging beyond the 10-working-day timeframe until they reach an impasse and one party then applies to the Scheme, or they may agree to extend that deadline.

Process diagram

The flow chart in diagram 1 below represents the key process steps that we recommend.

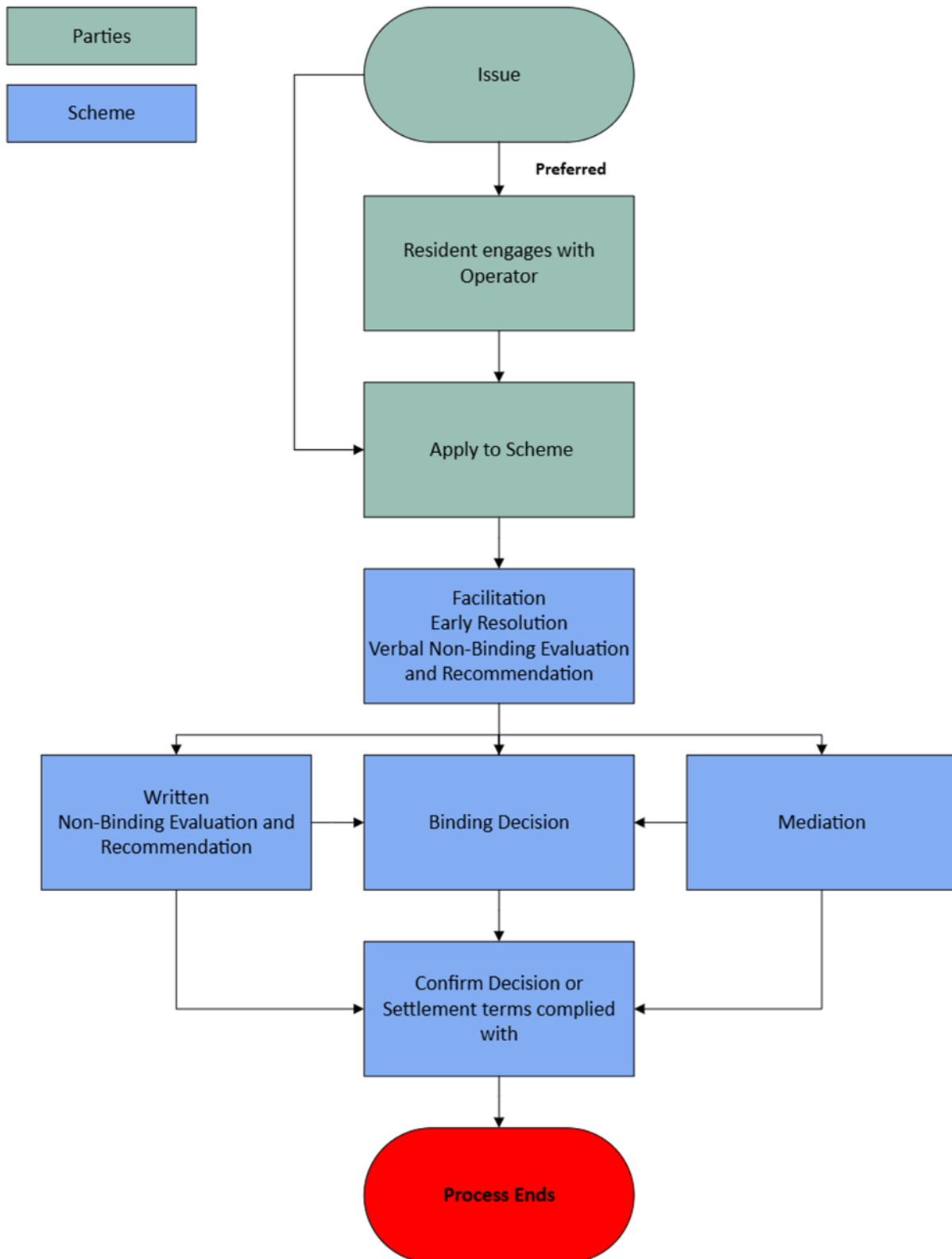


Diagram 1: Flow chart – process overview

Jurisdiction and remedies

- Jurisdiction covers all disputes involving ORA, all rights and obligations under ORA and issues under the Code of Resident's Rights and Code of Practice. As this is a mandatory



Scheme and a specialist dispute resolution body, there should be no monetary limits. (This is an area with different views, discussed in section 3: *Scheme framework – Scheme scope and jurisdiction and Scheme framework–Step 8 – Appeal/Review rights* below).

- Broad range of remedies, including apologies, declarations of rights and obligations, declarations of a breach of an ORA, refunds, damages, and orders for retirement village policy changes. (See *The nature of binding decisions* in this section below.)
- Appeal rights are limited to questions of law only, in the interests of finality. (This is an area with different views. See the discussion in section 3: *Scheme framework–Step 8 – Appeal/Review rights* below).
- The right to seek a judicial review by the courts for serious procedural issues or breaches of the rules of natural justice.
- Operators, residents or their representatives or associations may bring test cases, with all parties' costs funded by the applicant.
- Decisions and orders are enforceable as if they were orders of the District Court.

Funding model

- Base Scheme funding is provided through operator levies based on the number of residential units.
- The operator pays directly for specific process steps the case assessor directs: mediation, non-binding evaluation, decision-making, and in-person mediations or meetings.

Impacts and statistics

- Approximately 80-90% of complaints are expected to be resolved at the early stages.
- Mediations likely will remain uncommon and may mainly be used for issues between residents.
- Binding written decisions are expected to be required in only 2%-3% of cases.
- Non-binding evaluations and recommendations are expected to resolve many cases effectively by prompting settlement.

Disputes between residents included

- A resident with an issue with another resident must address that issue through the operator's complaints process first.
- Issues escalated to the Scheme must relate to the village context or breaches of rights under occupation agreements or the Code of Residents' Rights.



Legal representation and advocacy

- Legal representation is limited; non-legally trained representatives or associations may assist with applications.
- An advocacy service for residents is not recommended. If, after experience of the new Scheme, it becomes clear that it is required, it should be established independently of the Scheme, funded by the operators. The Scheme will support residents through the process.
- A reduced role for the statutory supervisors (where appointed). The Scheme would perform many dispute resolution functions they have performed.

Operator obligations

- Operators must maintain internal complaints processes to resolve issues promptly.
- Operators must engage constructively with residents before escalating issues to the Scheme.
- Transparent reporting, including in the operator's annual report and disclosure statements

Legislative and structural recommendations

- Amendments to the Act, Code of Residents' Rights, Regulations, and Code of Practice are necessary to implement the recommended Scheme. These are outlined, at a high level, in Appendices 3 to 5.
- We recommend that mutual obligations of good faith be added to the Code of Residents' Rights (Appendix 4) and that these bind residents and operators.
- Existing dispute resolution providers, both public sector and private sector, may bid for the Scheme. A regulated Scheme could be established if no satisfactory bids are received.
- Information on trends across the sector and operators' behaviour patterns is collected and provided to the Retirement Commission and relevant authorities.

Comparison between the current scheme and the recommended scheme

ASPECT	CURRENT SCHEME	RECOMMENDED SCHEME
Complaint Handling	Operator is the first point of contact for resolving issues. Escalation to statutory supervisor, mediation, or disputes panel. Resident needs to apply for the complaint to be escalated to each stage.	Operator is the first point of contact for resolving issues. Issues can be escalated to an independent complaints body for evaluation, facilitated resolution, mediation, or a binding decision. Case manager assists residents. Case assessor controls the process.



ASPECT	CURRENT SCHEME	RECOMMENDED SCHEME
Statutory Supervisor	Assists in resolution of a broad range of disputes.	Minimised role, with case assessor and senior decision-maker taking on more responsibilities.
Mediation and Disputes Panel	Mediation used in some cases. Disputes Panel (3 people) hearing the issue, used infrequently	Facilitated resolution at an early stage encouraged. Case assessor provides early evaluation and recommendations. Case assessor determines whether mediation, evaluation and recommendation or a binding decision is most likely to resolve the issue. Complex cases may be escalated to senior decision-maker.
Timeframes	Structured timeframes, but they are longer, with potential delays.	Structured timeframes: 10-working-day period for operator to resolve issue, total resolution timeframe of 25 to 35 working days. Parties may extend by agreement or extensions may be agreed or granted.
Accessibility	Perceived as not user-friendly or accessible, residents often feel intimidated.	Designed to be user-friendly and accessible, with multiple means of access. Navigator and support functions performed by case manager.
Legal Representation	Operators often have legal representation, leading to power imbalance.	Legal representation minimised, parties encouraged to resolve issues directly or via the Scheme based on facilitated discussion, or on the documentation and information provided. Hearings are only held in exceptional circumstances.
Funding	Funded directly by operators, creating a perception of bias because the operator selects and pays the statutory supervisor, mediator and dispute panel.	Funded by operator levies for Scheme costs and direct payment by the operator for specific process steps. The Scheme chooses, engages and pays the dispute resolvers.
Privacy	Dispute panel hearings held in public	Private processes, confidential outcomes, although outcomes, case summaries and guidance notes may be issued, with residents' details anonymised



Case manager role

Under the supervision of the case assessor:

- checking complaints for fit within the Scheme's scope.
- requesting and gathering more information, if required, to enable the complaint to be assessed fully.
- helping the parties to navigate the process and understand the options, including assisting them to engage with other entities if required.
- assisting with communication between the parties – helping frame the issues and articulating each party's position to the other without advocacy.
- acting as a 'go-between' - facilitating resolution as an intermediary or convening a facilitation meeting.
- managing intake into mediation as directed by the mediator.
- administering the decision-making process as directed by the case assessor or senior decision-maker.
- providing information and (where appropriate) recommendations to the case assessor or senior decision-maker.

Case assessor role

Involved from an early stage. Makes most decisions about the issue and the process for resolution, including:

- reviewing and approving case managers' decisions to accept, reject or refer a case.
- requiring the parties to provide further information or evidence. This is an inquisitorial function to enquire into the case and obtain more information. (We have not proposed a separate independent investigative function that would investigate and make recommendations to the case manager, case assessor or senior decision-maker.)
- issuing a non-binding early evaluation and recommendation for resolution.
- directing the parties to mediation.
- approving settlement agreements.
- issuing a binding decision.

Senior decision-maker role

- A senior decision-maker supervises the case assessor(s).
- Complex or serious cases may be escalated to a senior decision-maker for a binding decision. They may be an employee of or contractor to the Scheme provider.

The nature of binding decisions

- Decisions are made on a fair and reasonable basis without technicalities. However, contractual rights must be respected and only departed from on recognised legal or equitable grounds.



- Decisions bind the parties, but do not have a precedent effect for non-parties. The Scheme will develop a body of expertise and practice and should produce consistent decisions.
- An argument was put forward that the decision should bind operators, but residents (as consumers) should be free to reject the decision and pursue other remedies (or to accept the decision, in which case it becomes binding on them). The stated rationale is to help restore the power imbalance between operators and residents, and, importantly, give residents (consumers) confidence to engage in the process. This is a *de facto* appeal right and is considered further in section 3: *Scheme framework–Step 8 – Appeal/Review rights* below.
- Decision-makers must give reasons for their decisions, which are issued as provisional decisions for comment by the parties. Depending on the detailed Scheme rules, a written non-binding evaluation may be a provisional decision.
- The reasons should be concise and not necessarily recite, analyse and determine each submission received. The approach to Employment Relations Authority decisions is a good guide. They must be written in plain language and an accessible style, that is:
 - appropriate to the intended audience; and
 - clear, concise, and well organised.¹
- By analogy with the Disputes Tribunal and other schemes, a broad range of orders is possible, including:
 - requiring the issue of an apology.
 - declaring rights and obligations.
 - declaring a breach of an ORA, collateral arrangement, the Act, Regulations or a code, policy or procedure.
 - declaring an ORA or collateral arrangement void, in whole or part, or varying them.
 - directing parties to do or not do specific things, including changing policies and procedures.
 - direct the payment of money by way of refund or damages, including damages for loss or ‘hurt and humiliation’ (in limited circumstances where the operator has acted unreasonably, which increases the stress on the resident arising from the issue). We expect any awards to be modest.
- Decisions and orders are enforceable as if they were judgments and orders of the District Court.
- Non-compliance with decisions and orders by an operator is notified to the statutory supervisor (if appointed), the Registrar of Retirement Villages or other appropriate authority.
- Operators, residents or their representatives or associations may bring test cases, with all parties’ costs funded by the applicant. We expect these will mainly be questions of interpretation, not uncrystallised disputes.

¹ For example, see section 5 of the current [Plain Language Act 2022](#). (The Act will be repealed for reasons unrelated to these principles.)



Reporting

- Transparent reporting, including in the operator's annual report and disclosure statements
- Information on trends across the sector and any patterns of behaviour of any operator is collected and provided to TAAO and other relevant authorities

No separate advocacy or investigation services

- An advocacy service for residents that is operationally separate from the Scheme may be required, given the importance of maintaining the Scheme provider's neutrality and impartiality. We suggest that the proposed resident-centric Scheme be allowed to 'bed-in' before deciding whether an independent advocacy service is required. Operator levies should fund any advocacy services.
- There is no separate investigative function. However, a decision-maker may require an expert's report or retain an investigator in extremely rare circumstances, for example, if an issue requires an independent valuation, assessment or investigation to determine the facts.

Recommendations

- The Act be amended to allow the Minister to appoint one or two scheme providers (**approved scheme**) or to establish a government or public sector-based scheme (**regulated scheme**). The operator levies fund the Scheme, and operators pay for specific process steps.
- To access scale benefits, one provider is appointed, with the Minister retaining flexibility to add a second provider later. We do not recommend more than two providers.
- Existing dispute resolution providers in the public and private sectors may bid for the Scheme. A regulated Scheme could be established if no satisfactory bids are received.
- The Act, Code of Residents' Rights, Regulations, and Code of Practice, should be amended per the Scheme framework recommended in this document.
- Policy decisions are required on two related matters: the Scheme's jurisdiction and the appeal rights. More modelling is required on the costs of the Scheme.
- There is no independent advocacy service and no separate independent investigation service. The proposed Scheme should be given time to 'bed-in' before revisiting if these are needed. Operator levies should fund any advocacy services.

2. Introduction

We are privileged to have been retained by Te Ara Ahunga Ora | The Office of the Retirement Commissioner | (**TAAO** or the **Commission**) to recommend a new Retirement Villages Complaints and Disputes Resolution Scheme framework.



This document incorporates and builds on previous reports, including [Te Ara Ahunga Ora's report \(2022\)](#)² and the [MartinJenkins cost-benefit analysis \(2023\)](#),³ and TAAO's other monitoring and annual investigation reports.⁴

Te Ara Ahunga Ora's report concludes that the complaints and disputes system does not meet the principles for best practice dispute resolution schemes. Both the Commission and the Ministry of Housing and Urban Development (the **Ministry**) wish to address this as part of the broader review of the Retirement Villages Act 2003 and associated regulations and codes. The review is being led by the Minister of Housing and Urban Development. Further information can be found on the Ministry's website at [Retirement Villages Act, regulations and codes - Te Tūāpapa Kura Kāinga - Ministry of Housing and Urban Development](#).

This report suggests a framework for a new dispute resolution scheme for retirement villages replacing parts of the current complaints facility and the dispute panel process aimed at improving the handling of complaints and disputes in retirement villages (the Scheme). The goal is to create a fair, empathetic, efficient, and easy-to-use scheme for both residents and operators.

This document is one input into the Ministry's process and will help inform its policy decisions. We understand there will be further industry consultation, undertaken by the Ministry, particularly on Scheme costs and key areas of tension or different perspectives between key stakeholders outlined in this document, most notably the related topics of the Scheme's jurisdiction and appeal rights.

This document is one input into the Ministry's process and will help inform its policy decisions. We understand that there will be further industry consultation, particularly on Scheme costs and key areas of tension or different perspectives between key stakeholders outlined in this document, most notably the related topics of the Scheme's jurisdiction and appeal rights.

We acknowledge the constructive engagement of and comments by key stakeholders on earlier drafts of this report. There are areas of difference on some topics, as well as a pleasing degree of alignment between them on other topics. Their contributions are greatly appreciated. However, this does not imply or amount to endorsement of this document by any of those stakeholders.

Scope and outcome

This document recommends a new complaint and dispute resolution scheme framework. The scope is to:

1. Identify the full menu of functions/design choices the Scheme could have.
2. Discuss where the Scheme could be located.
3. Discuss the 'pros and cons' of the options.
4. Identify principled criteria for making choices from those options.
5. Based on the criteria, recommend the preferred option (or options/sub-options) and a framework for the Scheme.

² Te Ara Ahunga Ora (2022) Retirement Villages Complaints and Disputes: An Assessment.

³ MartinJenkins (2023) Costs and Benefits of Proposed Changes to the Retirement Villages Act 2003.

⁴ [Monitoring reports | Retirement Commission Te Ara Ahunga Ora](#).



6. Identify the key legislative changes required at a relatively high level.

We know the multifaceted requirements for providing a fit-for-purpose Scheme. This encompasses understanding the sector's dynamics and challenges and the need for prompt, fair, accessible, and efficient complaint and dispute resolution.

The retirement sector is characterised by residents who cannot readily move out of their retirement village. Therefore, the restoration and preservation of relationships must be at the heart of the complaint and dispute resolution system. The system must be accessible and serve the needs of the users and other stakeholders. It must also provide efficient and effective dispute resolution or determination, striking the appropriate balance between cost, speed, privacy, confidentiality, and transparency.

Importantly, issues should be resolved early and close to the source of the issue, with a clear escalation path. The Scheme should be resident-centric, without being resident-biased, and be accessible to operators as well as residents.

The recommendations aim to meet the sector's requirements by offering a tailored, efficient, and independent approach to managing and resolving complaints and disputes. We intend for this approach to address the sector's unique needs, promote cooperation and early resolution, and contribute to the sector's growth, sustainability, and overall success.

Focus areas

We focus on the preferred options identified in the 2022 TAAO report and analysed in the MartinJenkins cost-benefit report: 'option 3A - establishing a Commissioner-based dispute resolution scheme' (we prefer to think of this as based in a government or public sector entity); and 'option 3B - appointing a dispute resolution provider to deliver a new scheme', each introducing a 'complaint assessor' role.

In doing so, we will (either explicitly or implicitly) address key questions identified by the Retirement Commission and related questions, including:

1. The Scheme's ideal scope;
2. The Scheme's funding model;
3. The role of the complaint assessor (which we call 'case assessor');
4. The role of the statutory supervisor;
5. Available remedies, including penalties and fines;
6. Whether and to what extent the Scheme should have an advocacy role and/or investigation function;
7. Accessibility, including cultural accessibility;
8. Questions of implementation, including:
 - a. time frames;
 - b. triaging/screening for early resolution and selection of the best process option;
 - c. extent of legal representation;



- d. appeal process;
 - e. transition arrangements from the current scheme to new Scheme; and
9. Where the Scheme is located, including whether the Scheme could/should be merged with pre-existing adjacent schemes, and, if so, which schemes could be considered.

