

Te Ara Ahunga Ora | Commission for Financial Capability

WHITE PAPER

RETIREMENT VILLAGES LEGISLATIVE FRAMEWORK: ASSESSMENT AND OPTIONS FOR CHANGE 2020

CONTENTS

Consultation details	2
Glossary of terms	3
Purpose of this paper	4
Executive summary and summary of recommendations	5
Structure of this paper	6
Part 1: Legislative framework	7
1.1 Legislative framework	7
1.2 The framework in action	9
Part 2: Retirement village occupation and operation	12
Part 3: Regulation - roles and responsibilities	13
Part 4: Complaints and disputes	16
Part 5: The Code of Practice	20
5.1 Legal significance of the Code	20
5.2 How the Code can be varied	20
Part 6: Consumer issues identified with the framework	21
Part 7: Emerging consumer issues	28
Part 8: Understanding the legal framework	31
Part 9: Looking ahead – options analysis	35
Appendix: Resident case studies	37

Consultation details

We seek your feedback on this White Paper. You may answer the questions below via an online form on the CFFC website. Click here cffc.govt.nz/rv-feedback. The CFFC will be releasing submissions publicly at the end of the consultation period, with personal details and those of individual retirement villages redacted.

If you have any other questions or comments, please email consultation@ccfc.govt.nz

Consultation is **open until 5pm Friday 26 February 2021**.

We are seeking feedback on five key questions:

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

Q 1.1 If you replied No, please say why.

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

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

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

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

Q 4.1 If Yes, please briefly describe the issue(s).

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

After reviewing all feedback CFFC will brief relevant Ministers in early 2021, providing a summary of the key points made, and any other recommendations.

Glossary of terms

Code of Residents' Rights	CoRR
Commission for Financial Capability	CFFC
Financial Markets Authority	FMA
License to Occupy	LTO
Ministry for Business, Innovation, and Employment	MBIE
Ministry for Housing and Urban Development	MHUD
Occupation Rights Agreement	ORA
Retirement Villages (General) Regulations 2006	the Regulations
Retirement Commissioner	RC
Retirement Villages	RV
Retirement Villages Act 2003	the Act
Retirement Villages Association	RVA
Retirement Villages Code of Practice 2008	the Code
Retirement Villages Residents Association	RVRANZ

Purpose of this paper

This project is pursuant to the Retirement Commissioner's obligations under section 36 of the Retirement Villages Act 2003.

The Retirement Commissioner (RC) is required to monitor the effects of the Retirement Villages Act 2003 (the Act), its Regulations (the Regulations), and the Retirement Villages Code of Practice 2008 (the Code). Collectively we refer to this as 'the framework'.

The RC conducts its statutory functions through its office - the Commission for Financial Capability (CFFC).

There are a number of parties affected by the statutory and operating framework that was established two decades ago. These include operators, supervisors, trustees, residents and their families, government agencies, and Ministers.

The number of parties naturally leads to a range of views about the effectiveness of the framework and how it balances the interests of village owners and operators, and residents.

The intention of this paper is to describe the environment, discuss core issues, and start a

conversation between industry, residents and government about if and where change is desirable. We have indicated areas that, in the opinion of the CFFC, warrant further work.

This paper:

- identifies the limits of the CFFC's and other agencies' abilities to ensure the current retirement villages framework -
 - delivers services, contracts and financial transactions that are fair and understandable for intending residents and residents, and
 - delivers retirement housing that is appropriate for the changing composition of New Zealand's ageing population
- sets out some of the strengths and weaknesses in the framework and the business model that has developed out of it
- identifies options to improve the framework effectively and in a timely manner
- recommends the CFFC's preferred option - a full policy review of the framework.

Executive summary and summary of recommendations

The majority of retirement village residents appear content with their choice of living arrangements. Most operators provide very good services and care to their residents.

However, there are issues at the margins, including of regulatory structure, that need attention.

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

There are consumer issues with the framework reflecting the way the framework tends to favour commercial imperatives of operators. These cannot be managed by Code variations because the scope of what the Code can do is restricted by the Act and Regulations.

There are indications that the capital-based, resident-funded business model supported by the existing framework will need to change in the future. Operator financial assistance is expected to increase, and the numbers of owner-occupiers reaching 65 with mortgages or renting is also increasing, meaning fewer people may have the large capital sum needed to purchase a village license.

Older residents and intending residents have a range of practical challenges understanding the legal framework before and during their occupancy. Contractual rights can be difficult to enforce. Some statutory rights for residents are not supported by agency functions or powers that protect their interests, either as individual consumers or as an older consumer group.

Summary of recommendations

This paper proposes it is timely, effective, and efficient for a policy review of the framework (the Act, two Codes and Regulations), to be undertaken by the Ministry for Housing and Urban Development (MHUD), with support

from the CFFC. That work would review policy on a range of consumer, framework and business model issues highlighted in Parts 6-8 of this paper and propose change.

Resale and buyback times

This paper recommends a policy review considers options to improve the resale and buy-back process. Options include introducing a guaranteed timeframe for buy-backs, interest payable during vacant period, and allocation of any capital gain on sale between the resident (or their estate) and the operator.

Such amendments to clause 53 of the Code would be within the scope of the Code, given the Act says that requirements relating to payments due when an ORA is terminated are among the matters the code must address.

The desire to provide certainty for residents would need to be considered alongside the operators' business model. Consideration could be given to restricting any changes to larger, for-profit operators.

Weekly fees continuing after termination

This paper recommends a policy review considers options to restrict the charging of weekly fees after a resident vacates a unit.

One option is to reduce weekly fees by 50 per cent after three months and to stop them entirely after six months.

Such change would be achieved by amending clause 54(2) of the Code. The change is proposed pending cost-benefit analysis, to determine its impact on different types of retirement villages, particularly small independent and non-profit villages.

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

This paper recommends that a policy review considers how to improve and standardise information about transferring into higher levels of care.

Code compliance

This paper recommends that a policy review includes a review of the Code, including the ORA provisions, with a view to establishing best practise and to balance operator control and residents' rights.

Lack of a simple complaints system or authorised advocate

This paper recommends that a policy review includes a review of the complaints function to streamline and formalise a clear and simple process.

A voice for residents

This paper recommends that a policy review considers whether changes are required to better support retirement village resident welfare.

Emerging consumer issues

This paper recommends that a policy review should analyse future trends, consider if consumer protections are strong enough, and investigate whether different models should be encouraged.

The legal framework

This report recommends that a policy review should include a review of the disclosure statements with a view to producing simplified and accessible documentation. This could include online resources.

The interface of care and residence

It should also explore the extent to which the presence of care changes the nature of a retirement village from a housing proposition to a health proposition and whether the definition of a retirement village needs modifying to include a wider range of lifestyle developments.

Structure of this paper

We have structured this paper into nine parts:

- Part 1 gives an **overview of the framework** supporting a prevailing ORA model.
- Part 2 provides some **context for the industry growth** and how operators derive income.
- Part 3 sets out the **statutory functions** and responsibilities of key review agencies
- Part 4 summarises the **application of the Code** relative to the Act and Regulations for addressing issues and complaints.
- Part 5 briefly examines the **legal status of the Code**, previous variations of the Code, including how they arose, then notes how the Code applies in practice and how it can be varied.
- Part 6 looks at examples of **specific consumer issues with the framework** such as resale, weekly fees, and transfer situations under ORAs, while
- Part 7 looks at **consumer issues with the business model** and its viability.
- Part 8 considers **whether the framework is understandable** by its users. It identifies examples of drafting anomalies, posing challenges for both consumers and agencies, and expectations of older consumers that agencies handle their referrals.
- Part 9 outlines **four options** for action and indicates CFFC's preferred option, a review of the regulatory framework.
- An Appendix describes examples of case studies referred to CFFC from the Retirement Village Residents Association of New Zealand (RVRANZ).

PART 1: LEGISLATIVE FRAMEWORK

This part of the paper outlines the legislative framework within which retirement villages operate. This consists of the Retirement Villages Act 2003, the Retirement Villages (General) Regulations 2006, the Retirement Villages Code of Practice 2008 (the Code), the Code of Residents' Rights (the CoRR), and the requirements regarding registration fees and the dispute panel.¹ It also outlines how the framework works in practice.

1.1 Legislative framework

The Retirement Villages Act 2003

The Act has two main purposes: to protect the interests of residents and intending residents, and to enable retirement villages to develop under a simple legal framework that is easy for residents, intending residents and village operators to understand¹. The Act also sets out further specific purposes as follows:

- to promote understanding of the financial and occupancy interests of residents and intending residents
- to provide a regulatory and monitoring regime for retirement villages that keeps compliance costs to a minimum
- to provide a way to introduce rules and procedures to give effect to this regime
- to oversee the conditions in which operators enter the sector and run retirement villages
- to create a secure environment for residents and protect their rights
- to give the Registrar of Retirement Villages and the RC certain powers and duties.

The Act creates consumer protections by:

- requiring villages to register with the Registrar of Retirement Villages
- appointing statutory supervisors to monitor villages' financial position and the security of residents' financial interests
- imposing restrictions on village land titles
- setting out a disclosure regime to help residents and intending residents understand their rights
- requiring intending residents to get independent legal advice before signing an ORA
- creating a two-tier complaints and disputes resolution process
- giving residents minimum rights via a Code of Residents' rights
- requiring retirement village operators to offer minimum standards through a code of practice

Contained within the Schedules of the Act is the mandatory content for a disclosure statement, ORA, the Code of Practice (the Code) and Code of Residents' Rights (the CoRR), which are collectively known as disclosure documents. Intending residents must be given a copy of all four documents. These are described further below.

Intending residents in New Zealand must get independent legal advice about the general effect and implications of the ORA before signing the ORA.²

¹ Retirement Villages Act 2003 section 3.

² Retirement Villages Act 2003 Section 27(3)-(6). There is no mention of advice on the effect or implications of other disclosure documents or codes, or any need for further legal advice whenever an ORA is proposed to be varied.

Retirement Village (General) Regulations 2006

The general regulations specify which forms operators must give the Registrar of Retirement Villages (the registrar) and when operators must file certifications for those forms and an annual return.

The regulations prescribe details about what provisions must be in ORAs, and matters required by the Act to be in disclosure statements. These are described more under the sections below.

The regulations also prescribe for statements in advertisements, provisions to be included in deeds of supervision between operators and statutory supervisors, and list two extra duties of statutory supervisors.³

Disclosure statement

The disclosure statement is like a prospectus offering investment information about the operator and the village an intending resident is considering⁴.

The information that must be included in the disclosure statement is prescribed in the Act and Regulations⁵. This includes ownership, management and supervision details, information on the state of the village and whether it is complete or not, services, charges and accounts, further details about key terms in ORAs relating to terminations, deductions and estimated financial returns to residents.

A disclosure statement issued may be amended from time to time as circumstances change and filed with the registrar.

Occupation Right Agreements (ORAs)

The definition of ORA in section 5 of the Act is intentionally broad, covering a variety of occupancy agreements from unit title, cross-lease title, and licence to occupy. For licence to occupy agreements there will be one contract. If a title or other ownership is involved there would be a package of documents incorporated with the ORA.

The obligations required to be included in an ORA are set out in Schedule 3 of the Act,

Regulations 6-12 of the Retirement Villages (General) Regulations and in the Code. The Schedule requires ORAs to cover consultation with residents before an operator's interest in the village is disposed of or before appointing a new manager, and a range of other resident rights repeated in the Code of Residents' Rights and the Code. The Regulations provide further detail on operator duties to run the village properly, provide financial statements and call meetings, find new residents for vacated units, and not give preference to finding residents for previously unoccupied units.

The effects of some terms created in ORAs can create financial hardship for some residents or their families.⁶ This is explored further in Part 6.

Code of Practice (the Code)

The Code's topics are largely operational duties but it also provides minimum standards that determine some key terms in ORAs. These reflect the requirements of both Schedules 3(1) (a) and 5 of the Act and include: staffing, safety and personal security of residents, fire protection and emergency management, transfer of residents within a village, meetings of residents with the operator, complaints facility procedure, accounts, maintenance and upgrading, termination of ORAs and communications.

Code of Residents' Rights (CoRR)

The separate Code of Residents' Rights summarises minimum rights conferred on a resident by the Act. It deals with such things as a resident's right to: services promised, information on anything likely to affect the terms of residency, consultation when proposed changes may have a material impact on occupancy or ability to pay, complain and have a speedy process for resolving disputes, involve a support person, be treated with courtesy, not be exploited by the operator or staff, and reminds residents they are required to respect other residents' rights.

The CoRR says residents have the right not to be exploited by the operator, people who work at the village or people who provide services at the village.

³ Section 42 of the Retirement Villages Act 2003 lists the duties of the statutory supervisor, saying a supervisor must perform any other duties imposed by the Act or regulations. Regulation 56 of the Retirement Villages (General) Regulations 2006 says the supervisor must supervise the process followed before an operator terminates an ORA, must accept a request by a receiver, liquidator or statutory manager made under section 24 of the Act to represent the interests of residents in negotiations.

⁴ The definition of advertisement includes a disclosure statement as well as promotional publications –Section 5, Retirement Villages Act 2003

⁵ Schedule 2 of the Retirement Villages act 2003 and further detailed in Regulations 14-38 of the Retirement Villages (General) Regulations 2006.

⁶ See Appendix – case examples provided by the RVRANZ

1.2 The framework in action

The legislative framework affects the business model used by operators of registered retirement villages. It does this in two ways. One is that the definition of a retirement village requires residents pay a capital sum as consideration to an operator for their accommodation, whether paid in lump, instalments, or another way.⁷ The other is that an operator can only offer accommodation in a retirement village using an ORA.

The net effect reflects a licence to occupy is a feasible way to satisfy these two requirements while sustaining both resident funding of the business and operator asset ownership. The licence to occupy model has long been the dominant one in the sector and precedes the Act and Code, which were largely drafted with this model in mind.⁸ The Retirement Villages Association (RVA) says 95 per cent of all occupancy right agreements are licences to occupy, the balance being unit titles (see below).

Almost all residents pay a lump sum for a licence to occupy without receiving any interest in their unit or the land it sits on. The money an incoming resident pays becomes fully available to the operator. It is repayable after the licence ends, once the vacated unit is relicensed, and the incoming resident's cooling off period has expired.

ORAs allow an operator to keep between 20 per cent and 30 per cent of that entry value lump sum originally paid, after termination of the licence (typically when the resident dies), usually without the vacating resident or resident's estate receiving a share of any increased value of the unit. Operators call this deduction a deferred management fee (DMF) or fixed deduction, designed to reflect the benefit the resident received from their use of the facilities in the village during their time there. The fee includes a margin to help cover capital costs of supplying and upgrading the village and facilities for future residents. In contrast, some Australian retirement villages (and potentially some in New Zealand) apply this charge based on the value of the unit

when the resident leaves or dies, which enables residents or their estate to share some potential capital gain⁹.

In most cases the effect of this means residents entering ORAs relinquish rights to an asset that is capable of appreciating in value over time. Any capital gain on the property is made by its owner – the operator.

A disclosure statement must not contain a statement to the effect that entering into an ORA is safe or free from risk.¹⁰ The key risk is residents might be financially locked into a village they later wish to leave when the market values of alternatives may have risen considerably, unless they have sufficient financial means, other than the capital they supplied (minus the DMF) when entering the village.

As mentioned above, the definition of an ORA is broad enough to allow for the possibility of other occupancy arrangements.¹¹

Most of the remaining 5 per cent of ORAs relate to unit titles within a village. However, several important sections of the Unit Titles Act 2010 do not apply to retirement villages, and where the Unit Titles Act 2010 is inconsistent with the Retirement Villages Act 2003, the latter generally prevails.¹² In such situations, the ORA sets out the terms for payments and services, and an operator can restrict how a resident can exercise their right to dispose of their title interest.

Unit title structures have fallen out of favour among operators, as the documentation required is complex, and there is the risk of having residents with different rights in the same village (i.e. those residents with unit titles and those with license to occupy). As a result, operators have been buying back titles from unit-owning residents and offering them to new residents on a license to occupy basis.

In further contrast, of the 30,000 or so units in 410 registered retirement villages around July 2018, only about 600 were occupied on a rental-type basis within 52 of those villages.

Renters are covered by the Residential Tenancies Act, including those few renting in retirement

⁷ All villages meeting the definition of retirement village must register with the Registrar of Retirement Villages and are subject to the Act.

⁸ Lane Neave (Lawyers) booklet, Welcoming in the New Age 14 years on: Retirement Villages Act 2003.

⁹ For example, infratil.com/assets/imported/nzx/Infratil-Retirement-Villages-and-Aged-Care-210598.pdf or www.smh.com.au/money/planning-and-budgeting/retirement-models-getting-shake-up-20180613-p4zlb9.html, which contains a brief description of differences with Australian retirement villages.

¹⁰ Regulation 36 – Retirement Villages (General) Regulations 2006.

¹¹ Section 5 Retirement Villages Act 2003 and regulations 14(2) and 15 Retirement Villages (General) Regulations 2006.

¹² As examples, a body corporate in a registered retirement village cannot adopt rules for that body corporate; the body corporate secretary does not operate the body corporate; and the body corporate cannot levy funds from owners.

villages, but most residents have ORAs. These are specifically excluded from the Residential Tenancies Act.

Other regulatory overlays – financial, health and building

Intending residents invest in their wellbeing by entering ORAs with operators for retirement accommodation and use of village amenities.

Capital-lending investors and shareholders invest in villages through non-occupation-related ways, such as shares or other financial securities, securing either equity investments or debt securities with operators.

This means there is a broader range of financial market regulatory touchpoints in the framework than meets the eye in the lifecycle of a village business – as the table below reflects:

TABLE 1: Regulatory cycle of a village

Stage	Agency contact/s
Village registration, village construction	Registrar of Retirement Villages / MBIE / Land Registrar / MBIE Building Determinations and Assurance / territorial authorities acting as building consent authorities / NZ Fire Service Commission
Supervisor appointment	Statutory supervisors are licensed by the Financial Markets Authority (FMA)
ORA	Registrar of RV / Statutory supervisor
Sales	Licensed agents (Real Estate Agents Authority, Lawyers)
Security offers to investors	Registrar of RV / Statutory supervisors / FMA
Annual reporting	Auditor. Statutory supervisor/ Registrar of RV
Operator compliance	Registrar of RV / Statutory supervisors / CFFC Monitoring
Complaints and disputes	Statutory supervisors / CFFC Panel list upkeep
Village disposal	Statutory supervisors appoint Receivers

A further regulatory overlay occurs when the retirement village business has an aged care business co-located on site. Several health and care-related Acts and Regulations involve the Ministry of Health, District Health Boards, Health and Disability Commissioner, Ministry for Social Development, and Work and Income NZ.¹³

There is a further regulatory overlay that applies to the development and design of a village so it meets minimum requirements of the local territorial plan and the requirements for building consent under the Building Act 2004, Building Code, Fire Safety Act 1975 and associated regulations including the Fire Safety and Evacuation of Building regulations 2006.¹⁴

Villages come in a wide range of built forms in both urban and rural settings. The accommodation may be offered with single level or multi-levelled free-standing town-house-like dwellings, terraced housing, units

and apartments in blocks or towers. The RVA indicates many of its operator members build new villages or renovate older blocks within existing villages to be Lifemark-rated, meaning they meet design standards in the Lifemark Housing Design Standards Handbook.¹⁵ Lifemark Design is a registered charity established by Disability Support Services NZ / CCS Disability Action.¹⁶ Its design standards focus on accommodation design for the current and future needs of an ageing population.