In assessing where the Scheme is located, we will consider a range of factors including:

- a. fiscal cost (in this respect, we rely on the MartinJenkins cost-benefit analysis, supplemented by our observations);
- b. consistency with organisational mission;
- c. independence, accessibility and expertise; and
- d. relevant legislative requirements.

Our recommendations are relatively high-level in some of the above areas. Financial modelling and revisiting the options rejected by the Ministry are out of scope.

Terminology

In this document:

- **Operator** includes any manager or other person or entity acting on the operator's behalf.
- **Issue** includes any complaint, concern or dispute.
- **Scheme Provider** means the entity providing or administering the Scheme.
- **Case Manager** means the person acting for the Scheme Provider responsible for day-to-day case administration, including dealing directly with the parties.
- **Case Assessor** means the person who acts for the Scheme Provider, investigates the complaint, and makes most decisions. (This is an alternative name for the complaints assessor role discussed in the TAAO and MartinJenkins reports. This role could have an alternative title such as 'case investigator' or 'investigator and decision-maker' or other title specified in the Scheme rules.)
- **Senior Decision-Maker** means the person in a senior role who acts for the Scheme Provider, makes decisions on complex cases, and functions as the representative face of the Scheme Provider to the sector and wider public. All decisions made by case assessors would be made under delegation from the senior decision-maker.
- **Decision-Maker** means the case assessor or the senior decision-maker, as applicable.

Other terms are set out in the dictionary in Appendix 1. The terms and in particular the Scheme roles could have other names specified in the legislation or Scheme rules.



3. Scheme framework

Scheme scope and jurisdiction

The Scheme design is complicated by the breadth of issues and the number of parties potentially involved, ranging from interpersonal issues between residents, through compliance with legislation and codes, to issues of interpretation of occupation rights agreements (**ORA**) between residents and operators. Some issues may be within the mandate or sphere of influence of other agencies, such as the statutory supervisor (where appointed) or the Registrar of Retirement Villages. Some issues may include groups of residents with a common interest in the subject matter and the outcome.

Despite this complexity, the full range of disputes under sections 53 and 54 of the Act should continue to be referred to dispute resolution, but we suggest limits on the operator's ability to refer disputes to the Scheme.

Section 54(1) should be amended so that the operator may refer a dispute to the Scheme of the kind concerning any of the matters under section 53(1) only where they have been the subject of a complaint by the resident to the operator and the operator has been unable to resolve the issue with the resident.

The operator should continue to be able to apply to the Scheme regarding matters under section 54(2). That is, issues concerning the resident voiding an ORA under section 31(1) and the resident's entitlement to a refund of capital, interest and costs under section 31(2).

(We recommend no monetary cap on the Scheme. If there is a cap, key stakeholders are reasonably well aligned that a cap of \$500,000 is reasonable. However, we recommend that the amount of capital repayment to a resident be an exception to the cap.)

The Act should clarify that any act or omission that impacts the use and enjoyment of the resident's rights under the occupation right, changes to charges, or any charges, deductions or money due to the resident on termination of an ORA, are within the scope of the dispute resolution Scheme.

At present, section 53(1) provides that a "resident may give a dispute notice for the resolution of a dispute concerning any of the operator's decisions" on a range of matters. On the face of it, the dispute panel only has jurisdiction where an operator has made a decision on the matter. Arguably, there is no jurisdiction for disputes where the operator has not made a decision, for example, where the operator has failed to act through inadvertence. In that case, to establish the panel's jurisdiction, the claimant theoretically must show that the operator has decided not to act. We are not aware that an operator has taken the point. However, we suggest that the opportunity be taken to clarify that all alleged breaches, acts or omissions are included under section 53, not just those arising from the operator's decisions.

The interpretation of relevant legislative instruments, contractual documents, and policies and procedures should be within scope.

We paraphrase and summarise these as follows:

Table 1: Sections 53 and 54

REF	CURRENT	PROPOSED CHANGE:
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s53(1)
and
54(1)

**By the resident or the operator
regarding the operator's decisions:**

Expand to be clear that any alleged breach of or acts or omissions affecting the resident's occupation right or access to services/facilities, or disputes over the interpretation of the ORA, collateral arrangements, the Act, the Regulations, codes, policies and procedures are in scope, not only the operator's decisions on these matters.

Clarify that the operator can only bring matters under section 53(1) to the Scheme if they have been the subject of a complaint by the resident to the operator that they have not been resolved.

(a) Affecting the resident's occupation right or access to services/facilities

Expand to disputes over either party's alleged breach of the operator's complaints and disputes policy, or of any resolution agreement reached under it.

(b) Changes to charges for outgoings or access to services/facilities

No change.

(c) Charges or deductions imposed because of an ORA ending; or

Any deduction of money due to the resident following termination or avoidance of the ORA

No change (but we recommend a shorter period for payment of money due to the resident).

By the resident:

s53(d) Breach of rights in the Code of Residents' Rights (CORR) or Code of Practice (COP)

Expand so the operator can initiate dispute resolution if a resident has breached either Code, and there is an impact on another resident – for example, obligations under 'Your obligations to others' in the CORR. Ensure the CORR binds residents and operators.

s53(2) Issues arising from health and disability services/facilities to which the Code of Health and Disability Services Consumers' Rights Code applies are out of scope

No change.

s53(3) Operator's breach of ORA or Code of Practice re: disposal of the resident's unit

As above, clarify that disputes over the interpretation of the ORA or Code of Practice are in scope.

s53(4) Dispute affecting the occupation right and between the resident and another resident (or a person in the other resident's unit with that other resident's permission).

Clarify that reference to the occupation right includes the use and enjoyment of those rights under the Codes (CORR and COP).



Remove the current requirement that the complainant prove that the occupier is in the other resident's unit with that other resident's permission.

By the operator:

s54(1)	Operator may give a dispute notice on matters listed in section 53(1)	Clarify that the operator can only bring matters under section 53(1) to the Scheme if they have been the subject of a complaint by the resident to the operator that they have not resolved.
s54(2)	Dispute regarding the resident voiding the ORA under section 31	No change.

The dispute resolution scheme should include jurisdiction over any dispute over:

1. A party's compliance with the relevant provisions of the Act, the Regulations, the Code of Residents' Rights (CORR), the Code of Practice (COP), an occupation rights agreement (ORA) or collateral arrangement or any relevant policy or procedure of the operator;
2. A party's compliance with the Scheme's rules;
3. The Scheme's jurisdiction (jurisdictional disputes);
4. A party's compliance with an order, decision or other binding directive under the Scheme;
5. The interpretation of Scheme rules; and
6. Disputes between residents that arise from the village context or rights under ORAs.

We considered whether other issues should be within the Scheme's scope. This includes those in elder mediation, including issues relating to elder care, allegations of elder abuse, and family disputes involving a resident and/or the residential unit. To the extent there are alleged breaches of the ORA and the rights and benefits under it they would fall within the Scheme, but otherwise the status quo should remain. Issues that fall within the scope of the Code of Health and Disability Services Consumers' Rights should be referred to the Health and Disability Commissioner. Allegations of abuse against an operator or its staff, or between residents, would be dealt with by the New Zealand Police. Family disputes should remain outside the Scheme's scope or be dealt with by the New Zealand Police if it falls within their jurisdiction.

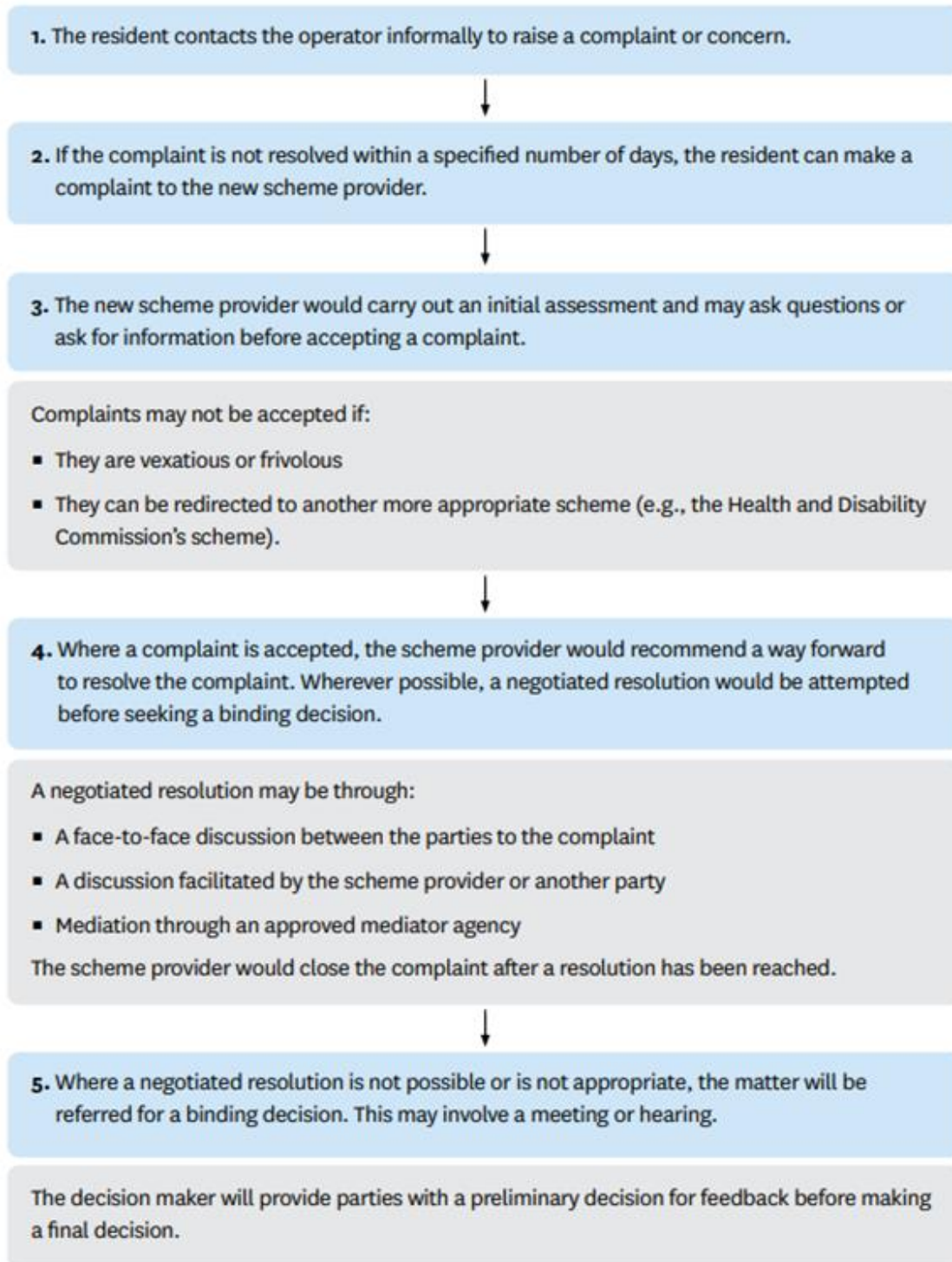
Except for the Scheme's expanded jurisdiction and the remedies discussed below, we have not identified further areas outside the scope of the current scheme that should be included.



Scheme Overview

In August 2023, the Ministry published its discussion paper on a review of the Act.⁵ The Ministry's figure 2 is an overview of a proposed scheme framework:

Figure 2 of the Ministry of Housing and Urban Development's discussion paper:



⁵ Ministry of Housing and Urban Development discussion paper (August 2023) [Review of the Retirement Villages Act 2003: Options for change](#).



Our recommended scheme framework is consistent with this approach, although it is expanded and differs in some areas. We do not distinguish between informal and formal processes, and mediation would be provided within the Scheme by a mediator experienced in elder mediation, whether an employee or approved panellist.

The Scheme primarily assists residents, and residents can bring issues to the Scheme after attempting to resolve them with the operator or directly if they do not wish to approach the operator for any reason.

In addition, for issues raised to them by a resident or residents, operators should also be able to access the Scheme where direct discussions with the resident or residents have not resolved the issues. They may also approach the Scheme for assistance, guidance or advice (within the Scheme's scope, but not legal advice).

Residents may be concerned that this could lead to operators acting in a way perceived as threatening or intimidating, such as threatening to take the issue to the Scheme if it is not resolved as the operator wishes. On balance, we feel that it is equitable for operators to have access to the Scheme they are funding for issues raised to them by residents. The resident-centric nature of the Scheme should lessen the strength of any perceived threat, and the fact of any such threat would be a cause for complaint to the Scheme. The early evaluation and reporting mechanisms should disincentivise the operators from taking that approach.

Case manager role

In this model, the case manager's functions include receiving the application, performing triage, information gathering, early resolution and facilitation functions, and administering the mediation and decision-making processes. They are the parties' point of contact and assist them through the process. The case manager presents information and recommendations to the case assessor.

Case assessor role (complaints assessor)

The case assessor is involved from an early stage through to completion. The case assessor approves some of the case manager's decisions, controls the process, and chooses the appropriate pathways. The case assessor decides the outcome up to a threshold in the Scheme rules. Above that threshold, binding decisions are made by a senior decision-maker within the Scheme provider, directly or under delegation. The Scheme rules will specify these thresholds, which may be according to the value, the type or the subject matter of the dispute.

The case assessor role would have the power to require parties to provide information. This and a robust triage process could help them make decisions quickly and rapidly decide the case if the facts support it, or progress to whatever process is appropriate.

Scheme providers may split case management functions across multiple roles depending on the service model they wish to adopt, provided the delineation between the case management functions and the case assessor's decision-making functions is preserved.

Senior decision-maker

This senior role is responsible for decisions in complex or important cases. The case assessor would report to this role. This role reviews and approves the case assessor's decisions above a specified threshold per a set of delegations. If the Scheme were in the public sector, this role would be akin to a direct report to a Chief Executive or Chief Ombudsman, or a Deputy Commissioner role, or, if in the private sector, an equivalent senior role.



The names for these roles are used for this report only. They have been criticised as being too legalistic. We agree that the Scheme rules could provide other, more user-friendly names for these roles. What is important is that the roles exist as outlined in this report.

High-level process

We have referred to the LDAC 2021 guidelines and the 2001 (then) LAC discussion of facilitation, negotiation, mediation and conciliation,⁶ and some frameworks used in other schemes in New Zealand and overseas jurisdictions.

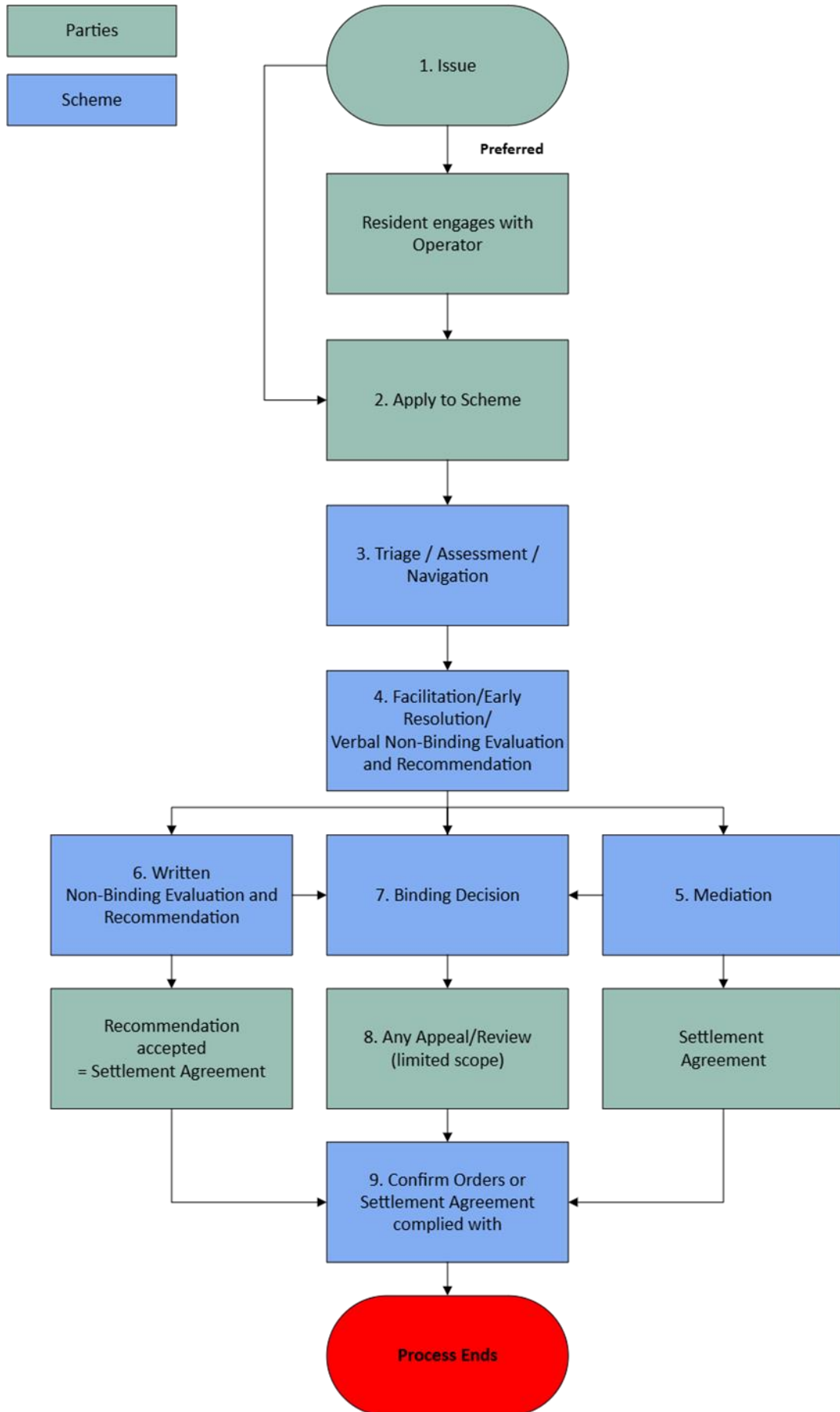
Synthesising these, we see the following high-level process steps for the Scheme as being the most appropriate:

1. Issue raised with operator (preferred/expected, but with exceptions);
2. Application to the Scheme;
3. Triage/assessment;
4. Early resolution/facilitation/conciliation/non-binding evaluation and recommendations, including the case manager acting as a 'go-between' to assist the parties in resolving the issue;
5. Mediation, if appropriate, as directed by the case assessor; and/or
6. Written non-binding evaluation and recommendation by the case assessor; and/or
7. Binding decision and orders/directions by the case assessor or senior decision-maker;
8. Review by the Scheme of manifest error or where new information becomes available. Judicial review or appeal to the courts (on a question of law only);
9. Confirmation that orders/directions have been complied with, or escalation to the statutory supervisor, and Registrar of Retirement Villages or other appropriate authorities.

The flow chart in diagram 2 on the next page illustrates these steps.

⁶ See:

Legislative Advisory Committee guidelines 2001, Part 2 (<https://www.ldac.org.nz/guidelines/guidelines-archive/lac-guidelines-2001-edition>). This is a superseded report, but pages 400 to 410 of the 2001 guidelines are referred to and adopted in Chapter 29 of the latest (2021 edition) guidelines of the (now) Legislation Design and Advisory Committee [LDAC-Legislation-Guidelines-2021-edition.pdf](#).