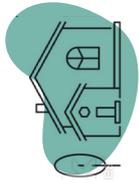
A critical effect of the retirement villages framework is how the Act distributes the roles and functions of key agencies and the statutory supervisor mentioned above. Some agencies have direct regulatory effect on industry behaviour and development while others, such as the CFFC, are constrained from direct effect by their statutory functions. This is explained further in Part 3.

¹³ The aged care sector legislation and regulations include: • Residential Care and Disability Support Services Act 2018 (in force from 26 November 2018, and replacing the Social Security Act 1964) • Health and Disability Services (Safety) Act 2001 • Health and Disability Services Standards (NZS 8134:2008) • Health and Disability Commissioner Act 1994 (and the Code of Health and Disability Services Consumers' Rights) • Age-Related Residential Care Services Agreements: contract between the provider of residential services and the District Health Board • Admission Agreement between the provider and resident.

¹⁴ An operator must maintain a written policy for fire protection and emergency management – Clause 19, Code of practice.

¹⁵ www.lifemark.co.nz/cms/files/Lifemark-Design-Standards-Overview-1.pdf.

¹⁶ www.ccsdisabilityaction.org.nz/



OWN HOME



RESIDENTIAL VILLAGES

Independent or Serviced



CARE SUITE

Could be the same serviced apartment, with increased care provided
Could be a move into a new care suite or unit



CARE FACILITY

Move into a residential care facility (from RV or Care Suite or directly from own home)



Owner

ORA

(Occupational Right Agreement)

Compulsory for residential villages
Required to include a capital payment

Operators business models

97%
LTO

2.5%
Unit title

<1%
Other

RV as owner OR Resident as owner

Home Based Support Services may be provided
 ↓
Independent possible public funding
 ↓
Serviced likely private funding

ORA

(Occupational Right Agreement)

16-17%
in care have an **ORA**

RV as owner
(sometimes through a related entity)

Residential Care Subsidy may be provided
Income and means testing applies

ARC

(Agreement for Residential Care)

83-84%
in care have an **ARC**

RV as owner
(sometimes through a related entity)

PART 2:

RETIREMENT VILLAGE OCCUPATION AND OPERATION

The RVA states that the sector's capacity has doubled since 2008. As at December 2019 its 380 member villages operated 34,200 villas, apartments, and serviced apartments housing approximately 44,500 older New Zealanders¹⁷. Based on existing capacity, the RVA states that the sector needs to turn over between about 4,000 and 5,000 units a year to remain on a financially sustainable footing. The RVA states that in 2019, the sector built 1935 units, a rate of 37 a week.

Across NZ, 13.9% of those aged 75 and over are living in a retirement village, an increase from around 9% seven years ago. This growth suggests the sector is likely to need another 18,000 units by 2028¹⁸.

Operators' income comes from four sources:

Development margin: There will generally be a margin between the cost to develop the unit and amount for which the ORA is sold. This is income to the operator where they are also the developer.

Property revaluations: Since the underlying land and buildings are rarely sold, revaluations of retirement villages are based on current expected cashflow from new residents' capital payments, or occupancy advances. Income from these unrealised revaluations is not treated as taxable income under normal income tax rules.

Interest-free use of capital payments and deferred management fees: These advances are, in effect, interest-free loans to the operator and act as a wealth transfer that increases the longer the "loan" is retained. When payments are returned to the resident or resident's estate, the operator subtracts a deferred management fee (sometimes called a fixed deduction) – a further source of revenue.

Services to residents: Residents make ongoing payments, usually monthly, for the services they enjoy while living in the retirement village. These payments help fund village operating expenses such as power, the village van, garden maintenance and so on. Some operators fix the outgoings charge payable over the occupancy of a resident, meaning an operator generally subsidises the resident from increased operating costs of the village over time.

Most operators assume two things: That property values will keep appreciating, and that they will sign as many ORAs as are terminated (once the village is constructed and ongoing). Operators depend on these two trends continuing as many would make a loss without revaluing their property holdings. The implications of this are discussed further in Part 7 of this paper.

¹⁷ Retirement Villages Association Annual Report 2020.

¹⁸ Jones Lang Lasalle – NZ retirement villages and aged care Whitepaper, p23 – June 2020

PART 3:

REGULATION - ROLES AND RESPONSIBILITIES

The RVA and many operators refer to the CFFC as the industry’s “regulatory watchdog,” although this is not exact. Various agencies have complementary roles, and none has a lead role.¹⁹

Some stakeholders, particularly operators and residents’ associations, consider the regulatory framework amounts to self-regulation because the Act says one of its purposes is to establish an “industry-focused” regulatory and monitoring regime that “minimises” compliance costs.²⁰ Residents’ associations say this sometimes exposes vulnerable residents to exploitation through harsh treatment or unfair terms.

Minister of Housing and Urban Development

The Minister responsible for the administration of the retirement village legislative regime is the Associate Minister of Housing - Public Housing portfolio (the Minister).

Ministry of Housing and Urban Development

The Ministry of Housing and Urban Development (MHUD) is responsible for administering all but one section the Retirement Villages Act 2003, and its regulations.²¹ This responsibility includes recommending amendments to the Minister if it considers them necessary. The CFFC helps MHUD identify any problems with the way the legislation is working.

Ministry of Business Innovation and Employment

The Ministry of Business Innovation and Employment (MBIE) provides administrative support for the Minister of Commerce and Consumer Affairs and the Minister of Building and Construction. MBIE administers a provision of the Retirement Villages Act relating to the appointment of the registrar. MBIE is also administrative steward and central regulator for the building system and housing and regulatory system.

Minister of Commerce and Consumer Affairs

The Minister of Commerce and Consumer Affairs is responsible for corporate law and governance, financial markets, competition

policy, consumer policy, protecting intellectual property, and trade policy and international regulatory cooperation.

Minister for Building and Construction

The Minister for Building and Construction is responsible for regulation of the building and construction sector and setting performance requirements for buildings and building products.

Registrar of Retirement Villages

The registrar (a role based at MBIE) keeps a public electronic register of retirement villages and considers operator applications for exemptions from statutory supervision and from provisions of the Code. Of New Zealand’s 455 registered villages as at April 2020, 29 were exempt from statutory supervision.

The registrar has broad power to suspend the registration of any village if its registered documents are misleading or if the operator is not complying with the Act or regulations. Suspension prohibits an operator from signing any further ORAs until corrective action has been taken.²² In 2019, it suspended one village’s registration for failure to deliver its annual return on time. The suspension was lifted upon delivery of the return.

The registrar can seek court orders and remedies for contravention of parts of the Act, as can statutory supervisors (see below).²³

¹⁹ In a memo dated 20 August 2012, Retirement Commissioner Diana Crossan said to Adam Hunt of the Financial Markets Authority: “When the Act was passed, I think it was expected that the sector would be largely self-regulating ... My concern is not that there are different agencies involved in regulation, but rather that there needs to be leadership in the sector and the leadership is driven by one resourced agency ... While some issues might be addressed by the long-promised review of the Act, others could be resolved if one agency had an overseeing active leadership role within government for the retirement village sector.”

²⁰ Section 3(c)(iii) Retirement Villages Act 2003

²¹ Section 87(1) Retirement Villages Act 2003.

²² Section 18 Retirement Villages Act 2003.

²³ Sections 80-82 Retirement Villages Act 2003.

Retirement Commissioner

The RC has statutory functions to:

- monitor the effects of this Act, regulations and code of practice and ensure the legislative framework is effective
- inform the Minister about matters relating to retirement villages
- promote education about retirement village issues
- collect and publish information about sector issues
- perform any other function conferred by the Act or regulations.²⁴

The RC can propose variations to the Code and make recommendations to the Minister of Housing and Urban Development. Section 90(4) of the Act says the Minister can amend the code after considering the recommendations of the RC and any groups or bodies representing the interests of retirement village operators, residents or intending residents, statutory supervisors, or any other individuals.

The CFFC maintains a disputes panel list that forms part of a dispute resolution scheme for retirement villages (see below) and publishes regular monitoring reports on aspects of retirement village operations, all available on its website. It also provides information and education to residents, intending residents and their families, operators, lawyers, and other interested public.

Statutory supervisors

Statutory supervisors act as an external safeguard for residents. Their role is primarily one of administration rather than advocacy. There are four well-resourced supervisory firms and all are members of the Trustee Corporations Association of New Zealand.²⁵ As well as statutory supervisors, the four firms have relationship managers who deal directly with the villages, and support staff. In 2018, there were nine relationship managers, and the supervisors had overall responsibility for front-line supervision of 376 villages. All firms use a

standard deed of supervision form that says supervisors must represent the interests of residents in negotiations with any receiver, liquidator, or statutory manager. Supervisors represent the interests of residents in a village collectively rather than individually.

Supervisors must do everything in their statutory powers to consult with the operator, direct the operator to supply information to residents, direct the operator to operate the village in a specified manner or apply to a Court for a range of orders if they believe the financial position or management of a village is inadequate or the security interests of residents are inadequate.²⁶

A deed of supervision between the retirement village operator and the statutory supervisor sets out the supervisor's terms of appointment. The deed ensures supervisors are actively involved managing any risks to residents' interests, such as proposed new security interests, the disposal of the village or changes in the effective control of the village.

Every retirement village operator must appoint a licensed statutory supervisor unless granted an exemption²⁷. Supervisors are a type of corporate trustee for residents in a village.

Their responsibilities include:

- monitoring the financial position of the village
- checking that residents' security interests are protected, and that the operator is managing the village adequately
- putting right anything that may materially prejudice residents' interests
- acting as an intermediary for deposits and progress payments by residents to village operators
- reporting annually to the registrar and residents on their performance
- dealing with complaints that cannot be resolved by the operator
- carrying out any other functions specified in the Act or deed of supervision.

²⁴ See sections 36(a) to (e) of the Retirement Villages Act 2003.

²⁵ Covenant Trustees is the largest firm and supervises around 73% of all villages who are not exempt from supervision. The other three firms are Anchorage Trustee services, Trustees Executors and the Public Trust.

²⁶ A range of orders is listed in 43A (2) (a) - (j) Retirement Villages Act 2003

²⁷ Statutory supervisors are licensed by the Financial Markets Authority (FMA) for terms of up to five years. Licenses may be renewed. The FMA requires six-monthly reports about their activity and potential breaches by the villages they supervise. Complaints can be made to the FMA if concerned about a supervisor's performance or behaviour. The CFFC produced monitoring reports in 2009 and during 2017-18 that rated statutory supervision highly effective.

If the financial position of the village, the security of residents or the management of the village is inadequate, a statutory supervisor can direct the operator to give residents information about its financial position, security interests or management of the village.

A supervisor can also direct the operator to run the village in a specified way and could apply to the courts to address any concerns or minimise risks to residents.

Supervisors allow some contingency time for handling enquiries from individual residents when setting their annual supervision charges to operators. The Retirement Village (General) Regulations 2006 set out situations where supervisors are required to actively consent to an operator's proposed course of action.²⁸ As a result, supervisors are more involved with the retirement village than may have been the case under the former Securities Act, bringing consequential costs and benefits to both operator and the residents.

Supervisors must notify the registrar of certain concerns. These include where they believe a

retirement village operator is unable to, or is likely to be unable to, pay its debts or has liabilities greater than its asset value. It also includes breaches, or potential breaches, of the Deed of Supervision. In 2019 the registrar received 11 such notifications about 14 operators. Some were about technical insolvency (addressed by converting shareholder debt to equity) or a failure to prepare financial statements or hold an annual general meeting within timeframes required by the Act.²⁹

The relatively small number of notifications may reflect not only the effectiveness of the supervisors' regulatory functions but the indirect regulatory effect of accepting the appointment. Supervisors say they examine an operator's finances and governance arrangements thoroughly before accepting any appointment to supervise a village, which helps keep out unscrupulous or under-prepared operators. Supervisors' relationships with operators range from regular formal meetings to occasional transactional interactions.

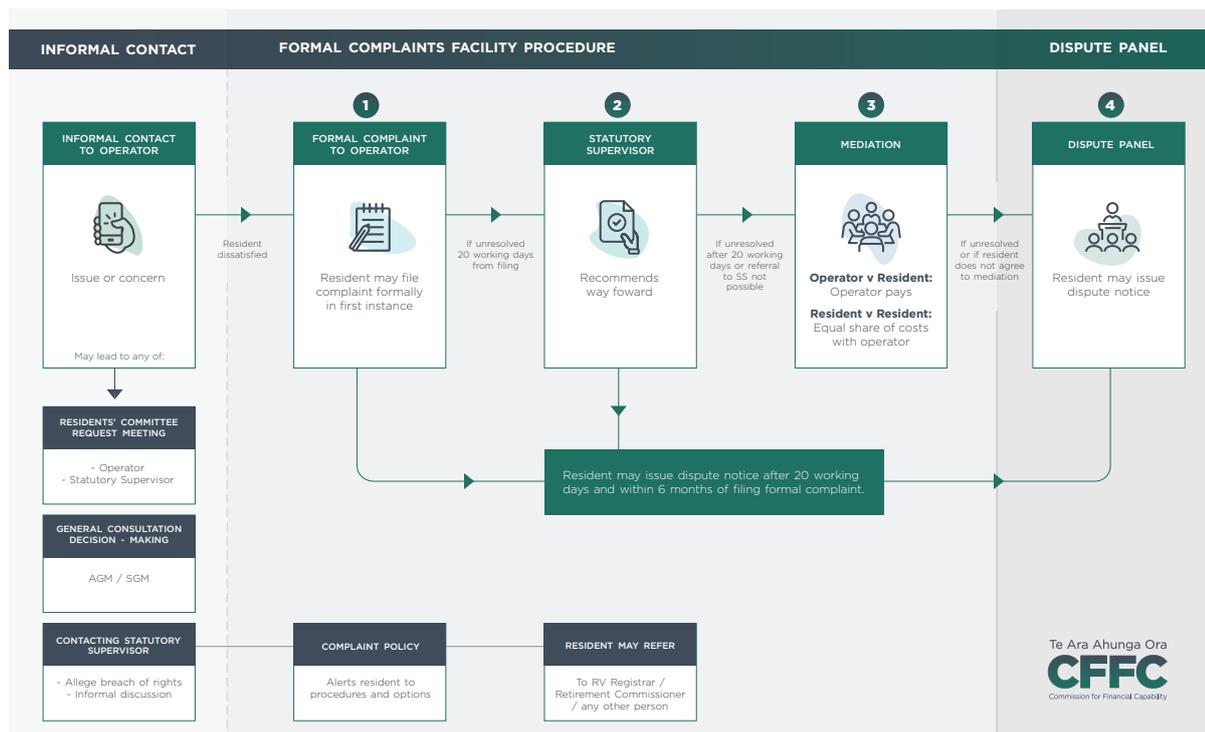
²⁸ Regulations 50-51, Retirement Villages (General) Regulations 2006

²⁹ Advice from Ministry of Business, Innovation and Employment to Commission for Financial Capability, 26 May 2020.

PART 4: COMPLAINTS AND DISPUTES

In every retirement village there are two types of dispute procedure other than informal contact: a complaints facility and dispute resolution. The Code and the CoRR both emphasise efficient and speedy resolution of complaints.³⁰

An operator's complaints-handling facility must meet minimum policy and procedure requirements set out in the code of practice. The Code includes the following diagram to help residents understand the range of options to resolve complaints:



The operator must respond and take steps to try and resolve the complaint to the resident's satisfaction within 20 working days. If it is not resolved the matter is referred to the statutory supervisor. If the resident is still dissatisfied the operator must then offer mediation.

The resident keeps the right to give a dispute notice to the operator relating to the complaint at any time after the first 20 working day period and within 6 months from first filing the complaint.³¹

An alleged breach of the CoRR is treated slightly differently. Residents can refer an alleged breach of the CoRR to the retirement village operator, the village's statutory

supervisor, the registrar, the RC and/or a disputes panel (as set out in Part 4 of the Act: see below) or any other person.³²

One difficulty with this approach is the lack of a clear pathway, given some of these agencies will have no power to act, and the recipient party is not provided with guidance (either in the Act or Regulations) as to what they should do with the referral. These matters are discussed further in Part 8.

This approach contrasts with the process for claiming other breaches, which excludes notification to other parties (section 33(2) of the Act), and a person is not precluded

³⁰ Code of practice at clause 32, Code of resident rights at clause 4

³¹ Dispute notices relating to an operator breach of an ORA or the code of practice in disposing of a unit formerly occupied by the resident may be given without previously filing a complaint, but cannot be given until 9 months after the unit became available for disposal - sections 53(3) and 57(3) Retirement Villages Act 2003

³² Section 33(2) Retirement Villages Act 2003.

from using the formal complaint process above to allege a breach of the CoRR.

The registrar has a general power to apply to a Court and injunct someone appearing to contravene anything in sections 25-33 of the Act.³³

Operator complaint data

Residents can – and do – take diverse complaints to operators. Since variations to the Code took effect in April 2017³⁴, by April 2020, a total of 2,655 complaints had been reported, around 440 every six months. Of 695 complaints recently sampled and analysed by the CFFC, 50% were considered minor, 31% minor with an impact, 13% were of medium severity, 6% were serious and 0.2% considered very severe.³⁵

On average since April 2017, 73% of registered villages have had no complaints in any reporting period. Of those that do have complaints, between 70 – 75% are usually resolved by operators within 20 working days, and on average 82% of all complaints are resolved within each 6-monthly reporting period. Some complaints stay under investigation or part resolved.

Some resident concerns are not resolved through dialogue with the operator. In complaint reporting for the period October 2019 – April 2020, of 183 complaints reported, 25 required statutory supervisor involvement, 6 had mediator involvement and 41 had some other form of third-party involvement. Few residents pursue their options through to the dispute panel (see below).

Statutory supervisor involvement is limited

Residents can refer complaints about breaches of the CoRR to the statutory supervisor, and they can also inform or otherwise involve the supervisor in a formal complaint that could become the subject of a dispute notice.³⁶

A supervisor's role is like a mediator: not representing residents but instead to work with both sides "to provide them with an impartial perspective and to recommend a way forward".³⁷

Retirement Commissioner functions are restricted

The RC's functions and powers under the Act are not as extensive as those available under legislation empowering equivalent commissioners or ombudsmen, such as the Children's Commissioner, Health and Disability Commissioner, Privacy Commissioner, or the Banking Ombudsman. The Banking Ombudsman has power to investigate disputes between customers and banks or non-bank financial service providers.³⁸

The CFFC must monitor the effects of the framework, gather, and provide information about the sector, educate the public, and inform the Minister of trends or problems. To assist in this regard, it has the power to require information from operators, which must be supplied within 20 working days.

The CFFC is not a complaints authority. However, residents and their families approach the CFFC seeking redress or referring alleged breaches, not only of the CoRR but of contractual documents and the Code.³⁹

This can be contrasted to other industries, such as broadcasting, where the Broadcasting Standards Authority (BSA) supports and enhances the maintenance of standards by providing a free, independent complaints service and approving industry codes. This is funded partly by government and partly by industry levies. Legal representation is unnecessary. The BSA has authority to review complaints dealt with by broadcasters, which complainants believe have not been properly considered, and then to make decisions.⁴⁰

33 Section 80 Retirement Villages Act 2003

34 The variations included a new requirement on operators to report number, nature, and outcome of formal complaints in each village to the retirement commissioner every 6 months: see Clause 32(3) Code of practice.