Step 1 – Issue raised

It is important that:

- Issues are resolved as early, quickly, informally and as close to the source as possible. So, residents should engage with the operator to resolve the issue before approaching the Scheme for help.
- Despite this, residents can approach the Scheme if they are uncomfortable approaching the operator for any reason.

It is part of the operator's management function and service to residents to engage with them and seek to resolve issues as early and amicably as possible. This is reinforced by the Act, which requires operators to have a complaints facility (section 53). Also, each operator will have better knowledge than Scheme providers, mediators, case managers and case assessors of the residents, their issues, and the available options or solutions that might best meet the residents' and operator's needs and interests, as well as the needs and interests of the village and all its residents and other stakeholders.

Operators should have the opportunity to manage issues before escalation to a Scheme. This is the expectation or 'default' setting. However, residents should be able to apply directly to the Scheme if they feel unable or unwilling to engage with the operator for any reason.

So, step 1 has the following parts.

1. Preferably, the resident raises the issue with the operator and seeks resolution under the operator's complaints and disputes process and other relevant village policies.
2. If the resident does not wish to raise the issue with the operator, the resident can apply to the Scheme.
3. The operator must maintain an internal complaints process or facility to resolve issues amicably and as soon as possible. We expect most day-to-day issues to be resolved by discussion under this process.
4. The operator will have a simple, transparent process for promptly escalating issues for resolution within its management structure.
5. If the resident and the operator have not resolved the issue within a 'reasonable period', the resident or the operator can apply to the Scheme. We suggest 10 working days, which may be extended by agreement.

A 'reasonable period' should be shorter rather than longer. A longer period introduces delay where it is or becomes obvious that the issue will not be resolved directly between the resident and the operator. A shorter period avoids delay and does not prevent the parties from discussing the issue past that point if discussions are progressing constructively. The period should be sufficient to allow prompt escalation within the operator's management structure. The parties may agree to extend the period.

We recommend that either party may apply to the Scheme if the issue is not resolved within **10 working days** of being raised with the operator.



The parties could agree to waive the 10-working-day period (for example, where the issue is the interpretation of the resident's ORA and a decision is required by the parties).

Step 2 – Application to the Scheme

A resident can approach the Scheme directly or after attempting to resolve the issue with the operator under step 1.

An operator can approach the Scheme after attempting to resolve the issue with the resident under step 1 but cannot approach the Scheme directly without first engaging or attempting to engage with the resident.

A case manager will be assigned to assist the parties and manage the issue to completion.

If the resident has not approached the operator, the case manager will encourage them to do so if appropriate. This may be with assistance from the case manager and/or a support person.

If the issue is between residents, they must first address it under the operator's complaints process or facility and other relevant village policies. If resolution is not achieved or the operator has not engaged per those policies, the issue can be escalated to the Scheme. Where appropriate, the case manager would contact the operator and refer the matter back for early resolution.

The Scheme would apply to disputes between residents arising from the village context. Other civil disputes between the residents would be dealt with by other means, such as the Disputes Tribunal. Disputes that may be escalated to the Scheme include allegations by one resident of a breach of the CORR, COP or village policies by the other resident, or acts or omissions that adversely affect the use and enjoyment of rights under the ORA.

There will be one intake point but several means of accessing it, including:

1. Telephone (including using the NZ relay service)
2. Email
3. Online form via a dedicated website
4. Posting or delivering a written paper-based form
5. Other accessibility and language options, including tikanga-based options

(each referred to as an **application**).

An application may be made by one or more residents or by non-legally trained representatives, or by an association or other representative body on behalf of one or more members.

Legal representation and non-legally trained representatives are discussed on page 50.

Step 3 – Triage/assessment

Each application will be received and considered by a case manager carrying out a **triage** function. The triage may involve one or more of:

1. **Assess** whether the application is complete, clear and within the Scheme's scope. Further information may be needed to assess the application.



2. **Request** further information or clarification if needed. This may include guiding the applicant through the application and its requirements.
3. **Refer** the resident to, or back to, the operator. This may include assisting the resident and operator with effective communication strategies and framing the issues for discussion, without being an advocate for either party, or requesting that the operator provide a written response or explanation to the resident (and to the Scheme provider for monitoring and oversight).
4. **Reject** a vexatious or frivolous application. This would apply in obvious cases and be used sparingly otherwise, as information can emerge through the process that may change the initial assessment.
5. **Redirect** the application or issue to a more appropriate scheme or agency—primarily the Health and Disability Commissioner’s scheme for issues within the scope of that scheme – or recommend they seek legal advice if appropriate.

Redirecting may include the case manager assisting the person in engaging with that other scheme or agency. For example, the case manager may assist the person with the application or contact the scheme or agency on their behalf to relay and articulate the issue and begin the process, but without being an advocate. It may be appropriate for the Scheme provider to agree on Memoranda of Understanding with other agencies to facilitate speedy and efficient collaboration and referrals.

6. **Advise** any other parties that must be informed, such as the statutory supervisor, the Registrar, the Office of the Retirement Commissioner, the Privacy Commissioner, or other statutory agency or role.

A valid application proceeds to the early resolution/facilitation function.

Step 4 – Early resolution/facilitation and non-binding evaluation

One of the case manager’s key functions is a ‘navigator’ function, which explains the processes and options to the parties and helps them navigate towards resolution.

In doing this, the case manager should be mindful of preserving relationships as far as possible, resolving the issues as early, amicably and close to the source as possible, and avoiding partisan advocacy. The case manager can ask questions of each party, request information, and clarify facts, positions, arguments and offers.

We expect the vast majority of cases to be resolved at this stage.
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The Martin Jenkins report⁷ estimates that, under the current scheme, 11%-13% of complaints involved statutory supervisors, 2%-2.5% required mediation, and approximately 0.5% went to a

⁷ Footnote 2 above, Appendix 1: Assumptions underlying the analysis, page 68.



disputes panel. Therefore, approximately 84%-87.5% of complaints were resolved at earlier stages.

This is a relatively typical distribution. We believe the proposed Scheme would be similar and 80-90% of the complaints would be resolved at or by this early resolution stage, with the case manager's assistance.

We expect that only 2%-3% of cases would require a binding written decision (and only a small proportion of those would proceed to any appeal). Lower fees and the directions of the case assessor may result in slightly more mediations. The non-binding written evaluation would resolve the balance, in a similar percentage to the current statutory supervisor recommendations.

Roles and functions

We do not believe the case manager should be able to compel a party to provide information.

However, the case assessor and senior decision-maker should have inquisitorial powers ie, the power to ask questions and require the production of documents, evidence and submissions as part of the decision-making process.

The case manager may assist either or both parties with effective communication and to frame or reframe the issues for discussion (for example, by linking the issue to the Code of Residents' Rights, Code of Practice, the operator's policies and procedures, or the ORA terms and conditions).

The case manager will inform the other party of the application and request a response. The case manager will discuss the response with the complainant to see if, or to what extent, this resolves the complaint. If not resolved, they will discuss the issue with each party to see if direct discussions may resolve it.

Where a written response is to be provided, we strongly recommend that the Scheme rules provide for a 'one-text' approach. That is, the response would be entered into the same document as the application or complaint provided to the respondent. This will enable the complainant to easily understand the response to each part of the application or complaint.

The case manager will act as a 'go-between', relaying discussions between the parties. We refer to this as facilitation, but it is sometimes called conciliation.

The case manager may convene a conversation between the parties, acting as a facilitator to ensure effective communication. Part of this function is to assist the parties with framing and expressing issues and positions clearly and concisely. The aim is to avoid or correct misunderstandings and help the parties articulate the issues. The case manager will also facilitate discussion of potential options to resolve the issues, including identifying any common ground and helping the parties to narrow or resolve the issues in dispute.

We suggest facilitation is attempted, whether the resident has approached the Scheme directly or the parties have unsuccessfully engaged under step 1.

The facilitated conversation may be by any agreed means, including:

- One or more meetings between the resident and operator with the facilitator present:
 - physically in-person (this will incur further fees to be paid by the parties)
 - virtually, eg, by Teams, Zoom, or telephone.



- A 'shuttle' process or acting as a 'go-between' where the facilitator talks to one party separately and relays agreed information to the other party and vice versa, repeating the process until resolution or impasse.

The operator should be required to provide the facilities for the resident to participate in virtual meetings. The case manager should book, launch and host each virtual meeting. They should not be recorded. They should be 'without prejudice' unless agreed otherwise.

Based on sector feedback, we feel it would be helpful for the triage/assessment and early resolution/facilitation functions to be evaluative and provide robust feedback to both parties on their respective positions. This may involve reality-checking and providing an independent view to each party on the relative strengths and weaknesses of their positions and seeking to correct any factual misunderstandings or misunderstanding of rights and obligations.

We appreciate that this could be seen as a threat to the role's independence, so it needs to be exercised cautiously, professionally, empathetically, and even-handedly. However, in our view, in the retirement village context and given the nature of the more common issues, the benefits of prompt evaluation and feedback leading to early resolution outweigh the risk of a perception of a lack of independence.

Hence, we envisage the case manager providing early verbal non-binding evaluation and recommendations to each party as part of the facilitation process.

In addition, the case assessor may provide a written, non-binding evaluation and recommendations. These indicate to the parties the likely outcome if the case is escalated to a binding decision and may prompt early resolution. Alternatively, it may prompt a party to present further information or evidence to be considered by the decision-maker.

The statutory supervisors currently perform a similar role. They issue letters of recommendation that recommend a solution or outcome based on their assessment. The recommendations in these letters are non-binding, but they carry weight and often resolve the issue because of the status of the statutory supervisors. Therefore, a case assessor's non-binding evaluation and recommendation is a sensible approach for matters that can be influenced or resolved this way. We expect this to resolve matters in a similar percentage (and in a similar way) to the current statutory supervisor recommendations.

Scheme providers, case managers and case assessors must not act as representatives or advocates for any party. However, they may articulate the resident's issues and points of view to the operator or other resident, and the operator's or other resident's issues and points of view to the resident. This is to ensure effective communication and prevent or resolve misunderstandings.

(An operationally separate advocacy service is an additional option discussed on page 36 but is not recommended.)

While they gather information and seek clarification, we do not believe it is appropriate for the case managers to have an investigative function as this would conflict with their navigation, facilitation and case management functions.

However, the case assessor or senior decision-maker should be inquisitorial and able to compel the parties to provide documents and information.



The Scheme rules should specify that documents or information should be gathered or obtained from the operator and not the resident, where both hold the information. It is likely easier for the operator to retrieve and provide the document or information.

If the issue is resolved at this step, the resolution would be documented. This would either be in a settlement agreement between the parties or, at a party's request, recorded in a binding decision (without reasons). The case assessor should approve the settlement agreement, and, ideally, have a similar function to mediators under section 149 of the Employment Relations Act 2000. That is, the case assessor certifies that they have explained the terms of the settlement agreement to the parties and the parties have confirmed their understanding and agreement. At that point, the settlement agreement binds both parties.

Case assessor determines the next steps

If facilitation and early verbal non-binding evaluation and recommendations do not produce a resolution within a 'reasonable period,' the case assessor, as they consider appropriate, may do one or more of the following:

1. Direct the parties to mediate (**Step 5**),
2. Issue a written non-binding evaluation and recommendations (**Step 6**), or
3. Issue a binding decision (**Step 7**).

The case assessor will determine which process is most suitable and likely to resolve the issue, given the parties and the nature of the issue.

What constitutes a reasonable period in each case is a matter for the case assessor. For the reasons discussed above under step 1, we expect that period to be shorter rather than longer, and that 10 working days would be sufficient in most cases.

A complainant may withdraw the complaint at any time, for example, if they do not wish to participate in the next step directed by the case assessor.

Step 5 - Mediation

About mediation

Mediation has been defined as:⁸

“...a consensual process involving the assistance of a third party to enable the other parties to explore actual or perceived issues of difference in order to prevent or resolve those”.

Mediation is less adversarial than most alternative processes and can preserve or repair relationships. The focus is on solutions and the future rather than strict legal rights and the past. It involves generating and considering options and assisting the parties to choose those that best meet their respective needs and interests. Mediation preserves party autonomy. The parties have control over the process (shared or assisted by the mediator) and full control over the outcomes, as the parties must agree upon these. The mediator has no decision-making power.⁹

⁸ Boulle, Goldblatt and Green *Mediation, Principles, Process, Practice* (2nd ed, 2008) at page 6.

⁹ See Spiller (ed) *Dispute Resolution in New Zealand*, 2nd ed, 2007, page 70.



Overview

The case assessor may direct the parties to mediation.

Operators should be obliged to mediate, but residents should be able to decline mediation (although the case manager should encourage them to mediate). Once participation is confirmed, the case manager will appoint a mediator, with the approval of the case assessor.

We expect most disputes to be resolved before mediation. The case assessor's role is to determine whether mediation is the appropriate next step for the parties, given the facilitation and conciliation efforts that have taken place (which use mediation skills).

We agree with stakeholder feedback that mediation, as outlined in this step, should only be offered where necessary to resolve the dispute. It should be offered only when the case assessor assesses mediation as having a high likelihood of success. The Scheme provider will build up experience that will inform this judgement.

Reasonable limits should be placed on mediation, both the period within which mediation is to occur, and the time spent on mediation within that period. This serves two purposes. It encourages the parties to engage constructively and move towards resolution within the time allowed and provides cost certainty rather than having an open-ended process.

The scope of these limits depends on the budget. We suggest that a half-day mediation is considered one 'session' and that parties have two sessions available over 10 working days.

Other sessions would be available at the discretion of the case assessor after consultation with the mediator. We do not favour full-day mediations due to the pressures they may place on residents and their representatives.

The operator would pay the mediation costs based on the Scheme rate card for mediation, unless the case assessor (in consultation with the mediator) decides otherwise for additional sessions beyond the first two.

As with facilitation meetings, they should generally be held online. The operator should be required to provide the facilities for the resident to participate in virtual meetings. The case manager should book, launch and host each virtual meeting. They should not be recorded. They should be 'without prejudice' unless agreed otherwise.

Residents' representatives would like to see in-person mediation retained as an option, with the operator paying the costs. The rationale is twofold: in-person mediation will be more suitable for many residents than an online mediation, and the costs would incentivise the operator to settle earlier. We agree that this option should be available. The decision would be made by the case assessor after discussion with the parties, with the cost to be borne by the operator per the Scheme rate card. For privacy reasons, the mediation may need to be held off-site rather than at the village.

We expect relatively few cases to progress to mediation, and online mediation is the primary option, with in-person mediation the exception. Over time, the proportion of residents comfortable with online meetings will rise, and in-person mediation should become less frequent.

Resident-to-resident mediation

We understand that resident-to-resident mediation is currently rare.



Clause 36(2) of the Code of Practice provides that in mediation between residents, the operator and the residents involved will share the cost of the mediator's services equally. This seems equitable to us.

We understand that, in practice, the operator often pays 50% of the mediation cost, and the residents pay 25% each. Sometimes, the operator pays the whole cost to assist the residents in resolving the issue.

The current regime could continue. It seems equitable for the operator and residents to pay the costs equally. Clause 36(2) of the Code of Practice should remain.

An operator may wish to assist its residents by paying a greater share of, or all, the mediation costs, but this should not be compulsory. It is sufficient that operators fund the Scheme and contribute to the mediation cost. The operator's contribution incentivises the operator to assist the residents in resolving the issue early.

The mediation process

The mediation process would be an orthodox one:

1. Once mediation is confirmed, the case manager, with the approval of the case assessor appoints a mediator who must be independent of the parties and neutral.
2. The mediator sets the timetable in consultation with the parties. The location of the mediation (online or in-person) is confirmed.
3. The parties exchange opening position statements. These can be the original application to the Scheme and any response, or new documents. The position statements outline the key issues in dispute and the outcomes sought. The case manager could assist each party in preparing a position statement and articulating the party's position clearly, but without advocating for the party.
4. The mediator works with the parties to help them understand each other's points of view, generate options for resolution and choose between them to reach an agreement, if possible. Mediation is private, confidential, privileged, and without prejudice. Case managers and case assessors do not attend mediation.
5. Where issues are resolved, the mediator assists the parties in recording this in a binding, enforceable settlement agreement provided to the case manager and case assessor.

Mediations are generally conducted via video conference or telephone conference. In-person mediation may also occur if the parties and mediator agree on who pays all additional costs.

If the parties do not resolve all issues at mediation, the case assessor will either issue a non-binding written evaluation and recommendations (**Step 6**) or make a binding decision (**Step 7**) on the unresolved issues.

If the parties resolve issues, the case assessor should approve the settlement agreement, and, ideally, have a similar function to mediators under section 149 of the Employment Relations Act 2000. That is, the case assessor certifies that they have explained the terms of the settlement agreement to the parties and the parties have confirmed their understanding and agreement. At that point, the settlement agreement binds both parties.



Perceptions that mediation is unsuitable

The perception has been raised that mediation is never appropriate due to the nature of these disputes. Our view differs: introducing a neutral, skilled mediator may succeed where earlier efforts failed. The case assessor would assess the viability of mediation and its likelihood of success. This approach is different from one where the parties themselves choose the option. While the parties could express a preference, it would be up to the case assessor to decide whether mediation is likely to succeed. One of the deciding factors would be whether the mediation would be too emotionally taxing for the resident. The case manager/case assessor would select the most appropriate mediator for the nature of the dispute.

It has been argued that since mediation is a consensual process it should not be mandatory for operators to engage in mediation. We consider it helps address the power imbalance to make mediation mandatory for operators, but optional for residents. We expect the case assessor to develop expertise in deciding when mediation is likely to be effective in helping resolve the issues.

Interpersonal and relationship issues are particularly well-suited to mediation, but contractual and other legal issues may also be resolved at mediation.

Step 6 – Written evaluation and recommendations (non-binding)

We recommend that, at any time before a binding decision is issued, the case assessor may issue a written non-binding evaluation of the case and recommendations to resolve it. This could be:

1. On the case assessor's initiative,
2. At the request of the case manager, or
3. At the request of a party or the parties.

After the evaluation is issued:

- The parties may agree to resolve the case as recommended, as a binding settlement.
- The parties may use the evaluation to inform their facilitated negotiations or mediation.
- A party may reject the recommendations and request a binding decision (or mediation, if mediation hasn't already occurred).
- If the parties have not resolved the case within 10 working days after the evaluation is issued, the case assessor will decide the next process step.

We prefer an 'opt-in' model where the parties must decide to adopt the recommendations rather than an 'opt-out' model where they are deemed to have accepted the recommendations within a fixed period.¹⁰

In the Retirement Villages context, we prefer binding outcomes to be by agreement of the parties, rather than by passage of time.

¹⁰ An example of the latter is [section 149A of the Employment Relations Act 2000](#). Under that section, the parties request a written recommendation and then have a period (specified in the recommendation) within which to reject it; otherwise, it becomes final and binding on them.



We expect the Scheme to gain credibility with operators, and that, in practice, operators would accept and act on non-binding evaluations, except in exceptional circumstances.