35 An aggregated data analysis of complaints from all previous reporting periods was included in the October 2019 – April 2020 Complaint Reporting Summary Report cffc.govt.nz/retirement-villages/monitoring-and-reports/. Minor is defined as usually one-off and not negatively impacting resident well-being, minor with impact also usually one-off not seriously affecting resident health or well-being but impacting on enjoyment of living in the village, medium severity did impact on resident's health, stress or finance, serious or very serious had severe impact on health or well-being and some cases where misinformation or uninformed conditions of ORAs were significant.

36 Section 55(3) Retirement Villages Act 2003

37 Code of practice clause 35(4).

38 bankomb.org.nz/the-complaint-process/complaints-we-can-consider/

39 Section 33(2) Retirement Villages Act 2003 gives residents the right to refer alleged breaches of the Code of residents' rights to the RC and other parties.

40 www.bsa.govt.nz/complaints/

Registrar of Retirement Villages has some investigative power

The registrar has limited investigative and enforcement power. It has the power to suspend registration of a village if an operator is not complying with the Act or Regulations or if any registered document is misleading or deceptive. It has a general power to inspect and take possession of documents for the purpose of ascertaining operator compliance and detecting offences.⁴¹

The registrar may also:

- request information from auditors of a retirement village⁴²
- apply to a Court to injunct someone from contravening sections 25-33 in the Act or to order disclosure of information,⁴³ or
- seek a range of other Court orders in situations where a person may suffer loss or damage due to another person contravening sections 25-33 in the Act.⁴⁴

Disputes panel rarely used

Operators and residents can use a disputes panel to try to resolve a dispute. This is done by issuing a dispute notice. Few unresolved complaints advance to the dispute panel stage.⁴⁵

The dispute panel process can be expensive for both sides despite the operator meeting the appointment costs of the dispute panel member. Cases to date have all been heard by a panel member sitting alone.⁴⁶ The RC maintains a list of suitable panel members. The parties must consult to select a panel member, then the operator engages the member formally. The cost of the panel member's time is, at least through to a final decision stage, met by the operator not the resident. Few formal complaints progress to the dispute panel.

Despite this, the dispute panel process has gained a reputation for wearying residents. One reason is the dispute panel may award

costs against an unsuccessful applicant and has done so.⁴⁷ Another is the process can become adversarial and can be intimidating for some older people. Unlike Tenancy Tribunal procedure, legal representation before the dispute panel is not prohibited. In most cases, operators involved at this level engage counsel and incur more legal costs, raising resident fears of cost awards for earnest yet unsuccessful claims.

Panel members have broad power to conduct pre-hearing and hearing process as they see fit. The panel works like a Tribunal, usually making pre-hearing orders to refine issues, conducting formal hearings, and providing detailed written decisions based in law rather than pragmatic solutions. Dispute panel decisions may also be appealed and on appeal the Court must conduct a re-hearing of the dispute in full.

2017 Review of complaints and disputes processes

The CFFC reviewed the complaints and disputes processes in 2015-16 and resulting amendments to the Code took effect in April 2017. The main changes were the introduction of a three-stepped complaint resolution procedure, in which any complaints that are unresolved after 20 working days go from an operator to the statutory supervisor, to guide a way forward. If a resident is still dissatisfied with the supervisor's suggestions a new duty was installed on operators to offer mediation. Residents retain the right to issue a dispute notice after the initial 20 working days rather than go through the stepped process.

While the focus on dispute prevention and codifying a duty to offer mediation was widely supported by residents and operators, the RVRANZ says complaint and dispute processes remain unsatisfactory. It argues the process is "onerous, lengthy, stressful and unsuitable for retired people who are seeking a life of peace and harmony yet [are] keen to have their rights

41 Sections 18 and 97 Retirement Villages Act

42 Section 47 Retirement Villages Act 2003

43 Sections 80-81 Retirement Villages Act 2003

44 Section 82 Retirement Villages Act 2003

45 24 Dispute Panel decisions have been reported since 2007. In that time several dispute notices have been filed then discontinued without a hearing or decision. So far in 2020, excluding a notice leading to one reported dispute panel hearing, 2 other notices have been filed then withdrawn later after settlement.

46 If a dispute involves an operator breach of an ORA of code of practice in disposing of a unit, then the operator must appoint three members to the panel: section 60(4) Retirement Villages Act 2003. Otherwise, 1 or more panel members must be appointed.

47 See *Hughes v Belmont Lifestyle Village* - February 2017 where the panel assessed the criteria for awarding costs under section 74 Retirement Villages Act then awarded 60% of the operator respondent's costs to be paid by the resident cffc.govt.nz/retirement-villages/complaints-and-disputes/disputes-panel-decisions/

respected. It says many residents are ailing, suffer a loss of confidence, and are keen to please. They are not fit to engage in a lengthy and unnecessary battle".⁴⁸ RVRANZ reiterates clause 32(1) of the Code, saying the complaint process should resolve complaints in a way that is quick, fair, objective, appropriate to residents and cost-effective for operators and residents.

The RVRANZ suggests the Tenancy Tribunal would be a more age-appropriate and cost-effective forum for dealing with unresolved retirement village complaints than the dispute panel. There are a couple of factors to be considered here. Firstly, in a retirement village the needs of the community as a whole need to be considered, not just an individual resident. Secondly, some complaints do not relate to legal or contractual issues that could be resolved at the Tenancy Tribunal, but are instead the result of personal disagreements,

differences of opinion, or perceived unfairness or unfair treatment (and could be between residents, or between one or more residents and village staff). The Tenancy Tribunal is unlikely to provide a solution to all complaints.

Some residents say they want to be able to refer complaints they are dissatisfied with to an ombudsman-like agency to investigate and make decisions at an earlier stage. There are examples in other systems that may be useful here, such as the appointment of an advocate for the complainant, as occurs when complaints are made to the Health and Disability Commissioner.

Overall there are several areas of potential improvement within the complaints process, and the ideal option would be one that is less stressful for residents than the current arrangements, while being effective and accepted by all parties.

⁴⁸ RVRANZ Memorandum dated 24 April 2020.

PART 5:

THE CODE OF PRACTICE

5.1 Legal significance of the Code

The Code must be complied with by every operator, is enforceable as a contract by a resident, prevails over any less favourable provision in an ORA, must be given effect to by such agreements, and must be made available to every intending resident and resident.

In the event of a suspected breach of the Code, a resident (or their family) would file a complaint, which may be followed with a dispute notice if not satisfactorily resolved.

Section 92(1) of the Act passes responsibility for implementing many of the Act's provisions to the Code.⁴⁹ The Code is subordinate to the Act and regulations and is changed by the Minister via a Gazette notice.

The settings of the Code directly impact on several consumer issues discussed further below.

Clause 6 of the Code repeats the legal status of the Code described in the Act and adds that the effects of the code are monitored by the RC. Operators may apply to the registrar to be exempted from complying with any provisions of the Code for up to two years.⁵⁰

Schedule 5 of the Act says the Code must specify minimum standards or levels of service in 10 broad areas and these are to be included in ORAs. The areas are:

- staffing
- safety and personal security
- fire protection and emergency management
- the transfer of residents within a village
- operator-resident meetings and residents' involvement in decision-making
- a complaints process

- accounts
- maintenance and upgrading work
- termination of an ORA
- communication with residents.

5.2 How the Code can be varied

Section 89(1) of the Act ensured the first Code prepared and published under the Act was submitted by a village, group, or association of villages for Minister approval, reflecting strong intent for industry-led regulation.⁵¹

Under section 90(4) of the Act, the Minister may approve a variation to the Code after considering the recommendations of the RC as well as the views of those in the retirement village sector or other persons. MHUD must be confident it has enough information to advise the Minister that a proposed change is lawful, is feasible for all villages, involves workable costs for operators and residents, and will result in the best possible level of protection for residents.

Just two changes have been made since its first approval in 2006. One was in 2013 in response to Christchurch earthquakes that left residents in three villages unable to reoccupy their homes. Capital repayment provisions were added to the Code to deal with no-fault insurance cases.

The other change, in 2017, involved amendments to the complaints process. Those amendments took effect in April 2017 in response to a monitoring report published by CFFC in July 2015.

The Act does not provide for a regular Code review. This can mean that non-urgent but desirable change can be time-consuming to secure.

⁴⁹ Section 92(3) says nothing in the Code applies to any health services or disability services or facilities to which the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies.

⁵⁰ Section 93 Retirement Villages Act 2003

⁵¹ Under section 89(2) of the Act, the Minister needed only to consider the RC's recommendations. The RC first had to consider recommendations from anyone in its opinion representing the interests of operators, residents, statutory supervisors, or other persons.

PART 6:

CONSUMER ISSUES IDENTIFIED WITH THE FRAMEWORK

Resale and buyback times

The RVRANZ says operators sometimes exploit residents over the resale and buyback of units when ORAs end (see Appendix).

Many of the cases cited by RVRANZ point to either:

- a lack of incentive for operators to move quickly to resell, given interest-free use of outgoing residents' capital and the ability to continue charging weekly fees
- a tendency by operators to give priority to the sale of other village units, whether new or refurbished, that offer better returns
- inefficiency on the part of some operators, indicated by poor consultation, limited marketing, and poor management of builders during refurbishment of units

There could be a possibility of action under the Fair Trading Act 1986 or the Consumer Guarantees Act 1993 but we are unaware of such challenges to date.

Clause 53 of the Code requires operators to buy back a unit upon termination of a resident's ORA "at any time before entering a new ORA with a new resident". In most cases, the length of time before a new agreement is signed is less than a year, although in some cases it can be 18 months or more.