A suggestion from the sector is to allow oral presentations, for example, by video conference, instead of or supplementing written submissions. This may assist residents (who may not have legal assistance for their submissions) compared to operators (who likely will have legal assistance) and therefore ‘level the playing field’.

The case assessor or senior decision-maker should have a discretion to talk to a party or the parties together under their inquisitorial powers. However, in most cases, the case manager will have gathered information and submissions from the parties and relayed that to the case assessor. The navigation function and assistance in articulating positions that the case manager provides should help address this concern.

Step 7 – Binding decision

In most cases, the case assessor investigates and assesses the case and makes the decision. Complex cases are escalated to the senior decision-maker.

The case assessor would receive information from the case manager, gathered from or provided by the parties. The case manager may make a recommendation to the case assessor where appropriate, but this is optional, not mandatory.

The case assessor would have inquisitorial powers and could ask questions and compel further evidence, information and submissions from the parties (ie investigate the case further). If these are not provided within the time the case assessor requires, then the case assessor can decide based on the available information.

Stakeholder views

Given there is no hearing, some stakeholders expressed a concern that residents may not feel they have ‘had their day in court’, which may lead to a lack of engagement with the Scheme. Residents’ representatives are less concerned about this.

We have considered how everybody can feel heard and present their case. There will likely be a lot of interaction between the case manager and the parties before the binding decision stage. They will have their chance to talk (‘their day in court’) during the facilitated discussions and any mediation. Having issues resolved on the documents is likely to alleviate concerns expressed by residents and their representatives about the intimidating nature of panel hearings.

Another view is that the decision should bind operators, but residents (as consumers) should be free to reject the decision and pursue other remedies (or to accept the decision, in which case it becomes binding on them).

The stated rationale is to help restore the power imbalance between operators and residents, and, importantly, give residents (consumers) confidence to engage in the process. This is a *de facto* appeal right and is considered further in section 3: *Scheme framework–Step 8 – Appeal/Review* rights below.

Provisional decisions

We propose that all binding decisions be first issued as a provisional decision for comment. The case assessor would set out the facts gathered and propose the outcome and the action required of the parties. The parties would have a reasonable opportunity to comment (and to comment on



each other's comments) before the decision is finalised and becomes binding. This helps to conform to the principles of natural justice. The written non-binding evaluation could be or form the basis of the provisional decision. We recommend:

- The provisional decision is issued to the parties for comment, to be made within five to 10 working days at the case assessor's discretion, depending on the complexity of the case.
- Each party may provide comments to the assessor (copied to the other party by the case manager).
- Each party has five working days to comment on the other party's comments.
- For flexibility, speed, and accessibility, parties may provide their comments to the case manager in any way, including by telephone, for the case manager to record and provide to the parties and case assessor. The case manager would proactively follow up with the parties to seek their comments.
- If neither party responds within the time frame, the decision becomes binding.
- The case assessor issues the final binding decision after considering the comments received.

Scope of decisions

The case assessor may make the following decisions (whether or not the case manager has done so earlier):

- Rejecting the application (for example, because it is frivolous or vexatious or has been previously determined by the Scheme or an alternative process, or it is outside the scope of the Scheme)
- Redirecting the issue to another agency or entity (for example, the Health and Disability Commission if the issue is within its jurisdiction)
- Directing the operator to resolve the issue directly with the resident (for example, by applying the operator's policies)
- Directing the parties to, or back to, facilitation or mediation
- Requiring the issue of an apology
- Declaring rights and obligations
- Making observations or findings that are critical of a party
- Declaring a breach of an ORA, a collateral arrangement, the Act, Regulations or a code
- Declaring an ORA or collateral arrangement void, in whole or part, or varying them
- Directing parties to do or not do specific things, including changing policies and procedures



- Directing the payment of money by way of refund or damages, including for loss or for 'hurt and humiliation' where the operator has acted unreasonably. Awards would be up to a maximum specified in the Scheme rules. (We suggest \$10,000 but expect most awards to be modest and less than \$5,000).
- Requiring specific disclosures to be made, in the operator's next annual report and/or disclosure statements
- Request the statutory supervisor (if appointed) to consider exercising its powers under section 43 of the Act to:
 - direct the operator to provide specified information
 - direct the operator to operate the retirement village in a certain way
 - apply to the Court for an order under section 43A of the Act
- Request the statutory supervisor (if appointed) and the Registrar to exercise their powers under section 44 of the Act to make a public statement
- Make the orders provided for under section 70 of the Act
- Other or ancillary orders that are specified in the approved scheme rules.

As additional consumer protection, the case assessor should be empowered to approve a settlement agreement before it becomes effective. The case assessor would review the settlement agreement to ensure it is not unreasonable or unconscionable in context from the resident's perspective. The Disputes Tribunal has this function.¹¹ If the settlement agreement is approved, it takes effect as a binding decision,¹² if not, the case assessor makes a binding decision.¹³

A benefit of decision-making within the Scheme is that this model is a natural fit for fostering lessons and continuous improvement. The senior decision-maker would be a face for the Scheme, build a reputation and ensure consistency.

Retaliation and non-compliance

Concerns have been raised that operators could retaliate against residents for raising complaints. Three factors assist with this. First, retaliation can be the subject of a complaint and enforcement action and would be non-compliant behaviour. Secondly, the proposed fee structure is that the operator is not charged directly per complaint until the later stages, so there is no direct cost impact at the initial stages (other than the operator's time), which may lessen this risk. Thirdly, the obligation of good faith that we recommend may also reduce the risk, although the Scheme cannot eliminate this risk.

The model also addresses non-compliance. Binding decisions that find that the operator has been non-compliant should be copied to relevant authorities, such as the statutory supervisor and the Registrar of Retirement Villages and should be disclosed in the operator's annual reports and disclosure statements. The areas of non-compliance that are escalated and published should include non-compliance with:

¹¹ See [section 18\(3\) of the Disputes Tribunal Act 1988](#).

¹² See [section 18\(3\) of the Disputes Tribunal Act 1988](#).

¹³ See [section 18\(5\)\(c\) of the Disputes Tribunal Act 1988](#).



- The Scheme rules
- The Act, regulations and codes
- The obligation of good faith
- The ORA or a collateral arrangement
- A policy or procedure of the operator or the village.

The decision-maker should also have the power to request the statutory supervisor and Registrar to consider exercising their powers under section 44 of the Act regarding publication of statements about any non-compliance.

Advocacy service

We note the views and submissions about the potential benefits of an independent advocacy service. The advocacy service's role would be to represent residents or actively assist them in presenting their case. Currently, the burden falls on volunteers to a material extent. Any advocacy service must be outside the Scheme; otherwise, it would compromise its independence.

The options include:

- A new independent advocacy service
- Funding the existing volunteers
- Funding existing government-funded advocacy groups in adjacent sectors
- Not having an independent advocacy service.

Because the proposed Scheme is resident-centric and has navigator, assistance, and facilitation functions, this will go a long way towards meeting the needs that an advocacy service would address.

Therefore, we suggest that the proposed Scheme be allowed to 'bed-in' before a final decision is made regarding an advocacy service. The review period could be specified in the rules approved by the Minister. We suggest a 2-3 year period from the Scheme launch may be suitable.

Publicly funded advocacy services (like those for Health and Disability complaints) are uncommon. If an advocacy service is required, better alternatives than a bespoke advocacy service may be any or a combination of funding existing public, government-funded, private for-profit or not-for-profit advocacy groups in relevant adjacent sectors.

Public decisions and case notes

We recommend that decisions and case notes (case summaries) are published on the Scheme's website. These should be redacted or anonymous for residents, but not operators.

Ineffective complaint resolution in villages

We acknowledge that some villages have ineffective complaint and dispute resolution mechanisms. We recommend that every village is required to have a complaints facility, as at



present. Ensuring that they do so may be a responsibility of the statutory supervisor within its remit of overseeing the management of the retirement village (section 43(1)(b) of the Act).

A list of requirements, such as compliance with certain timeframes, would further supplement this. Failure to conform with these expectations would be grounds for the decision-maker to declare a breach and direct changes to be made, or to request the statutory supervisor (with the authorisation of the Registrar of Retirement Villages) to consider exercising the powers under the Act to require the operator to act in a specified manner or to make a public statement regarding management (sections 43(1) and 44 of the Act).

Escalation

For issues above a specific threshold of financial value and/or complexity, the decision should be escalated to a senior decision-maker.

Jurisdiction

The Scheme should have an expanded jurisdiction to resolve issues between the parties.

The Scheme should have the jurisdiction currently granted under section 78 of the Act to the Disputes Tribunal to make orders under section 82(3)(c) to (e) and 82(1) of the Act.

We recommend that jurisdiction be expanded to the matters under section 82(3)(a) and (b) of the Act: to make orders declaring occupation rights agreements or collateral arrangements void or varying them where there is a contravention of section 82(1).

The decision-maker should be able to ask questions and seek further documents or information.¹⁴

The case assessor or senior decision-maker should have full discretion over the process, subject to principles of natural justice, including a fair process.

We have suggested the decision-makers have the same jurisdiction as the Disputes Tribunal and note that Disputes Tribunal referees have a broad scope in conducting their hearings. Technically, they can try to assist the parties in settling the dispute,¹⁵ although they predominantly take a determinative approach.

The recommended Scheme does not have an independent investigative function, but the decision makers may act inquisitorially and require the production of documents and provision of information.

However, we recommend that decision-makers have the power to appoint:

- An independent investigator. We expect this to be rarely used, but it may bridge concerns about the lack of a scheme investigation function. The Disputes Tribunal has the power to appoint an investigator.¹⁶
- An independent expert to provide expert advice where the decision-maker is not a subject matter expert. We expect this to be rarely used, but it may be appropriate in complex cases.

¹⁴ For an example, see section [42\(1\)\(b\) and \(c\) of the Construction Contracts Act 2002](#).

¹⁵ Section [18 of the Disputes Tribunal Act 1988](#).

¹⁶ Section [41 of the Disputes Tribunal Act 1988](#).



The Scheme should fund the cost of these, unless the decision-maker determines otherwise (for example, that the operator should pay or that all parties should contribute).

Orders, penalties and enforcement

As stated above, we recommend that the decision-makers have jurisdiction equivalent to that of Disputes Tribunal referees, including the orders listed in section 19 of the Disputes Tribunal Act 1988.

Without limiting that jurisdiction, a decision-maker should be able to make the orders currently listed in section 82(3) of the Retirement Villages Act for any matter within the Scheme's scope (not merely the matters in section 83(1)), that is an order:

1. declaring all or part of an ORA or collateral arrangement void from the outset or from a specified date;
2. varying an ORA or collateral arrangement;
3. directing the refund of money
4. directing the return of property;
5. directing the payment of damages for loss or damage; or
6. directing the provision of specified services at no cost to the recipient.

As a specialist dispute resolution body, there should be no monetary limit on the Scheme's scope for matters within its jurisdiction.

If monetary limits are required, the limit for an order under the last three bullet points, items 4 to 6 above, should be \$60,000 at minimum (reflecting the increased jurisdiction of the Disputes Tribunal under the proposed Disputes Tribunal Amendment Act 2024).

Ideally, the limit should be in the range of \$350,000 (the current level for the District Court) to \$500,000 (the level for three of the four financial service provider dispute resolution schemes, the fourth has a limit of \$200,000¹⁷). (Other schemes have much higher thresholds for example, the grocery industry dispute resolution scheme up to \$5 million, albeit in a purely commercial context.)

If a limit is required, we recommend a limit of \$500,000 for items 4 to 6 above. This is well-aligned with key stakeholders.

Decisions regarding an ORA or collateral arrangement should be an exception or 'carve out' from the monetary cap, irrespective of the value of the rights under the ORA or collateral arrangement.

For items 1 to 3 above there should be no monetary limit.

Compensation for 'hurt and humiliation' and loss of a benefit

This is a concept in the Employment Relations Act 2000 and the Human Rights Act 1993, which has also been applied (for example) under the Financial Service Providers (Registration and

¹⁷ The Insurance & Financial Services Ombudsman (IFSO) scheme; Banking Ombudsman scheme; and Financial Services Complaints Limited (FSCL) scheme have limits of \$500,000; the Financial Dispute Resolution Service (FDRS) scheme has a limit of \$200,000. (Note that in some cases this can be exceeded, eg, by agreement between the parties.)



Dispute Resolution) Act 2008 (**FSP Act**). Section 63(2) of the FSP Act enables compensation to be awarded for non-financial loss, stress, humiliation, and inconvenience, and for loss of a benefit, up to a certain amount stated in the Scheme rules.

The four schemes under the FSP Act have limits on this compensation, ranging from \$3,000¹⁸ to \$10,000 (plus GST, if any).¹⁹

Often, residents seek vindication and an apology or another outcome that they feel entitled to under the relevant law, codes or policies. Where they are successful, and if claimed by the resident, there should be scope for the decision-maker to award a modest amount of compensation in appropriate cases, but not as a matter of course.

There would be a high bar to qualify for any award. Making a complaint and working through a complaint process has an inherent level of stress and inconvenience. This is not sufficient to meet the threshold for an award. There would need to be unreasonable conduct by the operator.

Circumstances entitling an award would include where the operator's conduct is unreasonable in the decision-maker's opinion, whether through delay, taking unmeritorious positions or otherwise acting in a way that unreasonably increases the normal stress levels associated with a dispute.

The decision-maker should also have jurisdiction to award compensation for (i) humiliation, loss of dignity, and injury to the feelings of the resident; and (ii) loss of any benefit, whether of a monetary kind, which the resident might reasonably have been expected to obtain if the issue had not arisen. This mirrors sections 123(1)(c)(i) and (ii) of the Employment Relations Act 2000 and sections 92M(1)(b) and (c) of the Human Rights Act 1993 and the Schemes under the FSP Act.

Given residents' relative vulnerability, we feel that similar protection to that provided to employees, people protected from prohibited grounds of discrimination and consumers of financial products is appropriate where it is established that their rights have been infringed upon.

We recommend a limit of \$10,000 (plus GST, if any), but expect that most awards would be modest and less than \$5,000, with a high bar to a claim, as discussed above.

Basis for decision

Decisions should be made on a similar basis to the Employment Relations Authority and the Disputes Tribunal.²⁰

That is, the decision-maker:

- Has an inquisitorial role, resolving issues by establishing the facts and deciding according to the substantial merits of the case, without regard to strict legal rights, forms or technicalities.
- However, must act according to the law, on a principled basis and:
 - comply with the principles of natural justice

¹⁸ Financial Dispute Resolution Service (FDRS) scheme rules, rule 10(4).

¹⁹ Insurance & Financial Services Ombudsman (IFSO) scheme terms of reference, clause 19.2(b); Banking Ombudsman scheme terms of reference, clause 29; and Financial Services Complaints Limited (FSCL) scheme terms of reference, clause 47.

²⁰ See sections [157\(2\)](#) and [160\(2\)](#) Employment Relations Act 2000; and section [18\(6\)](#) of the Disputes Tribunal Act 1988.



- aim to promote good faith behaviour
- support successful relationships within the retirement village
- further the objects of the Act
- act as they think fit in equity and good conscience, but must not act inconsistently with:
 - the Act
 - the Regulations
 - the ORA or a collateral arrangement.

This means that contractual and other legal rights and obligations will be enforced and will only be departed from based on established legal principles.

This approach allows the decision-makers to assess complaints in context — not only with reference to the law and contract, but also considering industry codes, operator policies, and good practice. This approach ensures outcomes are just, practical, and aligned with the expectations of both residents and operators. The decision-makers are empowered to consider what is fair and reasonable in all the circumstances, allowing flexibility while preserving procedural fairness.

Form of decision

Section 71 of the Act states that the disputes panel must record in writing its findings on material issues of fact and the reasons for its decision resolving a dispute and provide that record to the parties and the operator (if the operator is not a party).²¹

Form 7 of the Regulations is the form required for disputes panel decisions under regulation 25(2).²² We suggest a similar modernised form be annexed as a schedule to the amended regulations or the Scheme rules.

We recommend that the Act or Regulations be amended to provide for concise reasons to be given, modelled on section 174E of the Employment Relations Act 2002, which states:

A written determination provided by the Authority...

(a) must—

- (i) state relevant findings of fact; and
- (ii) state and explain its findings on relevant issues of law; and
- (iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
- (iv) specify what orders (if any) it is making, but

(b) need not—

- (i) set out a record of all or any of the evidence heard or received; or
- (ii) record or summarise any submissions made by the parties; or
- (iii) indicate why it made, or did not make, specific findings as to the credibility of any evidence or person; or
- (iv) record the process followed in investigating and determining the matter.

²¹ And for example, section [104 of the Residential Tenancies Act 1986](#) is similar.

²² <https://www.legislation.govt.nz/regulation/public/2006/0198/latest/DLM398055.html>



Binding nature of decision

This is discussed further in *Step 8 – Appeal/Review* rights below

We recommend that decisions are binding on the parties, as at present.

Section 72 of the Act provides that:

1. A dispute resolution decision is binding on the applicant and respondent; and
2. A dispute resolution decision in relation to a dispute with another resident or person living with another resident is binding on the applicant and resident.

We note that other legislation and schemes, such as dispute resolution schemes under the FSP Act, provide for decisions to be binding on the parties only if the complainant accepts the award in full and final settlement of the complaint. Otherwise, they can pursue the claim in forums such as the Disputes Tribunal or the courts.

In the Retirement Villages context, this is inconsistent with the desire for a quick, cost-effective scheme that promotes early resolution and finality. As the Scheme will be specialised and the decision-makers will be inquisitorial finders of fact, decisions should bind both parties, subject to limited appeal and review rights discussed below.

We recommend that section 72 of the Act remains.

Step 8 – Appeal/Review rights

There are several valid approaches in this area, which we outline below. The tension is between:

- Finality, certainty and cost-effectiveness, and
- Access to justice and the ability to challenge a decision.

Judicial review

It is difficult to oust the court's jurisdiction, and attempting to remove the right to seek judicial review is undesirable.²³

²³ Legislation Design and Advisory Committee (LDAC) Supplementary Materials to the Legislation Guidelines 2021, taken from the 2018 LDAC Annual Report <https://ldac.org.nz/guidelines/supplementary-materials/excluding-or-limiting-the-right-to-judicial-review>:

“Judicial review is the means by which courts fulfil their constitutional role of ensuring public powers are exercised in accordance with law. The possibility of judicial review provides incentive for decision-makers to take into account appropriate matters and follow proper process. Legislation removing the right to judicial review could be seen to immunise unlawful exercise of power from judicial scrutiny. For this reason, legislation attempting to oust judicial review is, in practice, narrowly interpreted by courts and rarely achieves its objective*.

[*LDAC Legislation Guidelines 2021, chapter 28.1, “[b]ecause ouster clauses undermine fundamental principles of constitutional law, the courts give them a narrow interpretation to preserve their ability to review decisions in at least some circumstances. As a result, ouster clauses may not be fully effective even if included.]

“Often the reason given for seeking to include restrictions on judicial review is to prevent frivolous and ultimately unsuccessful court challenges causing unacceptable delays and frustrating the overall policy objective behind a Bill. But LDAC’s view is that removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk....