Regarding repayment of money on termination and other financial terms, a recent Family Law Journal review article noted how strongly commercial imperatives of operators underpin ORAs, saying:

"The operator has no obligation to pay this sum until the unit is resold and a new resident has signed a new occupation right for that agreement. While there are exceptions to this obligation, it does not diminish from the conclusion that the term favours the financial objectives of the operator. Other financial terms in ORAs which tend to favour the operator include the end date for paying the fixed outgoings charge to the operator on termination of an ORA, the end date for the accrual of a fixed deduction on termination where the stated period for accrual has not been reached prior to termination, and the terms relating to refurbishment and transfer."⁵²

By contrast, a resident enjoys more favourable financial terms under an ORA which does not follow the licence to occupy model, such as a unit title ORA. While residents with those ORAs still pay a fixed deduction charge on termination,

they have rights to market and sell their own units, and to receive a share in any capital gain on resale, as well as to enjoy the rights associated with ownership during their term.

⁵² Jones, Sara (2017). The financial implications of living in a retirement village: a comparative review of the financial terms of the ORA, New Zealand Family Law Journal, March 2017.

The Code's minimum requirements for termination directly influence how operators schedule repayments to vacating residents, handle outgoing charges, charge or not for refurbishment, and allocate liability for charges and costs when residents transfer from an independent unit to one with a higher level of care.

There are a number of potential responses to the current situation.

The first is a guaranteed buy back, so that a time is specified within which the operator must buy back a unit, and repay the capital (less the DMF). This already occurs in some cases in New Zealand and has recently been introduced in most Australian States.

Alternatively, interest could be payable to the resident by the operator, for the duration that the unit remains empty. Or the capital gain that

is ultimately realised on sale of the unit could be allocated between both operator and resident.

These options may present a number of considerations for the operators. Liquidity issues could arise where funds are scarce. Smaller or non-profit villages may not have access to funds to buy-back if the unit remains unsold. In poor economic times, the property market may be slower, and units may take longer to sell.

Some of these could also impact residents, whether through reduced experiences in their village, or price adjustments to ORAs or weekly service fees. In extreme cases, residents may not get their exit repayment if operators have insufficient capital on hand to make the exit repayment.⁵³

This paper recommends a policy review considers options to improve the resale and buy-back process. Options include introducing a guaranteed timeframe for buy-backs, interest payable during vacant period, and allocation of any capital gain on sale between the resident (or their estate) and the operator.

Such amendments to clause 53 of the Code would be within the scope of the Code, given the Act says that requirements relating to payments due when an ORA is terminated are among the matters the code must address.⁵⁴

The desire to provide certainty for residents would need to be considered alongside the operators' business model. Consideration could be given to restricting any changes to larger, for-profit operators.

⁵³ Law Commission Report 57: Retirement Villages (September 1999) para 15 - describes prudential risk a resident has when signing an ORA as the risk that through under-capitalisation at construction stage or poor administration thereafter, either the operator will be unable to perform promises to provide the dwelling-place, amenities, or the services, or the resident will be unable to recover the lump sum.

⁵⁴ Clause 9 of Schedule 5 of the Retirement Villages Act 2003.

Weekly fees continuing after termination

From a desk top analysis of amended ORAs in 30 different villages, 66% of operators stop charging weekly fees when a resident vacates a unit.⁵⁵ The others keep charging weekly fees afterwards, with variable cessation dates, such as the earlier of six months after termination or upon the exit repayment being made to the outgoing resident. The Code requires those operators continuing to charge outgoings after termination to halve the charge if the unit still is unoccupied after six months, although there is no limit on how this half-charge can apply, usually it is until the unit is reoccupied.

Both approaches – immediate cessation of weekly fees and cessation only upon reoccupation – satisfy the Code because the Act says the Code must address “requirements for payments due” and how those payments are calculated when an ORA ends. This includes: the period for which charges will continue to be imposed after termination, the

relationship between those charges and ongoing costs, the operators responsibilities in relation to the sale or disposal of the vacated unit, and the rights of the former resident or its estate in relation to the sale or disposal of the vacated unit.⁵⁶

Some operators say enabling outgoings to continue to be charged until a vacated unit is relicensed is essential to the sustainability of their business. It ensures they have the necessary cash flow to keep running and sustained operations provides well-being for other residents in the village.

Residents and resident advocates argue the opposite – that this approach is unfair and exploitative.⁵⁷ Residents say the resale process is controlled by the operator and can be quite protracted. Residents who have terminated their licence to occupy type of agreement and vacated the unit gain no benefit from the unit yet must continue to meet its running costs.

This paper recommends a policy review considers options to restrict the charging of weekly fees after a resident vacates a unit.

One option is to reduce weekly fees by 50 per cent after three months and to stop them entirely after six months.

Such change would be achieved by amending clause 54(2) of the Code. The change is proposed pending cost-benefit analysis, to determine its impact on different types of retirement villages, particularly small independent and non-profit villages.

⁵⁵ August 2020 - CFFC searched the most recently amended ORAs filed with the Retirement Villages Registry from a random mix of 30 villages operated by corporate, independent and not-for-profit operators in both urban and rural areas (for example: Ryman Edmund Hillary, The Russley, Whitby Lakes, Brooklands, Ngunguru Trust, Selwyn Heights, Coonbrae Enliven, Pinesong, Alandale, Summerset and more.) Independently operated villages were more likely to have ORAs with terms continuing outgoings after vacancy till a unit had been relicensed.

⁵⁶ Schedule 5, Clause 9 of the Retirement Villages Act 2003

⁵⁷ See Appendix – case examples provided by the RVRANZ

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

This issue involves both consumer policy and legal understanding of the framework and may be considered in terms of residence and care.

Matters arising from residence in an independent unit within a retirement village are dealt with through the legislative framework discussed throughout this White Paper. Residents have an ORA and protection under the CoRR.

Care facilities are different. They are part of the health system so the Code of Health and Disability Services Consumers' Rights applies to patients. Care is provided through a contract that providers have with the local District Health Board. There is also a link to the welfare system as the government may provide funding through the residential care subsidy.

Another difference is that some patients in care facilities will not have an ORA. It is possible to access residential care within a RV under a periodic, non-occupation right instrument, such as an aged residential care agreement. In this case, any complaints would be dealt with through the health system, rather than the RV system.

Some residents will enter a retirement village to live in an independent unit but later move into a care facility. When this occurs, all operators require them to end their existing ORA and sign a new one, or a variation of an existing one. The transfer triggers a need for the operator to refurbish the vacated independent unit and work proactively to grant a new licence for it to a new resident.

Clauses 24 and 25 of the Code set out terms of transfer information that operators must include in ORAs for residents moving from an independent unit to a higher level of care.

These provisions appear to be drafted to cover shorter-term respite care, in the village, rather than full time residential care in a care facility.⁵⁸

The difference between an independent unit and a higher level of care is not easily understood when care facilities are co-located within RV sites. Some residents or their families only understand the full impacts of some transfer terms when their individual circumstances change, often after they have been in a village for a few years or are older and at their most vulnerable. For a resident who has been in a licensed independent unit for a long time, there is a risk they will have insufficient capital to transfer into a serviced apartment that has become more expensive over time.

A transferring resident will at least have the value of what they paid when first entering the independent unit, less the fixed deduction from that amount payable on termination, but they may not have access to any other financial resources.

Some residents lobbying for policy review of the framework say the effects of some financial terms upon them can be unfair and is a form of exploitation and therefore a breach of the CoRR.⁵⁹

The hardship of a resident contrasts with the operator, who receives the capital gain due to it from the transferring resident, has access to the vacated unit while in some cases still charging outgoing charges, and refurbishes the property and relicenses it for an increased price.

How a resident can afford to transfer into a new ORA for a higher level of care in these situations therefore depends on the terms in the ORA (the minimum requirements for which are determined by the Code) and the operator's financial assistance policies.

58 This information must include the circumstances in which the transfer is instigated and by whom, whether residents have priority to the higher level of care over non-village residents who may apply for the same care services or facilities, and whether the transfer depends on a unit being available and the resident being need assessed. It must also state that residents have a right to information on available options, have an independent needs assessment and to be consulted along with their family or representative. The ORA must also set out financial arrangements such as charges to the resident resulting from the transfer and other costs incurred by the transfer and who is responsible for them. If the village has a co-located care facility, Regulation 31 Retirement Village (General) Regulations 2006 requires a disclosure statement to set out if the ORA allows the resident to leave the unit to receive care and the terms on which that is allowed.

59 See Appendix – case examples provided by the RVRANZ

The CFFC's 2019-2020 monitoring report looked at financial assistance provided by operators to residents and found that loans were most commonly given to cover transfers between independent units and serviced apartments or between units in the village to care suites in dedicated co-located care facilities.⁶⁰ Sometimes interest is not charged, in which case many operators refer to the financial assistance as a deferral, because the total amount due is paid as part of the exit repayment after termination. A separate survey by PWC found that 41% of financial assistance is in the form of loans or deferrals drawing down against the remaining capital of the resident.⁶¹

Some operators will not charge a fixed deduction at the time of transfer, but instead take a single fixed deduction at the very end of the resident's time in the village, for the different units the resident has occupied. The

total fixed deduction does not generally exceed a 20% or 30% apportion of the overall amount paid for (all the) units in which the resident has lived.

Other operators have a policy that the new ORA triggers different care arrangements, which come with their own overheads, so there may be a second and separate fixed deduction.

Almost all operators surveyed by the CFFC in its 2019-2020 monitoring report offered residents financial assistance, and the RVA acknowledged the demand for operator financial assistance would continue to grow.

There is no standard operator practice for transfers from independent units to care facilities. Nor is there any clear or comprehensive information about transfers to higher levels of care, the costs involved or the regulatory protections in place.