We do not recommend excluding the right to judicial review. This right protects the parties against serious procedural errors and other breaches of the rules of natural justice.

Appeal

Rights of appeal are statutory. A common law right of appeal does not exist²⁴ and Parliament may curtail appeal rights in legislation.

Chapter 28 of the Legislation Design and Advisory Committee Guidelines 2021 fully discusses appeal rights.²⁵ The following questions need to be asked:²⁶

- Should there be a right of appeal?
- If so, who should hear the appeal?
- What should be the nature of the appeal?
- Should there be any limits on the appeal?
- What procedure should apply?

The LDAC states that for most decisions (other than in criminal cases):²⁷

...the starting point is that legislation should provide a right of appeal if the rights or interests of a particular person are affected by an administrative decision. An appeal enables the merits of a decision to be re-examined through an assessment of questions of fact and the application of judgment to those facts (rather than just an assessment of the process by which the decision was made, which is what is examined in a judicial review). Therefore, an appeal should be available unless there are factors that would make an appeal inappropriate.

The value of an appeal must be balanced in the particular circumstances against a consideration of the potential costs, implications of delay, significance of the subject matter, competence and expertise of the decision-maker in the first instance, and the need for finality. However, concerns about cost and delay should usually be dealt with by limiting the right of appeal, rather than denying it altogether.

Under section 75 of the Act, the current position is that any party may appeal a decision to the District Court or High Court, as applicable. The appeal must be made within 20 working days after the decision. There is no further appeal from the District Court or High Court judgment.

We understand that three appeals have been heard in recent years, one to the High Court in 2013²⁸ and two to the District Court, in 2011²⁹ and 2023³⁰. This is approximately 10% of Dispute Panel cases over the period. Given this, both:

- Operators' concerns about the quality of Dispute Panel decisions appear overstated, and
- Residents' and their representatives' concerns that a resident cannot fund an appeal and may be 'burnt off' by the operator bringing an appeal also appear overstated.

LDAC maintains the view that legislation should not remove the right to apply for judicial review. Restrictions placed upon the right should be rare and limited to cases where finality is critical and be proportionate to that objective."

²⁴ *Guy v Medical Council of NZ* [1995] NZAR 67 at 93 and 94.

²⁵ [LDAC-Legislation-Guidelines-2021-edition.pdf](#).

²⁶ Footnote 26 above, at page 139.

²⁷ Footnote 26 above, at page 140.

²⁸ *Waters v Perry Foundation* [2013] NZHC 576.

²⁹ *Robinson v Oceania Village Company Limited* (15 March 2013) District Court, Auckland, CIV-004-002618.

³⁰ *Summerset Villages (Richmond) Limited v Flanagan* [2023] NZDC 17450.



A resident is not required to participate in an appeal for the original decision to be upheld. The onus is on the operator/appellant to establish that the decision was wrong. However, they will likely want to be heard to defend a decision in their favour. In important or test cases, representative bodies may seek to intervene. There is also an assumption that the resident cannot afford to fund an appeal; this is not always the case.

Nevertheless, both groups have valid points relevant to the Scheme design:

- Operators wish to have a remedy to challenge an adverse decision, especially where it has a precedent effect or broader application
- Residents and their representatives seek finality, certainty, and a cost-effective process, and to know that the issue will be resolved in the resident's lifetime.

Other regimes have more restrictive provisions than the current Act. For example, the dispute resolution schemes under the FSP Act do not provide for appeals *per se*, although there is a right to request a further review from the decision-maker, for example, if new or further evidence is available. (We recommend the same right.)

Under section 49F(3) of the FSP Act, in an enforcement action, the District Court may modify terms of a binding settlement that are “manifestly unreasonable”. The Disputes Tribunal has the power to approve settlements.

Disputes Tribunal orders and approved settlements are generally final. There is no right of appeal except under Section 50 of the Disputes Tribunal Act 1988 on limited grounds: that the referee conducted the proceedings in a manner unfair to the appellant and that prejudicially affected the outcome. If the referee disregarded a provision of an enactment brought to their attention, this is deemed grounds for appeal if it resulted in an unfair outcome for the appellant.

There has been discussion of, and we have considered (and initially proposed) an appeal process within the Scheme by a panel of three adjudicators, but this is unduly expensive.

We have also considered having no appeal rights (in the interest of finality) or having appeal rights on questions of law only or requiring leave to be granted by the Court before an appeal may be brought.

Stakeholder views – jurisdiction, finality, and appeal rights

Key stakeholder views vary on jurisdiction, the binding and final nature of decisions and appeal rights. These topics are interrelated.

The first key policy decision is whether the Scheme should be mandatory and a specialist dispute resolution body, or whether parties (residents in particular) can elect other forums such as the Disputes Tribunal or court.

One stakeholder's view is that Scheme decisions should bind the operators but not the residents, citing local and overseas examples of schemes that operate this way (primarily in the financial services and utilities sectors). This is a *de facto* appeal right.

The stated rationale is to help restore the power imbalance between operators and residents, and, importantly, give residents (consumers) confidence to engage in the process (because it is final if they accept the decision, but they have alternatives if they don't). This preserves access to justice and helps restore the power imbalance.



The alternative view is that it is unfair to allow one party to reject a decision and choose another forum but not permit the other party to do this, especially if there are no appeal rights.

The stakeholder's view is that there should be no appeals in the interests of finality, timely resolution, lower cost and efficiency of the broader system, recognising the expertise of the scheme and maintaining trust in the scheme as a genuine alternative to litigation. A key factor is the concern that a drawn-out appeal may see the resident die before the dispute is finally resolved.

In our view, this differs depending on whether the Scheme is mandatory. If residents can opt into the Scheme (ie choose to go to the Disputes Tribunal or court or to use the Scheme) and do opt into the Scheme, they should be bound to accept the Scheme's decision. Conversely, if the Scheme is mandatory, there may be stronger grounds for a right to refuse to accept a decision based on the stakeholder view above or to have appeal rights. The same arguments apply to both.

A related point is the Scheme's jurisdiction (discussed in section 3: *Scheme framework – Scheme scope and jurisdiction* above).

If the Scheme is mandatory, then there should be no monetary limits on its jurisdiction. As a specialist dispute resolution body, it should deal with all issues within its scope irrespective of value. If so, there is a greater argument for appeal rights – either on the substance of the case or limited to questions of law.

If the Scheme is **not** mandatory and not the sole specialist body, then, as residents can opt in, there is more scope for:

- Scheme decisions to be final and binding on both parties (no appeals); and
- Monetary caps to apply.

If there are no monetary caps, or if there are caps, the higher they are, the stronger the argument for a right of appeal.

If there are monetary caps, the parties should be able to waive the caps by agreement, or to waive part of their claim to bring it within the Scheme's jurisdiction.

We have considered limiting appeals to certain types (eg, breaches of the ORA or legislation) or values of cases (eg, >\$60,000 or >\$350,000). There are difficult boundary issues. Given the breadth of the type of disputes, limiting the types and values of cases subject to appeal could have unintended and perverse consequences. There is also the possibility of disputes being framed to bring them within or outside the appeal framework, which would cause further disputes, delays, and costs.

Another factor is the policy position ultimately taken by the Ministry regarding the payment of capital sums to residents or their representatives. If payment is required within a fixed period, then there are likely to be many fewer disputes regarding this high-value category of issue and fewer appeals.

There is a range of reasonable, rational views and outcomes. We respect and recognise the validity of alternative views. On balance, by a small margin, we prefer the following interrelated package:

- The Scheme is mandatory for all issues within its scope. It is a specialist tribunal or dispute resolution body and will accumulate expertise and experience.



- Binding decisions of the Scheme bind all parties, residents and operators.
- There is the right to apply to the Scheme for the review of a decision in the case of manifest error (error on the face of the decision) or where new facts or evidence become available after the decision and were not available earlier.
- Appeals to the court are permitted on a question of law only, with no further appeals from that judgment.
- Appeals and applications for Scheme review must be brought within 20 working days of the decision.
- There is the right of judicial review for serious procedural errors or breaches of the rules of natural justice.

We feel this balances the interests of finality and access to justice, but we recognise there are valid alternative views and approaches. It also addresses the criticism of the current scheme that it has too many options and is confusing for residents. We propose a mandatory, expert ‘one-stop shop’.

Whichever approach is implemented; we recommend that it be reviewed at the time of each formal review of the Scheme (every 3 to 5 years). The idea of test cases has been raised, similar to those available under the FSP Act dispute resolution schemes. The operator bringing the test cases would pay all the respondents’ costs and the decision-maker’s costs. We feel this has merit and should be adopted.

Errors on a question of law

Errors of law are mistakes made by a decision-maker in applying or interpreting the law, including:

- Misinterpreting statutes or case law.
- Failing to follow the correct procedure.
- Disregarding principles of natural justice, such as the right to be heard.

Errors of law are distinct from errors of fact. Errors of fact occur when decision-makers make incorrect findings or assumptions about what happened in the dispute.

For example:

1. The *Summerset Villages v Flanagan* case³¹ involved a question of jurisdiction: was the claim related to care (and therefore within the Health and Disability Commissioner’s jurisdiction) or access to contractually granted rights and benefits (and therefore within the dispute panel’s jurisdiction)? This is a question of law. This appeal would remain possible under our preferred option 3.
2. The *Waters v Perry Foundation* case³² involved a claim that (a) the panel’s decision was wrong (i) in fact and (ii) law, and (b) the panel was not entitled to set aside the valuation of an expert valuer witness. Claims (a)(ii) and (b) allege errors of law. Appeals on these grounds would remain possible under our preferred option 3.

³¹ *Summerset Villages (Richmond) Limited v Flanagan* [2023] NZDC 17450.

³² *Waters v Perry Foundation* [2013] NZHC 576.



Claim (a)(i), that the panel was wrong in fact (an error of fact), would not be allowed under our preferred option 3.

3. The *Robinson v Oceania Village* case³³ involved an application to the Court to stay (stop) court proceedings so that the dispute could be referred to the contractual dispute mechanism under the site agreement (ORA). Again, this claim is jurisdictional and would remain possible under our preferred option 3.
4. A claim that the decision-maker made a mistake in his or her assessment of the facts would not be possible under our preferred option 3 (but a review may be possible under our preferred option 2, if new information is available that was not available at the time of the decision or there was a manifest error on the face of the decision).

Our preferred options are:

1. A party can seek a judicial review of a binding decision.
2. A party can seek a scheme review of a binding decision based on new information or documentation not available at the time of the decision or an allegation of manifest error, or if the decision-making process was conducted in a manner that was unfair to the resident³⁴. The application must be made within 20 working days of the decision. If the case assessor were the decision-maker, the senior decision-maker would review the decision. If the senior decision-maker were the decision-maker, an independent reviewer would review the decision.
3. A party can appeal a decision only on a question of law to the District Court or High Court, as applicable, by a rehearing. There would be no further appeal rights. The appeal must be brought within 20 working days of the decision.
4. A party or a representative body may bring a test case to the Scheme for the senior decision-maker to determine, likely as an exceptional case with a hearing and legal representation. The applicant must pay the respondent party's or parties' reasonable legal costs on a full indemnity basis (regardless of the outcome) and the decision-maker's costs.

Step 9 – Confirmation that orders/directions have been complied with

The Case Manager would seek confirmation from the parties that the orders or directions made under a decision, or the agreed outcomes in a settlement agreement, have been complied with before closing the case.

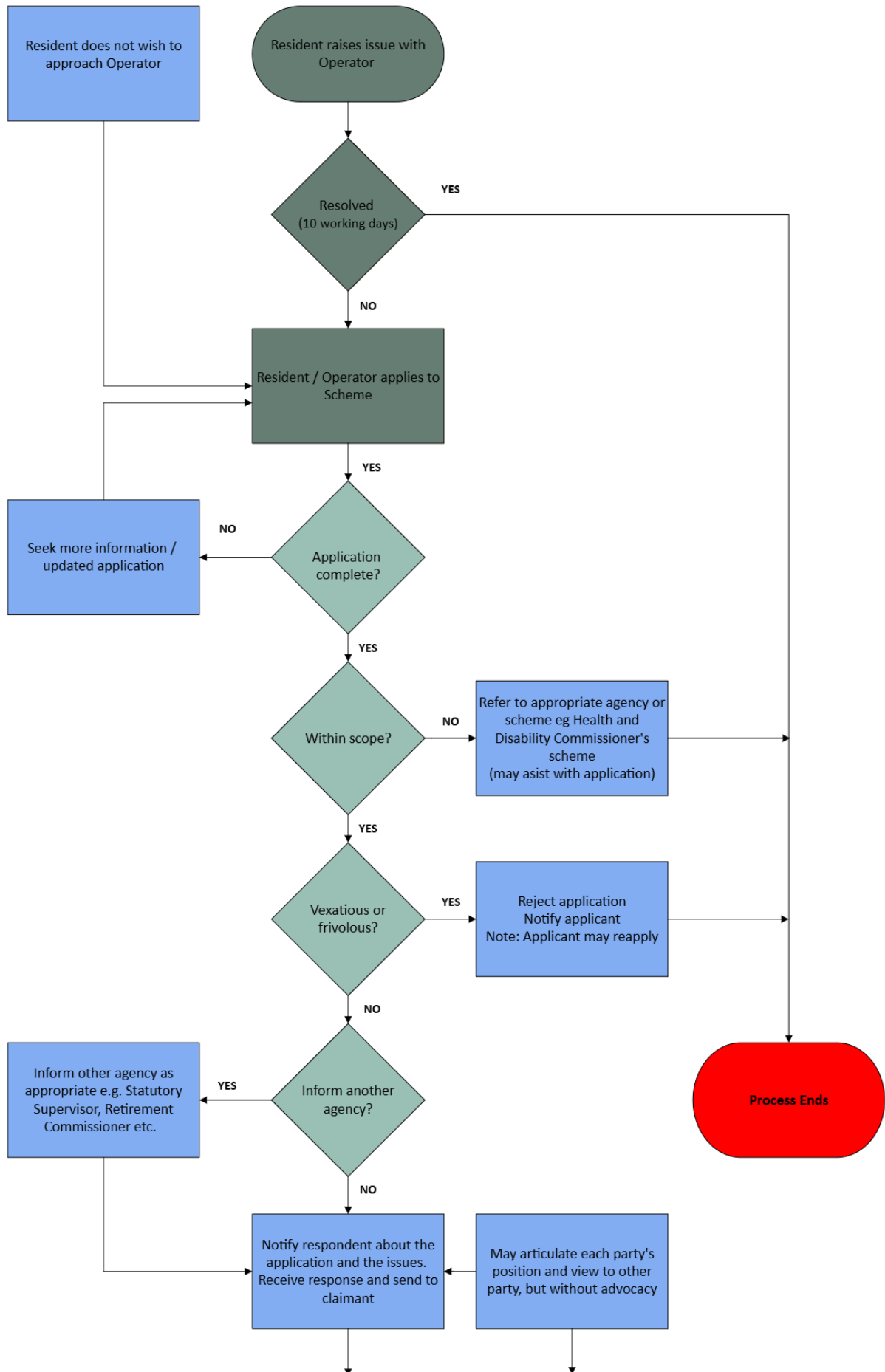
If they have not been complied with, the Case Manager would escalate the non-compliance to the statutory supervisor (if appointed), the Registrar of Retirement Villages or other appropriate authority.

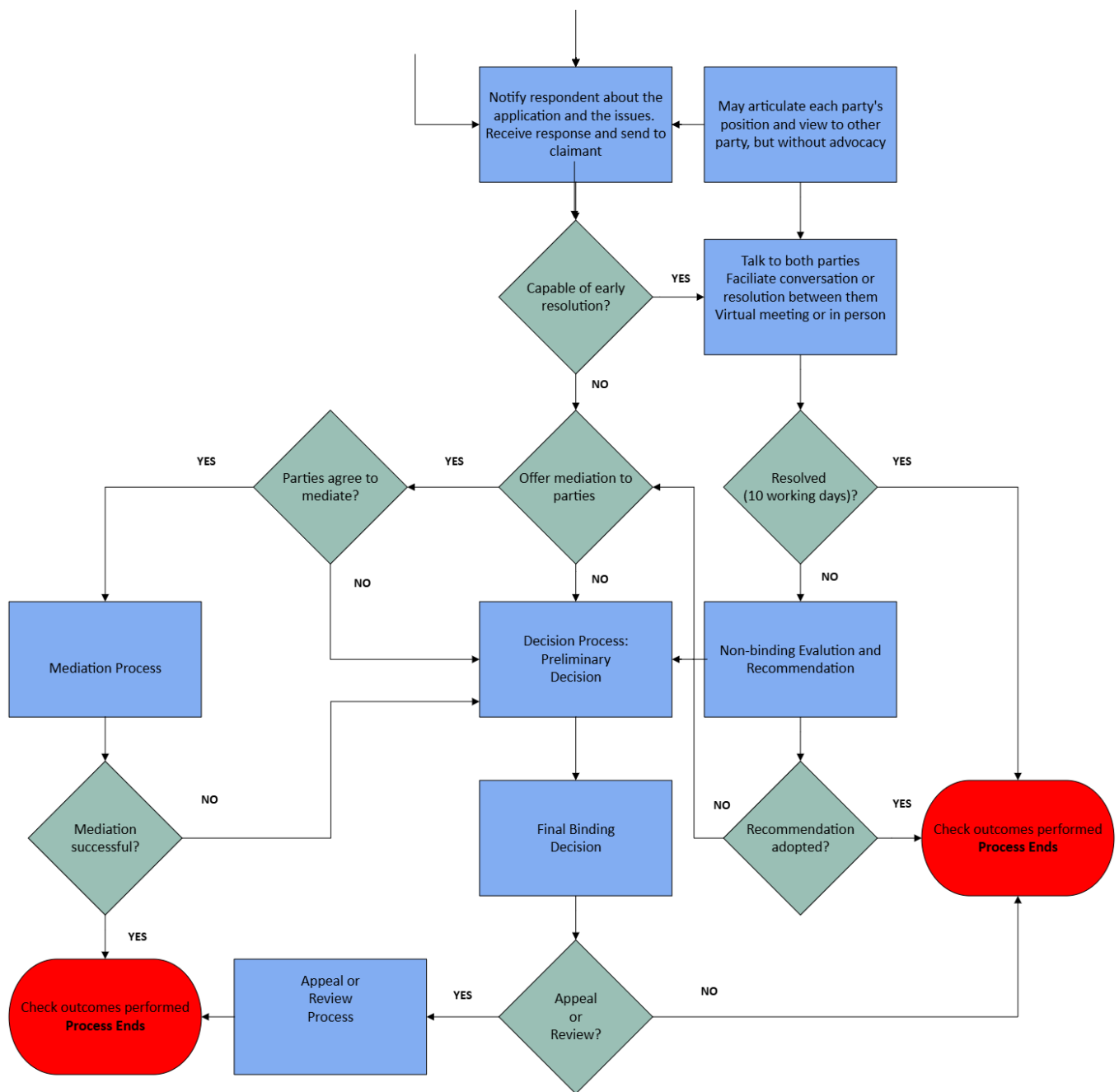
Scheme diagram

The next two pages contain a detailed flow chart depicting these steps in more detail (diagram 3). This is intended to depict the operations of the scheme. A simplified version may be used to promote the Scheme (for example, based on diagram 1).

³³ *Robinson v Oceania Village Company Limited* (15 March 2013) District Court, Auckland, CIV-004-002618.

³⁴ See section [50\(1\) and \(2\)](#) of the Disputes Tribunal Act 1988.







Legal representation

We understand that cost is a barrier for residents to have legal representation, while operators usually do have legal representation, especially at the panel hearings. The inability to afford representation may be a barrier to residents progressing to a dispute panel hearing.

As operators are more likely to have legal representation, reducing the opportunity to have such representation is likely to (a) reduce the power imbalance (b) reduce the adversarial nature, or its perception, of dispute resolution and (c) reduce cost.

Not allowing legal representation is possible: it does not infringe the principles of natural justice. The authors of Laws of New Zealand's *Administrative Law* note:³⁵

Natural justice does not generally impose a general right to representation, either by a lawyer or a layperson. However, a decision-maker reserves a discretion to permit representation in deserving cases, which must be exercised consistently with the principles of natural justice (that is, fairly and properly).

We recommend that the 'default' position is that no legally trained person may represent a party, but they may assist the parties in drafting written submissions.

This is in the context of our recommendation that decisions be made based on the information gathered and given to the decision-maker. There may be a hearing in exceptional circumstances, where lawyers may be granted leave to appear. We expect this would primarily arise in disputes with issues of law, such as contractual disputes or complex disputes over occupancy right agreements between an operator and resident or for a test case. Where one party is granted the right to legal representation, the other party or parties should automatically be granted the same right.

Limiting legal representation in this way should increase the Scheme's cost-effectiveness.

Non-legally trained representation

The right of a resident to appoint a non-legally trained support person or family member as a representative ought to be retained despite it not being a requirement of natural justice. This reflects the nature of the Scheme's constituency and the types of disputes that might arise. Assistance may be required for many reasons and on many levels, ranging from communication difficulties and technology barriers to concerns arising from perceived power imbalances or lack of confidence in self-representation.

While the case manager will support and assist the parties, the case manager cannot represent a party nor attend mediation.

Representatives and multiple claimants

We recommend that an application may be made by one or more residents or by representatives. Representatives can include:

- A (non-legally trained) representative of a single resident.
- One or more residents, or a committee or subcommittee of residents, on behalf of themselves or on behalf of a group of residents with common issues or interests.

³⁵ Philip A Joseph and Jason McHerron "Administrative Law" in *The Laws of New Zealand* (LexisNexis NZ Ltd, Wellington, 2023 [online]) at [79] (footnotes omitted).



- A (non-legally trained) representative or a representative body (for example, a committee or sub-committee, or the Retirement Villages Residents' Association (**RVR**) or the Council on behalf of residents with common issues or interests.

Claims from multiple residents should be able to be consolidated when they are against the same operator for the same or substantially the same issue.

Operators may apply via a (non-lawyer) manager or employee/contractor.

Representation should not impact the issue of costs awards except perhaps for vexatious or frivolous complaints,³⁶ or where a party is acting in bad faith. (See the Costs discussion below.)

Test cases

Operators or the RVA, and residents or the RVR or Council (or other representatives), should be able to bring test cases to the senior decision-maker, provided the initiator pays all parties' costs (unless otherwise agreed). This is to partly offset concerns about the limits on appeal rights, and the effect of unfavourable precedents being set.

Feedback and reporting

Comments from the sector emphasise the value that may be extracted from the data collected by the Scheme provider for the sector's benefit.

We agree with this and recommend that the Scheme provider provide regular reporting on trends to:

1. Operators (so they can improve their processes and act to prevent common disputes)
2. TAAO and the Ministry (so they are aware of trends affecting the sector and/or specific operators, and can perform their monitoring and reporting functions)
3. Statutory supervisors (both at an aggregate level as above, and for each operator they supervise).
4. The Registrar of Retirement Villages (especially for findings of non-compliance with scheme orders or legislation):

Also, we agree that the Scheme provider should have an educational function and publish anonymised case notes, summaries or guidance for the above purposes and to assist residents in discussions with operators and other residents. This would support the Scheme's evaluative functions, as parties can be referred to similar cases that are easily accessible.

Role of the Statutory Supervisor (where appointed)

Section 43 of the Act sets out the powers of statutory supervisors:

- (1) If a statutory supervisor believes the financial position of the retirement village, the security of the interests of the residents, or the management of the retirement village is inadequate, the statutory supervisor may—

³⁶ Similar factors would be present as with the discretion to hear a dispute or not as exists for Panel Members under [section 66\(1\)\(a\) of the Act](#) at present.



- (a) direct the operator to supply all residents (or their nominated representatives) with the information that the statutory supervisor may specify; or
- (b) direct the operator to operate the retirement village in a specified manner; or
- (c) apply to the court for an order under section 43A.

Also, the statutory supervisor may direct that an advertisement is not published or distributed to the public (section 43(2)). Under section 43A, the court may make a range of orders consistent with the statutory supervisor's oversight role of operators as issuers of ORAs and disclosure statements, noting that the Financial Markets Authority approves statutory supervisors.

In our opinion, the threshold for village management to be "inadequate" is reasonably high. As a matter of statutory interpretation, it must be the same threshold as that used to assess whether the village's financial position or the residents' security of interests is inadequate.

For example, in our view, an operator's failure to comply with an order under a decision or an agreement under a mediated or facilitated settlement agreement is evidence of inadequate management of the retirement village. As an additional enforcement measure, it should be deemed a relevant matter under section 43(1) of the Act for the statutory supervisor to act upon. The auditor of the retirement village and the Registrar of Retirement Villages should be informed. The fact of non-compliance should be included in the operator's published disclosure documents and annual report.

No changes to the statutory supervisors' statutory role under the Act are suggested, and it may not be necessary to change section 43(1). Clause 35(4) of the Code of Practice must be amended to refer issues to the Scheme, not the statutory supervisor. Statutory supervisors should be advised of relevant complaints and patterns of issues with operators they supervise. Complaints within their jurisdiction should be referred to them.

Role of the Office of the Retirement Commissioner

No changes are suggested to the current roles of monitoring, reporting and carrying out annual investigations.

Additional functions may be to review and recommend the rules of a proposed scheme to the Minister for approval and to monitor and report on the scheme's use and the scheme provider's performance against agreed-upon key performance indicators (for example, maximum or average process cycle times).

Role of the Minister of Housing and the Ministry of Housing and Urban Development

The Minister would approve scheme providers and their scheme rules, and make related decisions such as terminating an approval, approving rule changes or appointing regulated scheme and approving advocacy services, if required. No changes to existing functions are proposed. The Ministry would provide advice to the Minister.

Role of the Regulator (MBIE)

The Ministry of Business, Innovation and Employment monitors Te Ara Ahunga Ora | Retirement Commission and the Financial Markets Authority (which licences the statutory supervisors).



We do not see the need for any increased role or function directly concerning the Scheme and expect that its continued monitoring of the two Crown entities will be sufficient. (Similarly, while outside the scope of our report, we do not see any need to make changes to the FMA's role relating to the statutory supervisors).

4. Key legislative changes – overview

Assuming our recommended framework or a closely similar one is adopted, changes will be required to the Act (including changes to the Code of Resident's Rights in Schedule 4 of the Act) and the regulations, and consequently to the Code of Practice.

For future flexibility, we recommend that the Act and regulations provide what the scheme rules must include (see Appendix 3) and that the details be moved from the Act and regulations to the scheme rules.

The Scheme rules can be amended provided they comply with the Act and regulations. Similarly, we recommend that the Act be amended to provide that the Code of Resident's Rights may be amended using the same process, after consultation with the public and key stakeholder groups.

We recommend that the process be approval of the Minister on the recommendation of the Retirement Commissioner³⁷ or under delegated authority, for example, to the Retirement Commissioner.

Appendix 3 contains our high-level overview of suggested legislative changes in the body of the Act and Regulations for the proposed scheme framework.

Obligation of good faith

Although it is a more radical change, we recommend introducing an obligation of good faith as an amendment to the CORR (see Appendix 4). Alternatively, it could be a requirement under the Act, or a term implied into each ORA.

The Act should be changed so that the CORR is binding on the residents and operators.

This would be modelled on section 4 of the Employment Relations Act 2000, on the rationale that the relationship between a resident and an operator has elements similar to an employment relationship: there is a perceived or actual power imbalance; it is difficult to change residence (more so than it is to change employment); and proactively building and maintaining good interpersonal relationships are important in both settings. It should also apply between residents.

The obligations would be that the parties must:

- Deal with each other in good faith
- Not mislead or deceive each other or do anything likely to do so
- Be active and constructive in establishing and maintaining a mutually respectful relationship in which the parties are, among other things, responsive and communicative.

³⁷ For examples, see [section 63 of the Financial Services Providers \(Registration and Dispute Resolution\) Act 2008](#) and [Schedule 2 of the Grocery Industry Competition Act 2023](#).



Also, an operator proposing a decision that will or is likely to affect one or more residents adversely must provide the affected resident or residents with information about the decision and a reasonable opportunity to comment on the proposed decision.

Setting these expectations upfront may play a role in preventing issues from arising.

Section 57(3) of the Act provides for a 9-month period within which a resident or their representatives **cannot** complain about a delay in the disposal of the residential unit.

While outside the scope of our report, we suggest that the restriction in section 57(3) be removed to allow complaints at any stage of that process. If it is not removed, we suggest a shorter period of no more than 6 months (to align with the standard probate period relating to deceased residents) and ideally 3 months or less. Ultimately, this will depend on policy decisions to be made by the Ministry on the regime that will apply to repayment to residents of capital sums.

This is so that residents and their representatives have a remedy for inaction or unreasonably slow progress in preparing the unit for sale, marketing it and selling it.

Appendix 4 outlines proposed changes to the Code of Resident's Rights (schedule 4 of the Act).

As above, we recommend this binds residents and operators.

Appendix 5 outlines proposed changes to the Code of Practice.

5. Delivery options and where the Scheme could be located

MartinJenkins report

The MartinJenkins report discussed three options with sub-options:³⁸

Option 1 – Status quo for the scheme

Option 2 – Status quo with improvements

Option 3 – New dispute resolution scheme, either:

Option 3A – Establish a commissioner-based dispute resolution scheme, or

Option 3B – Appoint a dispute resolution provider to deliver a new scheme.

Both options introduce a 'complaint assessor' role.

Options 1 and 2 were not preferred. They are not considered further in this paper.

TAAO report

The TAAO report identified two delivery options:

Option 1 – scheme delivered by an appointed dispute resolution provider

Option 2 – scheme delivered by a commissioner (eg, the Retirement Commission or other similar entity).³⁹

³⁸ Footnote 2 above, at page 45.

³⁹ Footnote 1 above, at page 54.



Other options

In addition to Options 1 and 2, we have considered other options or sub-options:

Option 3 – Appoint two (or more) dispute resolution providers to deliver a new scheme either based on one set of scheme rules or with each drafting their own rules.

Option 4 – A split model where a dispute resolution provider performs some roles, powers, functions and duties, and others are performed by a commissioner or similar role.

Option 5 – Merge the Scheme into one or more adjacent existing schemes.

Option 6 – Provide optionality in the legislation. This means providing a mechanism for the Minister to change the model: appoint one (or more) dispute resolution providers or establish a government or public sector-based scheme. We recommend implementing this for future flexibility regardless of the other chosen option.

These options are discussed further below.

We agree with the MartinJenkins report's recommendation that all options should introduce a 'complaints assessor' role, although it may have a different title – we use 'case assessor' in this document (discussed under 'Terminology' in section 1 above).

6. Principled criteria for choosing from the options

Dispute resolution best practice principles

A best-practice dispute resolution scheme is user-focused, accessible, independent, fair, accountable, efficient, and effective. It must balance the needs of all stakeholders. These principles were agreed upon by stakeholders at the Stakeholder Roundtable meeting in January.

The Scheme we recommend must align with the best practice dispute resolution principles published by the Government Centre for Dispute Resolution (**GCDR**):

1. User focused and accessible

Users of dispute resolution services are at the centre of all aspects of the dispute resolution system. Dispute resolution is easy for potential users to find, enter and use regardless of their capabilities and resources.

2. Independent and fair

Disputes are managed and resolved in accordance with applicable law and natural justice. All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way.

3. Efficient

Dispute resolution provides value for money through appropriate, proportionate and timely responses to issues. It evolves and improves over time and makes good use of information to identify systemic issues.

4. Effective

Dispute resolution delivers sustainable results and meets intended objectives. It fulfils its role in the wider government system by helping minimise conflict and supporting a more productive and harmonious New Zealand.

5. Accountable

There is public confidence in dispute resolution. Those involved in its design and delivery are held to account for the quality of their performance. Regular monitoring



and assessment and public reporting encourages ongoing improvement and better outcomes across the system.

Alignment with submissions received

Most but not all submitters to the Commission and respondents to the RVR questionnaire expressed concerns that were generally aligned with the above principles. Key themes included:⁴⁰

- Independence from the operators, noting a lack of confidence in the current scheme
- Unbiased, impartial and free from conflicts of interest. A trusted entity to turn to
- Support for a sufficiently empowered decision-maker, alongside advocacy support for residents
- Unfair treatment and breaches of Occupation Rights Agreements and other rights
- Power imbalances between operators and residents, raising complaints and disputes stressful and intimidating
- Process improvements (for fairness and efficiency)
- Cost is a barrier for residents, but there is recognition that operators should not bear the full costs of resolving disputes between residents. In that case, residents should contribute
- Appropriate legal representation (according to the forum or process). For example, avoid overly legal processes until the binding determination stage
- Cost and cost-effectiveness.

The Scheme must address these concerns. A scheme aligned with the GCDR best practice dispute resolution principles will do this.

Appendix 2 depicts the current scheme's identified shortcomings in each area, the criteria we identify by which a scheme should be evaluated, and how our recommended scheme addresses each area.

Accessibility

We recommend that the Scheme provides accessibility options, including access to tikanga-based dispute resolution services.

Governance

Whichever option is chosen, the scheme provider must have appropriate governance in place, whether a board of directors, advisory board, advisory committee, oversight committee or other formal governance and oversight body.

⁴⁰ TAAO, Retirement Villages Complaints and Disputes: an assessment June 2022, section III, page 7. Commissions summary of submissions; and HUD, Review of the Retirement Villages Act 2003: Options for change, responses to questions 22 to 27, pages 25 to 30, and 74 <https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/Retirement-Villages-Act-2003-Review-Summary-of-Feedback.pdf>.



7. Evaluation of the options

Option 1 – A scheme delivered by an appointed dispute resolution provider

This is identified by MartinJenkins as the most cost-effective option, and we agree. Compared to the current scheme, the advantages relate to scale economies and independence from the operators.

This option would leverage the systems, skills and experience developed from other dispute resolution activities and the organisation's existing governance structure.

Option 2 – A scheme delivered by a commissioner (eg, the Retirement Commissioner or equivalent)

This option is identified by MartinJenkins as less cost-effective than option 1. We agree in principle, but we do not have a firm view of the quantum of the difference in cost between the two – it may be understated.

This option would also be independent of the operators. It may have advantages if an independent investigation function, advocacy function or ombudsman-like powers are to be included. Partly this relates to funding (eg, of an advocacy service) and partly whether powers to investigate and compel evidence would be better exercised using the State's coercive powers within the system of checks and balances that apply to the exercise of such powers rather than be vested in a private dispute resolution provider.

Having said that, many existing schemes have similar powers vested in private entities with the oversight of a government department or Ministry. For example, in the financial services sector, the four scheme providers are private for-profit or non-profit companies.⁴¹

Ultimately, we feel the decision will be policy and cost-driven, and not driven by efficacy of the Scheme, which can be provided successfully under either option.

Option 3 – Appoint two (or more) dispute resolution providers to deliver a new scheme based on one set of rules or each with their own rules

This is in addition to Option 1 and has the same advantages and disadvantages.

In addition, it aims to access the benefits of competition and innovation while having one set of rules that provide consistency to avoid confusion.

Alternatively, each provider could provide its own rules. This would widen the scope for innovation but reduce consistency, although all scheme rules would need to comply with the requirements set out in the Act (as outlined in Appendix 3).

There would be some duplication of set-up and administration overheads, which would involve extra cost, and scale benefits would be reduced at current case levels.

However, it gives flexibility to address significantly increased case numbers and provides redundancy (back-up) in case one provider cannot operate for any material period. It also provides competitive tension and encourages innovation in service delivery.

⁴¹ Insurance & Financial Services Ombudsman Limited; Banking Ombudsman Scheme Limited; Financial Services Complaints Limited; Financial Dispute Resolution Limited.



An example is the FSP Act, where multiple providers have been appointed, each with their own scheme rules (terms of reference). A financial services provider can choose which scheme it wishes to be a member of. In this model, each operator chooses which Scheme provider its issues are referred to.

We prefer the approach of each provider supplying its own rules for approval.

Option 4 – A split model where a dispute resolution provider performs some roles, powers, functions and duties, and others are performed by a commissioner or other similar role

Several different models are possible. For example, the dispute resolution provider could provide facilitation, navigation and mediation services, and the Commission (or another agency) could provide complaint assessment, investigation, and/or advocacy services. Alternatively, the Commission could provide investigative and determinative functions, and the non-determinative and assistance functions could be outsourced.

We do not support a split model as it does not satisfy the criterion of a single point of contact, would lead to duplication and extra cost, and could introduce further boundary issues and unwanted complexity and confusion.

The area where it could merit further consideration is a separate advocacy service, either within a government agency or outsourced. Alternatively, funding could be available to support existing volunteers and/or associations advocating for residents.

Option 5 – Merge the Scheme into one or more adjacent existing schemes

There is no obvious existing scheme to merge the retirement villages Scheme with.

There are some alternatives, but these would likely involve splitting the Scheme. For the reasons above, we do not support splitting the Scheme.

Options include the financial services dispute resolution schemes under the FSP Act, which could expand their jurisdiction to include disputes relating to the financial aspects of occupation rights agreements, collateral arrangements and charges to residents. They may be able to deal with issues of compliance with ORA rights and obligations and operator policies, or these may need to go elsewhere, possibly the Tenancy Tribunal or Disputes Tribunal. Interpersonal issues would need another scheme, perhaps private elder mediation organisations, Disputes Tribunal or possibly the Human Rights Tribunal.

These options are not palatable because they do not satisfy the criterion of a single point of contact. None of them necessarily have experience or expertise in retirement village settings.

Also, there would be difficult boundary issues and blended disputes that comprise both interpersonal and ORA or rights and obligations-based issues. The *Summerset Villages v Flanagan* case⁴² is an example of the difficult boundary issues between the disputes panel's jurisdiction and the Health and Disability Commissioner's jurisdiction. The issues in that case were finely balanced. We do not recommend overlaying these complex boundary issues with other boundary issues.

We are mindful of the alternative dispute resolution maxim that 'the issue is never the issue'. Accurately triaging and diagnosing the right scheme for the issue presented would be fraught. The decision may change during the process as further facts emerge, and submissions develop.