This paper recommends that a policy review considers how to improve and standardise information about transferring into higher levels of care.

This may include whether a separate regulatory framework for higher care settings and single fixed deductions is desirable. Changes to clauses 8 and 24 of the Code may be required.

⁶⁰ Financial services provided by operators – published June 2020: cfc.govt.nz/retirement-villages/monitoring-and-reports/monitoring-reports/

⁶¹ CFFC Monitoring Report 2020: Appendix refers to a survey by PWC suggesting 41% of villages provide loans or financial assistance to residents but does not clearly distinguish deferrals from loans.

Code compliance

A recent Family Law Journal article found that some operators' ORAs were not fully compliant with the Code.⁶² The non-complying terms included refurbishment of a unit on termination and the transfer from a unit in a village to a unit giving a higher level of care or care facility.⁶³ Even though operators may apply to the registrar to be exempt from complying with some Code provisions, no operator has yet sought an exemption from any provision of the code of practice.⁶⁴

The CFFC's 2009-10 monitoring report found a high level of operator compliance with the overall regulatory framework (although this has not been revisited formally since). The RVA conducts regular three-yearly audits of members' compliance with the overall framework and membership rules as a prerequisite for continued membership. All member operators must have a 100% achieved rate to get accreditation for membership.⁶⁵

The issues raised here are not exhaustive. The same Family Law Journal article suggested the Code should be amended so ORAs contained better protection of residents' financial interests, particularly:

- to prevent the continued charging of weekly fees after vacating a retirement village which is weighted in favour of the operator and have a fairer approach ending this fee on the termination of the ORA
- to regulate the deduction of refurbishment costs from exit payments
- to standardise the current approach of a few operators, so that a fixed deduction would not be payable where a resident terminates an agreement because of a breach by an operator
- to strengthen information requirements in ORAs about changes in charges and costs involved when residents transfer from an independent unit to a serviced unit or care facilities.

This paper recommends that a policy review includes a review of the Code, including the ORA provisions, with a view to establishing best practise and to balance operator control and residents' rights.

62 Jones, Sara (2017). The financial implications of living in a retirement village: a comparative review of the financial terms of the ORA, New Zealand Family Law Journal, March 2017.

63 A report by Consumer NZ on the application of the Fair Trading Act 1986 to alleged unfair terms in ORAs is expected late 2020.

64 Confirmed by the Registrar of Retirement Villages to the CFFC - email 25 May 2020

65 The Retirement Villages Association advises the auditing agency is very clear on what had to be improved before the accreditation is confirmed, and some operators require a few visits from the auditing agency to reach the 100% achievement mark.

Lack of a simple complaints system or authorised advocate

The four-tier system (formal complaint to operator / statutory supervisor / mediation / disputes panel) is complicated and expensive for residents and their families. The gap between an informal and formal complaint can be wide, legal representation is common, and there is no formalised overarching industry involvement. The CFFC receives complaints but does not have a mandate to determine them.

There are a number of potential options to consider, including whether a complaints

authority is required, and how it would be funded and hosted. While it is possible that direct access to the Tenancy Tribunal may be useful in some cases, it remains a daunting prospect for many residents, and would only be appropriate for legal and contractual disputes. Another option is still required to improve the overall process. This could be included in the remit of the Retirement Commissioner, as that role already exists, and has CFFC as an organisation to support it.

This paper recommends that a policy review includes a review of the complaints function to simplify and formalise a clear and simple process.

A voice for residents

There is no entity that is empowered specifically to look after individual resident's welfare. Within a retirement village, the needs of individual residents must also be balanced against the needs of other residents, and the community as a whole.

The CFFC's monitoring, publishing and educational work in retirement villages gives it a higher public profile than the registrar, statutory supervisors or MHUD. Many people who contact the CFFC incorrectly believe it has power to investigate cases and make decisions.

The RC's power to require information from operators is limited to monitoring the effects of the framework. Unlike Commissioners in other fields, this monitoring function is not intended as a regulatory, advocacy or complaints

determination tool for the RC to influence outcomes case by case.

This means for the majority of referrals, the CFFC simply informs them of its limited power, assists by answering uncomplicated questions, directs consumers to the formal complaint options prescribed in the Code, or emphasises the role of the statutory supervisor (if there is one) for the village. In effect, and in the absence of anyone else, the CFFC performs an "informal" complaints assistance role but has no explicit power to do this.

A critical point is that many residents or their family representatives say they are reluctant to formally complain or enforce their rights, even in situations where they perceive wrongdoing, as they do not want to threaten their living relationships.

This paper recommends that a policy review considers whether changes are required to better support retirement village resident welfare.

PART 7:

EMERGING CONSUMER ISSUES

Future affordability of retirement village accommodation

Several consumer demographic trends raise a flag for the long-term sustainability of the prevailing business model, in which capital is statutorily required as consideration for an ORA, and many operating costs are passed on to residents. The Code facilitates choice for operators about how they treat key terms in their ORAs, but overall, there are few retirement village business model choices for NZ consumers.

Future generations of owner-occupiers are increasingly likely to still have mortgages on their homes when they reach 65 years. This means that homeowners will be older when they become mortgage-free or they will have less equity to invest in a village unit.

Statistics New Zealand census tenure data shows a growing number of older people rely on the rental market for their housing, with a 44% increase in renting among those aged 65 and older, from 1986 to 2013 and that percentage is expected to increase over the coming years.⁶⁶ Almost 19% of that age group lived in rented accommodation in 2013 and that percentage is expected to increase over the coming years.⁶⁶

These people are unlikely to afford village entry.

Potential mismatch of supply for future demand

At the same time, the proportion of the population 65 or over will increase by more than 70% in about the same period – up from 730,000 today to 1,250,000 in 2035. The over 75 cohort is expected to increase by 150 per cent, or 470,000 people, between now and 2043. Almost 13.9% of those over 75 currently live in retirement villages up from 12.1% in 2015.⁶⁷

This slowly increasing market penetration, weighed against a rapidly increasing of 75+ year olds, suggests there is sustainable demand for the business model over the next two decades. On that basis some analysts suggest the sector is likely to need another 18,000 units to handle demand by 2028 alone.⁶⁸ The development being delivered in some regions, notably Auckland, exceeds the averaged required build rate.

The over 80-year-old demographic is around 85% Pākehā and this is reflected in the present resident profile of retirement villages. However New Zealand demography is changing, especially in Auckland, with a large growth in Asian population. These changes bring opportunities for culturally-focused villages in the future as well as risks that the prevailing business model will not appeal to broader ethnicities.⁶⁹

⁶⁶ Dr Bev James and Nina Saville-Smith (2018). Tenure insecurity and exclusion: Older people in New Zealand's rental market.

⁶⁷ Jones Lang Lasalle – NZ retirement villages and aged care Whitepaper June 2020

⁶⁸ Jones Lang Lasalle – NZ retirement villages and aged care Whitepaper p23 – June 2020

⁶⁹ Forsyth Barr: New Zealand Equity Research – Aged care sector – Golden Days: Issue 11 Field of dreams – March 2018

Equity release may not be enough for village residents

One of the benefits for an owner-occupier buying a licence to occupy is to release equity from their home and produce funds to supplement NZ Superannuation after purchasing the licence. Operators generally try to supply some independent units priced at a value around 75% of the value of an average 2–3-bedroom home in the same vicinity of the village.

However, the extent to which retirement villages deliver down-sizing, and equity-release opportunities for older owner-occupiers is not consistent. Rising house prices do not inherently deliver widespread opportunities for equity release across older owner-occupiers. A 2016 study into equity release realities for older people found that 45% of those residents who had realised equity from their home needed to use their remaining equity for services and day to day living costs in the village.⁷⁰

Operator financial assistance to residents is likely to increase

The CFFC's 2019/20 monitoring report found financial assistance is already necessary for a few residents in each village, and the RVA believes that need for resident financial assistance is likely to increase. Operator loans were most commonly given to cover transfers between independent units and serviced apartments or between units in the village to care suites in dedicated co-located care facilities.⁷¹ A separate survey found 41% of financial assistance is in the form of loans or deferrals drawing down against the remaining capital of the resident.⁷²

By contrast, a resident enjoys more favourable financial terms under an ORA which does not follow the licence to occupy model. While residents with those ORAs still paid a fixed deduction charge on termination, they are more likely to have rights to market and sell their own units, and to receive a share in any capital gain on resale, as well as to enjoy the rights associated with ownership during their term.

Business model viability and resident security depend strongly on revaluations

Most operators assume two things given the prevailing licence to occupy model: that property values will keep appreciating; and that they will sign more ORAs than are terminated.

Operators depend on these two trends continuing as many would make a loss without revaluing their property holdings. Even larger, listed corporate operators do not always generate enough operating revenue to cover operating expenses. The annual reports of listed corporate operators suggest a sizeable percentage of net profits come from property revaluations. One example is Metlifecare, which earned after-tax profits of \$39.2 million in 2019 on revenue of \$124 million and expenses of \$138 million. Another example is Oceania Healthcare, which earned after-tax profits of \$42.9 million to May 2020, on revenue of \$193 million and expenses of \$220 million.⁷³

Any recession that devalued property values would force operators to lower their prices to attract intending residents whose homes had been similarly devalued. At the same time, operators would be making repayments to residents or their estates at values set in pre-deflationary times. Operators may risk unsustainable debt to meet such repayments, which could affect their market capitalisation, credit and overall solvency.

A report by First NZ Capital (now Jarden) says some listed operators' dependence on banks has increased as companies expanded rapidly buying more land and building more villages. It says some have refused to show they have adequately stress-tested their balance sheets in case of a market downturn or demand for units.⁷⁴

70 Dr Kay Saville-Smith, Dr Bev James & Dr Michael Rehm (2016). Equity Release: Realities for Older People.

71 Financial services provided by operators – published June 2020: cffc.govt.nz/retirement-villages/monitoring-and-reports/monitoring-reports/

72 CFFC Monitoring Report 2020: Appendix refers to a survey by PWC suggesting 41% of villages provide loans or financial assistance to residents but does not clearly distinguish deferrals from loans.