⁴² Footnote 32, above.



Given that the recommended Scheme draws heavily from the Disputes Tribunal, we have considered simply adding to the Disputes Tribunal's jurisdiction. This is a potential option, requiring similar legislative change to that proposed for the Act and regulations.

Factors weighing against this include: the fees charged, the lack of specialist expertise, the possibility of hearings, the lack of navigation and facilitation functions, the limited financial jurisdiction of the Tribunal, and the fact that it is government-funded with limited cost recovery. It is also very busy. It might be argued that none of these issues is insurmountable, but we recommend a specialised scheme provider to solve better the issues raised in the sector.

Option 6 – Select an option above and provide optionality in the legislation

Schedule 2 to the Grocery Industry Competition Act 2023 (**GICA**) is a recent example. The Minister of Commerce and Consumer Affairs can either approve a scheme and rules to be delivered by a dispute resolution provider (an **approved scheme**) or recommend to the Governor-General that, by Order in Council, regulations be put in place for the rules and delivery of a **regulated scheme**. In the latter case, the Chief Executive of the Ministry of Business, Employment and Innovation becomes the provider of the regulated scheme.⁴³

In the current context, the Chief Executive of the Ministry of Housing and Urban Development or the Retirement Commissioner could perform that role. While a matter for the Minister to determine at the time, our current preference would be for the Retirement Commission to perform that role. This is for reasons stated by submitters (albeit in a slightly different context) that the Office of the Retirement Commission is familiar with the sector and legislation, and the role would align with current responsibilities.⁴⁴

We like the flexibility this gives but note the risk that the Scheme could become a 'political football' kicked backwards and forwards between an approved scheme and a regulated scheme based on the incumbent Government's policies from time to time.

We feel that the benefits outweigh this risk (which is present regardless of a mechanism in the legislation). This mechanism assists in holding the provider(s) accountable to their performance requirements by having alternatives readily available if their performance is sub-optimal. It also gives flexibility in appointing additional providers in the future, whether to provide competition, address significantly increased case numbers, provide redundancy (back-up), or otherwise.

We recommend Option 6 be implemented regardless of the other chosen option.

Transition arrangements

Transition arrangements require consultation with the operators for the details to be agreed upon. New issues would be referred to the Scheme from its commencement. Issues in the current scheme referred to mediation or a disputes panel would progress through that process. Issues referred to the statutory supervisor could continue if substantially completed, with recent referrals transferred to the new scheme. Other issues at earlier stages could be transferred into the new scheme.

⁴³ Clauses 3, 19 and 20 of [Schedule 2 to the Grocery Industry Competition Act 2023](#).

⁴⁴ TAAO summary of submissions: 'Submitters split on who any new scheme should be delivered by'.



8. Costs and fees

Scheme costs and operator levies

The new dispute resolution scheme will contribute significantly to outcomes that are in the interests of village operators. For example, it will mean that an operator who is struggling to resolve a resident's concern can seek the help of the Scheme to resolve it. The operator will also gain valuable insights from the Scheme as it will be able to identify systemic concerns across the sector and suggest useful solutions. Therefore, we suggest that funding for the Scheme is best derived from operator levies.

The most transparent method of funding is an annual operator levy. This method of levying commonly occurs in schemes set up to address disputes arising in particular industries.

We suggest that the operator levy is set and paid annually, based on the operator's number of residential units (as defined in the Act).

We think this is a better measure than the number of residents (as defined in the Act) as the number of residential units is easier to measure and less prone to short-term fluctuations.

We envisage a process like that under the Grocery Industry Competition Act 2023 (which is based on the number of retail stores). This would have the following features for each financial year:

- Advice from each operator to the Scheme provider before the start of the financial year of the number of residential units they have.
- Estimated scheme funding costs are calculated and issued by the Scheme provider and invoiced proportionately to each operator in the proportion that their number of units bears to the total number of units.
- If a new operator or retirement village starts operating or an existing retirement village is expanded during the year, then there is an adjustment in the estimated fees based on the number of new residential units.
- At the end of the financial year:
 - Each operator advises the number of residential units they have at that time
 - The Scheme provider calculates the actual scheme funding costs for the year and apportions that to the operators based on the number of residential units at year-end
 - For each operator, the Scheme provider reconciles the actual scheme funding costs and year-end residential unit numbers against the estimated scheme funding costs and residential unit numbers at the start of the financial year.
 - The Scheme provider invoices shortfalls or refunds overpayments to the operators.
- In setting and apportioning the estimated scheme funding costs for the next financial year, the provider can take into account experience within the Scheme – for example, if one or more operators have used the Scheme disproportionately, they may be allocated a greater share of the estimated scheme funding cost for the next financial year.



The estimated funding costs may include one-off set-up costs in the first year of the new Scheme (only). While we expect that providers of similar schemes will have existing case management systems and processes, there will be costs associated with integrating the new Scheme into their business, including updating websites and creating new forms and processes. Scheme providers may prefer to charge these costs upfront or to amortise them across the initial term of the Scheme. In all scheme years, there would be operational and dispute resolution costs.

Operational costs cover the fixed costs of providing the Scheme and its infrastructure, including employees, systems and processes, and promotion or educational activities.

Dispute resolution costs are the Scheme's variable costs—the cost of mediations, written evaluations, binding decisions, and appeals or reviews, under a rate card. They also include the costs of any in-person meetings or hearings, including travel, room hire, meals and accommodation and related costs.

We recommend that the operators pay the costs of mediation (including in-person mediation), written evaluations and binding decisions, and that the parties pay their own costs of the process (as at present).

For resident-to-resident disputes, we recommend continuing the current provision that provides for the residents and operators to pay the costs equally (as provided for in clause 36(2) of the Code of Practice), given that the operators would fund the Scheme infrastructure. An operator could elect to assist the residents by contributing to those costs but should not be obliged to.

Costs of in-person meetings or any hearings would be borne by the operator or by parties in agreed proportions.

In making these recommendations, we emphasise incentivising the parties to resolve issues before mediation or a binding decision. We note the risk that resident-to-resident disputes may be re-framed as a dispute against the operator (for example, alleging that the operator had not enforced one resident's rights against the other) so that the operator pays the costs. There is not necessarily a perfect answer. On balance, in this situation, the Scheme should set the expectation of 'user-pays' to incentivise earlier resolution. Individual operators may wish to adopt a policy of cost contribution.

The quantum of these costs should be determined through a procurement exercise with prospective providers, as different prospective providers may take different approaches and balance the fixed and variable components differently. Alternatively, if a government or public service-based model is preferred, then further costing is required.

We note that the operators would have ongoing costs for their internal process for dealing with issues and complaints raised with them. We expect that the new scheme (option 3A or 3B) would reduce the administrative burden on the operators for those issues escalated to and managed by the Scheme provider as indicated in the MartinJenkins report,⁴⁵ but there would remain a significant cost to operators in maintaining their internal complaints facility.

We suggest further modelling of the likely costs of the recommended Scheme. This may include allowance for the costs of reporting and the regular formal reviews of the Scheme.

⁴⁵ Footnote 2 above, under 'unquantified benefits' at pages 60-61.



Fees

Cost can be a barrier to accessing dispute resolution schemes. In our experience, eligible parties increasingly decline to participate in a scheme when they must pay even a heavily subsidised fee for accessing the service.

Free for residents

We prefer that the Scheme be free for residents in a dispute against operators up to and including the decision stage.

Operators have raised concerns about vexatious or frivolous claims over several years. The 2015 monitoring report⁴⁶ noted that there is low evidence of this. This is a legitimate concern in scheme design, but given the report's findings, it is not of great weight in this instance. If it is an issue, nominal filing fees can be an effective way of deterring these. (We note that concerns that may appear trivial to an operator can be important to a resident.)

We do **not** recommend filing fees. However, if they are used, they should be modest, given the lack of widespread problems and that residents will likely be on fixed incomes. They should not exceed Disputes Tribunal fees at the time.

If the claim is not for a specific amount, the filing fee should be the lowest fee the operator charges, so access to justice is not unduly restricted. Examples of where this may apply are declarations of rights or obligations under, or breaches of, ORAs, the operator's policies, the Code of Practice or the Code of Residents Rights, the Scheme rules and enabling legislation.

An alternative to filing fees, to address the concern about frivolous and vexatious claims, is to provide a sanction for 'repeat offenders'. The Domain Name Commission's dispute resolution scheme rules provide for a party to be unable to make a claim for two years where they have acted in bad faith three times in the preceding two years.⁴⁷

We are reluctant for the Scheme to deny access to justice. The Domain Name Commission approach may be appropriate in this context if calibrated reasonably. For example, it may alleviate operators' concerns if, for example, a person may not bring a claim for, say, three months if the case manager (with the approval of the case assessor each time) finds them to have made a frivolous or vexatious claim on three occasions in the preceding six months. However, we do not recommend this in this context, as it denies access to justice and the Scheme has other mechanisms to deal with frivolous and vexatious complaints,

We do not recommend filing fees nor preventing access to the Scheme. Obvious frivolous and vexatious claims scheme will be rejected by the case manager/case assessor.

Operator direct fees

We recommend an annual scheme funding amount to cover the fixed costs of the Scheme be levied on operators in proportion to their number of residential units, and that the costs for each

⁴⁶ James, B with CRESA (2015) Retirement Villages Act 2003 Monitoring Project Disputes Process, Report 2. The Practice, Experience and Views of Dispute Resolution. Prepared for the Commission for Financial Capability [Retirement Villages Act 2003 Monitoring Project: Disputes Process](#).

⁴⁷ [DNC Scheme Rules - New Zealand Dispute Resolution Centre](#) Rule 4.5: "If a Claimant has been found to have brought a Claim in bad faith...on three separate prior occasions within a two-year period, NZDRC will not accept any further Claim from that Claimant for a period of two years from the date of the third such finding of bad faith."



major process (written evaluation, mediation and binding decision) are paid by the operator. (Resident-to-resident issues are an exception, with contributions by the residents as at present).

We prefer that prospective scheme providers be able to decide the quantum and mix of fixed and variable fees that they wish to offer, and whether they wish to propose fixed fees or time and attendance charging, or a mix of the two, covering:

- Mediation fees
- Non-binding evaluation fees
- Binding decision fees

There will likely be a difference between the cost of a binding decision that follows the issue of a non-binding evaluation and a binding decision where no written evaluation has been issued.

Based on our experience and subject to the qualifications above, we expect to see fees in the following typical ranges (plus GST, if any):

1. Mediation fees: \$3,000- \$5,000 per half-day mediation, including capped preparation time.
2. Binding decision fees: \$3,500-\$20,000. Based on the experience of another scheme, this is a broad range: \$20,000 is an extreme fee applicable to a few highly complex cases. The midpoint is \$11,750. We expect most cases would be in the lower half of that range: \$3,500 to \$11,750, with many towards the lower end of the range.
3. Non-binding evaluation fees: \$1,500-\$18,000. Again, a broad range as above, and we expect most would be in the lower half of the range: \$1,500- \$9,000, with many towards the lower end of the range.

This depends on when it is undertaken. If it is late in the process, it may take almost the same amount of time as a binding decision. If so, the cost to move from the evaluation to the binding decision would be minimal. Alternatively, if the evaluation is issued early, it may be significantly cheaper than a binding decision. However, if the recommendations are not adopted, moving from the evaluation to the binding decision would be more expensive.

Costs awards

We understand that the prospect of having costs awarded against them has a chilling effect on residents who might otherwise engage in the process. Equally, operators have concerns about frivolous or vexatious claims. They would value the option of recovering costs in those situations.

We feel that the issue of frivolous or vexatious claims can be addressed by:

- The triage process and the Scheme provider rejecting obvious frivolous or vexatious claims
- Reality checking by the case manager through a verbal, non-binding evaluation
- Reality checking by the case assessor through a written, non-binding evaluation
- Reality checking by the mediator during mediation

The Scheme aims to resolve disputes involving older citizens, generally (but not always) on fixed incomes and in the relatively vulnerable situation of being unable readily to change residence.



In this context, we feel that access to justice considerations outweigh the concerns regarding frivolous or vexatious claims, especially given our view that they can be mitigated as above. If the nominal filing fees are adopted (which we do not recommend), they should be refunded to the resident if they are successful or otherwise forfeited to the Scheme or awarded to the operator.

However, decision-makers should have a residual discretion to award costs against residents in an extreme situation. The bar should be set high. We recommend that costs may be awarded by the decision-maker against a party only when they have acted in *bad faith*⁴⁸ or *in a contemptuous or improper manner* during the dispute resolution process⁴⁹.

These phrases are used (for example) in the Construction Contract Act 2002 (**CCA**) to provide a high threshold for cost awards. (The CCA provides an alternative threshold where the party's claims or submissions are *without substantial merit*. This is a lower threshold, which we do not recommend in this setting. We consider *bad faith* or *improper manner* to encompass claims entirely without merit and/or an abuse of process. The legislation or scheme rules should define these terms in this way.)

The general position should be that cost awards are **not** made against a resident (except in exceptional circumstances) but may be made against an operator.

9. Recommended option

Unless there is a strong policy reason otherwise, the deciding factor in the current environment is likely to be the financial cost to the operators, which will ultimately be passed on to residents indirectly. It is also important not to focus purely on cost – it is important that the quality of service is high to provide quick, quality access to justice and reliable outcomes. Quality of service is essential, and the focus should not simply be on costs, which could cause a race to the bottom.

Therefore, **Option 1 – a scheme delivered by an appointed dispute resolution provider is our preferred option by a small margin.** As stated above, the MartinJenkins report identified a provider-appointed scheme as being the most cost-effective option. We recommend this be combined with Option 3, the ability to have more than one scheme provider.

We recommend testing this by permitting both private dispute resolution providers and government or public sector entities or entities funded by them to bid to be scheme providers. This will enable the most cost-effective scheme, that delivers the required quality of service, to be identified.

Appointing an existing private or public sector provider allows an experienced and resourceful operation to efficiently implement the Scheme. The provider can use their experience to respond to any foreseen and/or unforeseen practical difficulties in the Scheme.

In addition, we recommend Option 6 – provide optionality in the legislation

The mechanism under Option 6 can be used to adjust the Scheme: to add one or more approved schemes, add or remove a provider or providers, and/or move to or away from a regulated scheme.

⁴⁸ For example, see [section 56\(1\)\(a\) of the Construction Contracts Act 2002](#).

⁴⁹ For example, see [section 57\(4\)\(b\) of the Construction Contracts Act 2002](#).



We recommend that the Commission and the Ministry monitor case numbers and consider appointing an additional provider/authorise additional resources if numbers are significantly higher than forecast.

We recommend that the Scheme be formally externally reviewed (by or at the direction of TAAO or the Ministry) every three years.

10. Conclusion

We recommend a dispute resolution scheme emphasising quick resolution and removing access barriers for retirement village residents. The Scheme is intended to be resident-centric without being resident-biased and assist and encourage the parties to resolve their dispute as early and close to the source of the issue as possible. The emphasis is on seeking finality as early as possible in the process. The focus is on preserving and repairing relationships as far as possible for the long-term benefits of the retirement village residents and operators.

We recommend that the Scheme provider be given inquisitorial powers and the ability to control the process and timelines in the interests of the parties and efficient resolution of the issues.

Our recommendations are summarised in the Executive Summary and appendices.

Thank you for considering this document and the recommendations.

Nāku noa, nā

Michael Jamieson

NZDRC Commercial Manager

About the authors

This document has been prepared by the New Zealand Dispute Resolution Centre Limited | Te Pokapū Whakatau Tautohe o Aotearoa (**NZDRC**) (<https://nzdrc.co.nz/>). NZDRC is a subsidiary of The ADR Centre Limited (<https://adrcentre.co.nz/>).

We have over 30 years of experience designing and delivering private alternative dispute resolution services in Aotearoa New Zealand, and globally. We have a proven track record of designing, developing and delivering accessible and effective alternative dispute resolution services and schemes for industry sectors, the community and the Government.



This document and our recommendations draw on our experience designing and implementing dispute resolution schemes. We understand that the Retirement Villages sector has unique features and dynamics and have tailored our recommendations to that reality.



Appendix 1 - Dictionary

TERM	MEANING
Act	The Retirement Villages Act 2003
Advocacy role	A role that represents residents or actively assists them in presenting or arguing their case
Case manager	A person acting on behalf of the Scheme provider who assists the parties through the complaints and dispute resolution process
Code of Practice (COP)	The Retirement Villages Code of Practice 2008
Code of Residents Rights (CORR)	The Code of Residents' Rights in Schedule 4 to the Act
Commission	The Office of the Retirement Commissioner Te Ara Ahunga Ora
Commissioner	The Retirement Commissioner
Case assessor	The case assessor is involved from an early stage through to completion. The case assessor approves some of the case manager's decisions and controls the process and chooses the appropriate pathways. The case assessor decides the outcome up to a threshold set out in the Scheme rules.
Consensual process	Any process by which the parties seek to reach an agreed outcome (whether with the assistance of a third party or not)
Council	The Retirement Villages' Residents' Council of Aotearoa New Zealand
Decision-maker	The case assessor or the senior decision-maker.
Determinative process	A process in which a binding decision is made for the parties by a third party
Early Resolution function	A process which seeks to facilitate a resolution to the issue before mediation or decision
Facilitative function	A process in which the case assessor seeks to assist the parties to resolve the issue
HDC	The Health and Disability Commissioner
the Ministry	The Ministry of Housing and Urban Development Te Tūāpapa Kura Kāinga
Investigator function	A separate function that conducts independent investigations and provides the results and recommendations to the decision-maker
MartinJenkins Report	MartinJenkins cost-benefit analysis (2023)



Manager	The person or entity appointed by the operator to manage the Retirement Village for the operator
Mediation	A process in which an independent neutral third party (a mediator) seeks to assist the parties to resolve the issues between them by agreement
Minister	The Minister of Housing and Urban Development
Navigation function	A role that assists the parties to understand their options and the process and to navigate their way through them to resolution.
Operator	As defined in section 5 of the Act. It includes a manager appointed by the operator.
ORA	Occupation Right Agreement as defined in section 5 the Act (often in the form of a Licence to Occupy (LTO))
Registrar	The Registrar of Retirement Villages appointed under section 87 of the Act
Regulations	Retirement Villages (Disputes Panel) Regulations 2006
Resident	A resident of a Retirement Village as defined in section 5 of the Act
Residential unit	As defined in section 5 of the Act
Retirement Village	As defined in section 6 of the Act
RVA	The Retirement Villages Association of New Zealand Inc.
RVR	Retirement Villages Residents' Association of New Zealand
Scheme	The complaints and dispute resolution services scheme
Scheme provider	The entity providing and administering the complaint and dispute resolution scheme and services under the Scheme
Senior decision-maker	This is a senior role, responsible for decisions in complex cases. The case assessors would report to this role, which would review and approve the case assessor's decisions above a specified threshold per a set of delegations. This role would be senior role likely reporting to a CE, CEO or equivalent.
TAAO	Te Ara Ahunga Ora The Office of the Retirement Commissioner
TAAO Report	Monitoring reports Retirement Commission Te Ara Ahunga Ora



Appendix 2 - Dispute resolution scheme criteria

BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
1. User focussed and accessible			
Users of dispute resolution services are at the centre of all aspects of the dispute resolution system. Dispute resolution is easy for potential users to find, enter and use regardless of their capabilities and resources.	Some residents are too scared to use the scheme or to complain as it is 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; The Dispute panel process is not user-friendly for residents – the process is adversarial, intimidating and stressful.	Single point of contact.	Yes (even if administered by more than one entity).
		Users are assisted to navigate the processes and adopt the option best suited to them and the dispute	Yes, by navigator function (case manager).
		Easy to access	
		Easy to understand	Multiple means of access.
			Plain language website and other information, diagrams, templates and explanations. Navigator function performed by case manager
		Run independently of the operators	Yes.
		Seeks to preserve relationships	



BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
			Yes, by using facilitation, non-binding evaluation and recommendations, and mediation where appropriate
		Explores non-adversarial avenues first. Attempts to facilitate agreement	Yes, as above
		Determinative processes are the last resort	Yes, binding decision after other processes considered or attempted
		Limited appeal rights (balancing finality vs access to justice considerations)	Yes, limited appeal rights (error of law only). Scheme review is possible if there is new information or manifest error.
2. Independent and fair			
Disputes are managed and resolved in accordance with applicable law and natural justice. All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way.	Operators have financial resources to engage legal counsel compared to residents in a dispute; Statutory supervisors are appointed and paid for by the operator; the Statutory supervisor, mediation and disputes panel process is paid for by	Run independently of the operators – independent appointment of panellists Minimise legal involvement	Yes Yes, cases are dealt with directly with the parties



BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
	the operator; No independent investigative function of complaints is built into the scheme.		based on the documentation and information provided. Parties can have legal support to prepare documentation. No hearings unless in exceptional circumstances. Lawyers need leave to appear.
		Minimise statutory supervisor involvement	Yes, advised of issues where required. Only a participant in exceptional circumstances.
		scheme funded or largely funded by the industry/operators	Yes, a mix of operator levies and user-pays philosophy, with contributions by residents where appropriate. Operator levies to cover fixed costs and operator and/or resident payments to cover DR processes.
		Investigative/fact finding role	There is no separate investigative role per se, but the case assessor/senior decision-maker has an inquisitorial function and can request information and seek to clarify facts. Senior decision-maker can require production of documents/evidence.



BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
			Yes
			Yes
		Mediation role – mediators are neutral/unbiased	
		Determinative role – decision-makers are neutral/unbiased	
3. Efficient			
Dispute resolution provides value for money through appropriate, proportionate and timely responses to issues. It evolves and improves over time and makes good use of information to identify systemic issues.	No structured early resolution process built into the Scheme so to prevent disputes; there is insufficient preliminary assessment of disputes to identify issues and the appropriate options for resolution; Determination of a dispute takes too long; there is no automatic escalation of a complaint built	<p>Triaging of complaints and issues at initial intake</p> <p>Seek resolution between parties directly first. Assist communication. Support the claimant/parties in the discussions</p>	<p>Yes, part of the case manager role.</p> <p>Yes, part of the case manager role.</p>



BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
	into the formal complaints process; The process around resolving breaches of the Code of Residents' Rights lacks clarity.	<p>Pathways that avoid delay and enable disputes to move smoothly to the next stage if they cannot be resolved at an earlier stage</p> <p>Family members are able to lodge complaints on behalf of their retiree relative.</p>	<p>Yes, shorter timeframes than the current scheme to avoid delay while allowing sufficient time for resolution at each step. The case assessor determines the next steps and the time frames.</p> <p>Yes, representatives can act on behalf of residents, as can residents' associations or groups of residents where there are common issues and interests.</p>

4. Effective

Dispute resolution delivers sustainable results and meets intended objectives. It fulfils its role in the wider government system by helping minimise conflict and supporting a more productive and harmonious New Zealand.	The 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 are better served by an existing tribunal process.	<p>Explore non-adversarial avenues first.</p> <p>Determinative processes are the last resort</p> <p>Seek resolution between parties directly first. Assist</p>	<p>Yes, as above.</p> <p>Yes, as above.</p>
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BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
		communication. Support the claimant/parties in the discussions	Yes, as above,
		Pathways that avoid delay and enable disputes to move smoothly to the next stage if they cannot be resolved at an earlier stage	
			Yes, as above,

5. Accountable

There is public confidence in dispute resolution. Those involved in its design and delivery are held to account for the quality of their performance. Regular monitoring and assessment and public reporting encourages ongoing improvement and better outcomes across the system.	The Retirement Commission monitors the formal complaints and dispute panel process; the Statutory Supervisor has some oversight of the scheme if requested to be involved; There is no monitoring of the resolution of informal complaints process by operators	Regular monitoring and public reporting (anonymised statistics) against KPIs.	Yes, annual reporting to the Retirement Commissioner and/or Ministry of Housing and Urban Development, and Statutory Supervisors regarding their management oversight functions for retirement villages.
		Statutory Supervisor oversight of pertinent (mainly financial) aspects of the scheme and any trends in operator behaviour.	Yes, share information with the Statutory Supervisors, especially regarding operator non-compliance including seeking a direction to be made per section 43(1) of the Act or a public statement per section 44 of the Act by the Statutory Supervisor, where appointed.



BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
			Yes, mandatory reporting by operators in annual reports and /or disclosure statements.
			Reporting by scheme provider(s), including feedback loops on trends to assist with continual improvement.
		Transparency by operators regarding complaint resolution.	

6. Other considerations

Privacy and Confidentiality	<p>Panel proceedings are public.</p> <p>Currently a party can request anonymity but it's not automatic. Even though the parties were anonymised would it still be possible for the resident to talk about the dispute in the media ie it wouldn't be like an NDA.</p>	<p>As far as possible, given its nature and participants, dispute resolution is conducted in private and is confidential</p>	<p>The process is private and confidential, usually by video-conference or telephone based on the documents and information gathered or supplied.</p> <p>No hearings, except in exceptional circumstances, <u>not</u> held in public.</p> <p>Privacy and confidentiality is maintained. There may be agreed announcements or statements to other village residents.</p>
Feedback for continual improvement			<p>Yes, residents' details are redacted from or anonymised in decisions, case summaries, and case studies that are published.</p> <p>Feedback loops on trends to assist with continual improvement – to operators,</p>



BEST PRACTICE CRITERIA	CURRENT SCHEME - PERCEPTION	SUCCESS CRITERIA FOR A NEW SCHEME	ASSESSMENT OF RECOMMENDED SCHEME
		Any decisions or case summaries published are redacted and/or anonymised	Commission, Ministry, resident groups and other relevant stakeholders.



Appendix 3 – Recommended legislative changes – high-level

Overview of what the Scheme rules must contain⁵⁰

1. The purpose of the dispute resolution scheme is to ensure that—
 - (a) residents of retirement villages that are parties to a dispute with the operator or another resident have access to a Scheme to resolve their dispute
 - (b) operators who are party to a dispute with one or more residents have access to a scheme to resolve their dispute after they have attempted to resolve it directly with the resident or residents
 - (c) the Scheme is resident-centric, user-focused, accessible, independent, fair, accountable, efficient, and effective.
2. The provider of an approved scheme must publish the rules of the Scheme on its website.
3. The rules of the Scheme must provide for, or set out, the following:
 - (a) a summary of the dispute resolution provisions of the Act:
 - (b) how the provider will promote knowledge about, and accessibility to, the Scheme (which must include requirements for the provider to work with other parties to do so):
 - (c) how disputes may be referred for resolution by the Scheme:
 - (d) the kinds of dispute resolution processes offered by the Scheme (for example, non-binding evaluation or mediation), including at least one determinative process that results in an order or other decision of a decision maker (a **binding decision**):
 - (e) that disputes must be resolved in a way that is consistent with the rules of natural justice:
 - (f) that the dispute resolution processes must provide for as little formality and technicality as the requirements of this Act, and a proper consideration of the dispute, permit:
 - (g) the kinds of remedial action or orders that the Scheme can impose on a party to resolve the dispute:
 - (h) the circumstances in which the Scheme may make an order (a costs order) requiring an operator or other party to pay all or part of another party's expenses in relation to a dispute resolution proceeding:
 - (i) that disputes must be resolved within—
 - a. 25 to 35 working days after the dispute is referred to the Scheme; or
 - b. any further time that the parties agree; or
 - c. any further time that the adjudicator or other decision maker, or the provider, allows:
 - (j) that the parties to the dispute must comply with a reasonable request made by a case assessor or senior decision-maker for submissions, documents, or other information:
 - (k) that the matters shared or covered in, or in the course of, dispute resolution proceedings are confidential:
 - (l) the amount payable (if any) by either or both parties to a dispute in connection with that particular dispute:
 - (m) that an independent review of the Scheme must occur every three years and must be supplied to the Minister within 3 months of completion:

⁵⁰ See [schedule 2 of the Grocery Industry Competition Act 2023](#) and [section 63 of the Financial Services Providers \(Registration and Dispute Resolution\) Act 2008](#).



- (n) a code of ethics, a complaints process, and continuing professional development requirements for mediators, case assessors, or senior decision-makers (including requirements for membership of, or accreditation by, a relevant body);
 - (o) the matters prescribed by the Act or any regulations.
4. The compensation that the Scheme can impose on an operator must be able to include compensation for non-financial loss, stress, humiliation, and inconvenience up to a certain amount stated in the rules.
 5. The rules of an approved scheme must be treated as containing any provision that is implied into those rules by the Act or any regulations.
 6. A rule of an approved scheme has no effect to the extent that it is inconsistent with any provision implied into the rules by the Act or any regulations.
 7. The rules of the Scheme may also include or provide for any other matters of process or procedure that are consistent with the purpose set out in clause 1.

Overview of changes to the Retirement Villages (Disputes Panel) Regulations 2006

REG.	BRIEF DESCRIPTION	CHANGE
3(1)	List of approved persons maintained by Retirement Commission	Name or list of approved scheme provider/regulated scheme provider maintained by Retirement Commission List of approved persons (panellists) maintained by scheme administrator
Forms 1 and 2	Separate forms for claim and response	Adopt a single text procedure: case manager sends claim form to respondent for a response to each point
Form 3	Power to procure witnesses	Remove
Form 7	Form of decision	Update to modern form and align with recommendations
Form 8	Application form	Remove duplication between notice of dispute, application and details of claim. One application form is sufficient. Case manager gives the application to the other party.
5	Person must give operator copy of notice of dispute	Case manager to copy parties as required
6(1)	Operator gives notice	Case manager to copy parties as required



6(2)	Panellist name address phone no. to parties	All contact is via case manager (for privacy and security of the decision-maker). Case manager's contact details are provided
7	Notice and certificate to Retirement Commissioner	Not required. Remove.
8	Operator gives notice of dispute to Panel	Case manager copies case assessor and parties as required
9	Appointment of chair of disputes panel	Remove.
10	Appointment of chair of disputes panel	Remove
11	Disputes panel may request further particulars	Case assessor/senior decision-maker may require further particulars.
12	Reply to dispute notice	Amend to provide reply (or response) to an issue and single text procedure
13	Disputes panel to consult parties on matters relating to hearing	<p>Delete. Provide that hearings are in exceptional circumstances and the case assessor will determine the procedure.</p> <p>Address processes in scheme rules or outline key processes available to the scheme: reject, refer, facilitation, non-binding evaluation (verbal/written), mediation, binding decision.</p>
14	Notice of hearing	Retain, but hearings are in exceptional circumstances, with additional costs.
15	Withdrawal of dispute	Applicant may withdraw at any time before a binding decision is issued (Any refund of fees to be addressed in the scheme rules)
16	Witnesses	Delete
17	Disputes panel may require verification of written evidence	Case assessor may require evidence to be given by statutory declaration



18	Adjournment	Case assessor controls time frames
19	Hearings usually to be in public	Hearings usually to be in private (and confidential) Maintain (4) – resident not to be identified
20	Manner in which hearing to be conducted	Maintain the principles, but change to reflect manner in which issues are to be decided
21	Procedure if neither party appears	Remove – case assessor discretion
22	Procedure if only applicant appears	Remove – case assessor discretion
23	Procedure if both parties appear	Remove – case assessor discretion
24	If disputes panel refuses to hear dispute	Amend to reflect case manager/decision maker discretion to reject or refer cases
25	Decision of disputes panel	Adapt to decisions and scheme framework
26	Retirement Commissioner to hold records of disputes	A decision is required as to whether the Commission or the Scheme provider is the repository
27	Majority decisions of disputes panel	Remove
28	Applications	Amend per scheme framework and make electronic communication the default but with other options including accessibility options
29	Order of disputes panel on application	Adapt to scheme framework
30	Information given to disputes panel must be copied to parties	Case manager to copy information to the parties and decision-maker



Overview of changes to the Act – high-level

1. Define the roles recommended in this document, including:
 - a. Scheme provider
 - b. Case manager
 - c. Case assessor
 - d. Senior decision-maker
 - e. Decision-maker
2. Define other terms recommended in this document, including:
 - a. Facilitation
 - b. Verbal non-binding evaluation
 - c. Written non-binding evaluation
 - d. Decision
 - e. Frivolous and vexatious claims
 - f. Acting in bad faith or in a contemptuous or improper manner, including:
 - i. Abuse of process or
 - ii. Claims entirely without merit
3. Provide for the Minister to approve one or more scheme Providers and scheme rules, provided they meet the relevant requirements. The scheme rules must contain all the necessary matters (see list above). Provide for the scheme rules to be amended with the Minister's approval and for the Minister to withdraw approvals.
4. Provide for the Minister to be able to appoint a regulated scheme and approve scheme rules. Provide for the scheme rules to be amended with the Minister's approval. Provide for the Minister to withdraw approvals.
5. Reflect the broader jurisdiction, remedies and financial thresholds for the scheme. Enable the parties to waive the financial limits by agreement. Residents may waive part of their claim to bring it within the scheme's jurisdiction.
6. Reflect the review and appeal rights.



7. Provide for the amendments to the Code of Residents' Rights [and Obligations] – schedule 4 to the Act, including adding an obligation of good faith. Amend section 32 of the Act to provide for this code to bind residents and operators.
8. Provide for amendments to the Code of Practice.
9. Remove or reduce the 9-month period in section 57(3) of the Act.
10. Provide for regular review of the scheme(s) (every 3 to 5 years).
11. Provide for transition arrangements.
12. Enable operators to choose which scheme they join, if there is more than one.



Appendix 4 – Recommended changes to Code of Residents Rights (schedule 4 of the Act)

Suggested changes are in blue font.

Code of residents' rights and obligations

[s 32](#)

Obligations of good faith

The operator, you, and other residents must:

- (a) Deal with each other in good faith;
- (b) Not mislead or deceive each other or do anything likely to do so; and
- (c) Be active and constructive in establishing and maintaining a mutually respectful relationship in which, among other things, the parties:
 - (i) are responsive and communicative;
 - (ii) respect each other's rights; and
 - (iii) treat each other with courtesy, dignity and respect.

Basic rights of residents

This is a summary of the basic rights given to you by the Retirement Villages Act 2003.

Services and other benefits

1 You have the right to services and other benefits promised to you in your occupation right agreement. [You have the right to use and enjoy the rights granted under your occupation right agreement and any collateral arrangement, in common with other residents with the same or similar rights under their occupation right agreements and collateral arrangements.](#)

Information

2 You have the right to information relating to any matters affecting, or likely to affect, the terms or conditions of your residency.

Consultation

3 You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay [or any other decision](#) that will or might have a material impact on your—



- (a) occupancy; or
- (b) ability to pay for the services and benefits provided.

The operator must provide you with information about the proposed changes and a reasonable opportunity to comment on them.

Right to complain

- 4 You have the right to complain to the operator and to receive a response within a reasonable time.

Disputes

- 5 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.

Use of support person or representative

- 6 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.

Right to be treated with courtesy and have rights respected

- 7 You have the right to be treated with dignity and respect. You have the right to be treated with courtesy and have your rights respected by other residents, the operator, the people who work at the village, and the people who provide services at the village.

Right not to be exploited

- 8 You have the right not to be exploited by other residents, the operator, the people who work at the village, the people who provide services at the village.

Your obligations to others

- 9 Your rights exist alongside the rights of other residents and the rights of the operator, the people who work at the village, and the people who provide services at the village. In the same way that these people are expected to respect your rights, it is expected that you in return will respect their rights and treat them with courtesy, dignity and respect.



Operator's contact person

If you want more information about your rights or wish to make a complaint against the operator or another resident, [contact the operator](#). The operator's contact person is [*name*] [*telephone number*].

Other contact persons

Other contact persons, if you want to make a complaint about a breach of your rights, are—

- (a) [the dispute resolution scheme provider listed on the Office of the Retirement Commissioner's website as advised to you by the operator.](#)

Information

The Retirement Commissioner ([directly or via the dispute resolution scheme provider](#)) publishes information on the code of residents' rights and disputes procedures available under the Retirement Villages Act 2003 that may assist to resolve your complaint.



Appendix 5 – Recommended changes to Code of Practice – high-level

Clauses 30 to 36 (pages 27 to 32) and the diagram on page 33, and clause 52 (page 44).

In each clause, remove the distinction between informal and formal issues or concerns and align language with the new Scheme.

30 Residents' committee

The Residents Committee or a subcommittee should have the standing to bring complaints on behalf of residents with a common issue or interest.

The Committee's ability to call meetings between residents and the operator and/or statutory supervisor should continue.

34 Making a formal complaint

Rather than the operator writing the complaint for the resident, the resident should be referred to the Scheme for the case manager to assist with this.

35 Procedure for resolving formal complaints

In paragraphs 4 and 5, '20 working days' should be changed to '10 working days', and references to the statutory supervisor should be changed to references to the Scheme, where applicable.

Paragraphs 6 to 9 need to be revised to align with the new Scheme (or to refer to the Scheme rules).

36 Costs of mediation

Paragraphs 1 and 2 do not need any changes.

Paragraph 3 needs rewording to align with the new Scheme (or to refer to the Scheme rules).

Diagram page 33, ref. clause 33(5).

After clause 36, insert the revised diagram from 'High-level process' in the body of this document or similar.

52 Rights of the former resident relating to sale or disposal of the vacant residential unit following termination

Subclause (1) provides that a complaint may be brought at any time, but a dispute notice cannot be issued until 9 months after the unit becomes available for re-occupation or disposal. [Sections 53(1)(3), 55(3) and 57(3) of the Act].

We suggest that this period be removed entirely, so that a complaint can be made to the new Scheme (ideally after attempted resolution by the parties). Alternatively, the period should be reduced to (at most) 6 months or preferably 3 months or less after the unit becomes available. This is to be closer to the standard probate period for the situation where the termination of the ORA arises from the death of the resident, and to enable the resident or representative to be proactive if they experience delay.

Section 57(3) of the Act would need to be amended by replacing '9 months' with the period chosen (if any), section 57(1) and (2) need amendment to be subject to (3). Section 57(4) needs review as otherwise there would be no way of resolving a dispute regarding an alleged breach under the code of practice, for example, a failure to advertise.



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