73 See: www.metlifecare.co.nz/wp-content/uploads/2019/10/ANNUAL-REPORT-2019.pdf. www.oceaniahealthcare.co.nz/investors/news-article-docs/2020/ohl-2020-annual-report-final-web-.pdf

74 www.rnz.co.nz/news/business/382742/retirement-village-companies-on-debt-row-analyst

Framework favours profitable development over rentals and other models

The results of a survey of Australian and New Zealand operators presented at the 2019 RVA annual conference indicated that 39% of NZ operators and 43% of Australian operators thought the sector would embrace a rental model in the next five years.⁷⁵ Around 50% of NZ operators and 80% of Australian operators indicated a new proposition would be needed to appeal to the new retiree in the next 5-10 years.

It is worth noting that rental models present different issues to the retirement village model under an ORA. There is not the same level of security, as renters could run out of funds to pay rent, the rental rate may increase, and the tenancy may be terminated. ORAs provide more certainty. In addition, where a village had a number of renters, there may be limited funds available to maintain the standard of the village overall.

A 2019 ANZ report showed NZ operators were comfortable with existing arrangements, in contrast with their Australian counterparts, who were more open to alternative ways of operating⁷⁶. Australian operators are considering whether to introduce new pricing structures that do not have deferred management fees, along with alternative rental models. Some of the biggest operators already offer alternatives to DMFs.

One explanation for New Zealand operators not embracing alternative models may be that the Act requires them to offer accommodation on recipient of a capital payment from residents.

However, ANZ suggests the real reason is twofold: investors, bankers, lawyers, and residents understand how the current model works (although, as this paper notes later, residents and lawyers find a core document, occupancy right agreements, often complicated and difficult to understand); and the model fits with the way operators fund village development⁷⁷. The sale of licence to occupy agreements repays debt from one stage and helps fund the next one until the village is completed and the debt is (usually) repaid in full.

The ANZ survey suggests the sector favours the prevailing model because it fosters faster and more profitable development than other models and is attractive to lenders. A retirement village operating on a rental basis cannot repay debt through its successive stages of development easily and must be funded differently. Specifically, it needs financiers prepared to fund it over the long term – a challenging proposition, according to ANZ, because of the type and length of financial commitment involved.

This paper recommends that a policy review should analyse future trends, consider if consumer protections are strong enough to adapt to change, and investigate whether different models should be encouraged.

⁷⁵ RVA Conference 2019 slides – ANZ presenter Richard Hinchcliffe www.retirementvillages.org.nz/site/events/conference/2019/2019-presentations/

⁷⁶ Retirement village sector insight: A trans-Tasman view, October 2019: comms.anz.co.nz/static/pobb-cms/pdf/ANZ-Retirement-Village-Sector-Insight-2019-A-Trans-Tasman-view.pdf.

⁷⁷ Retirement village sector insight: A trans-Tasman view, October 2019: comms.anz.co.nz/static/pobb-cms/pdf/ANZ-Retirement-Village-Sector-Insight-2019-A-Trans-Tasman-view.pdf

PART 8:

UNDERSTANDING THE LEGAL FRAMEWORK

A key purpose of the Act is to provide a legal framework readily understandable by residents, intending residents, and operators.⁷⁸

Residents and intending residents have at least three or four practical challenges to understanding the framework before and during their occupancy:

- reconciling the framework's structure and drafting anomalies
- understanding the role of the statutory supervisor
- understanding what services a retirement village does and does not include
- reconciling when proposed changes to occupation, both physically and holistically, require consultation.

Structural and drafting anomalies are evident in the framework

The Act, regulations, and both codes are inter-dependent, meaning one cannot be sure on the overall effect on one's rights without an understanding of all the instruments. The two codes have cross-referencing to sections of the Act and regulations. The disclosure documents are bulky and inter-dependent. In practice, operators often duplicate the Code's minimum standards and the CoRRs provisions as terms in ORAs. The effect is that consumers must draw on a range of sources to understand their rights.

Eight sections of the Act and a Schedule of the Act are referred to prominently through the Code. The Code attempts to help readers reconcile this inter-dependency by including

a 'useful information' section at the end that reproduces the eight sections and the Schedule.

This complexity suggests the documents should be reviewed with a view to simplification. Improved documents would be written in plain English, with key points at the front, and further detail easily available. This could be an appendix to the document or a separate website (such as the 'Disclose Register' for offers of financial products and managed investment schemes under the Financial Markets Conduct Act 2013).

Section 33(2) of the Act presents an anomaly for both consumers and agencies. Residents have a right to refer alleged breaches of the CoRR only to listed agencies. The right excludes referrals of alleged breaches of other key documents. s33(2) has no relation to formal complaint or dispute panel procedure. The resident may make the referral to an agency with or without having also made a formal complaint to the operator. It appears to give a sense of assurance to residents that their general rights under the CoRR will be taken seriously by whoever receives the referral. For agencies that receive referrals, neither the Act nor the regulations provides any guide on what they should do with such referral.

The CFFC receives up to 100 referrals of alleged breaches of the framework's regulatory instruments, disclosure documents and ORAs each year but, as previously outlined, has limited power and is not mandated to investigate or make decisions on complaints.

⁷⁸ Section 3 Retirement Villages Act 2003.

In 2017, the CFFC prepared a plain English version of the Code to make it easier to understand and remove repetition. Its introduction was put on hold in anticipation of a regulatory review of the retirement village framework signaled by the Ministry of Business, Innovation and Employment.

This responsibility was later transferred to the Ministry of Housing and Urban Development.

In 2020 the Retirement Commissioner asked the RVA to review the draft revised Code and advise of any issues. This work is underway.

This report recommends that a policy review should include a review of the disclosure statements with a view to producing simplified and accessible documentation. This could include online resources.

The role of the statutory supervisor varies

The primary role of the statutory supervisor is to provide financial and legal protection to the residents. However, there is misunderstanding about how they undertake this role, which leads to confusion. Supervisors are advocates for resident's rights in case of breaches of legal agreements (ORAs, Deed, Legislation) but not for residents' individual personal-type complaints with operators.

Some residents and resident associations assume that a statutory supervisor has a close relationship with the village itself, is someone they can turn to investigate individual cases, or advocate on their behalf or otherwise help get an operator to change a decision.

Some residents consider supervisors lack independence because operators select and appoint them. However, it is necessary that supervisors are involved from the start of the

village's operations, to ensure the rules are followed and the operation is viable. Residents themselves have the power to remove operators.

Some residents doubt supervisors' independence because the operators pay them through the residents' weekly fees, and consider that supervisors should advocate more for them, including on their behalf during complaints.

The CFFC's 2017-18 monitoring review of the effectiveness of statutory supervision found residents' interests were adequately protected and no evidence of any conflict of interest in the relationship between supervisors and operators. It did identify a small number of issues that could be addressed through regulatory change to help supervisors provide better financial reporting and security protection for residents.⁷⁹

⁷⁹ cffc.govt.nz/retirement-villages/monitoring-and-reports/monitoring-reports/ For example, supervisors have referred to the impractical requirements of Regulation 9 of the Retirement Villages (General) Regulations 2006 requiring financial forecasting of amounts payable to residents, former residents, and their estates

By contrast, supervisors say one of the benefits of having a smaller number of larger supervisor organisations managing industry growth is the ability to work together to ensure that robust supervisory standards are maintained. The CFFC's 2017-2018 monitoring review noted, in general, as the number of villages supervised by any one supervisor organisation increases the more relationship management, client services and support staff (analysts, settlement staff) there are to meet supervision requirements. Some individual supervisors have responsibility for retirement village groups: in some instances, this can mean a reduced reporting workload, usually where the review of financial documents is undertaken at a group or consolidated level rather than at an individual village level.

An operator can apply to the registrar for an exemption from having a statutory supervisor. This right seems contrary to key purposes of the framework⁸⁰ to protect the interests of residents and provide external oversight of the conditions of entry into and continuing operations of villages. A village without a supervisor may reduce a compliance cost for an operator, but it also reduces the process options residents have for resolving complaints and takes away consumer assurance the operator and its business activity is being monitored.

Distinguishing lifestyle subdivisions from registered retirement villages

A few lifestyle subdivision developers target retirees with similar marketing to registered retirement villages but offering owner-occupation rights. This circumvents the definition of retirement village in section 6 of the Act and therefore the compliance costs associated with registration.⁸¹

The degree to which the services and facilities in lifestyle developments differ from those in a registered retirement village can be hard to determine. The registrar investigates cases brought to its attention then applies the exemption test in section 6(4) of the Act. It asks whether the services or facilities to occupants in an unregistered development are beyond those commonly provided in similar residential units, which are not intended as accommodation for retirees, or with residential tenancies and other guest house type accommodation.

If the development provides services or facilities commonly found in retirement villages it will need to be registered.⁸² Consumers who purchase a unit in an unregistered village or other exempt lifestyle subdivision do not have the consumer protections of the Act. They will only have rights under the Unit Titles Act or common law property rights for the relevant tenure arrangement that applies.

The interface of care and residence

Many consumers confuse retirement villages and rest homes. The CFFC's 2018-2019 monitoring report highlighted how the definition of retirement villages in the Act refers to rest home and hospital care institutions.⁸³ Co-location of aged care facilities attracts intending residents, but some intending residents and residents do not recognise that a different framework applies to the care facility and their future care needs (as outlined in Part 6).

A residential unit within a residential care facility may be captured by the definition of a retirement village but is confined to those particular residential units and the common areas available to residents under their ORA.

⁸⁰ Operators may seek exemptions from statutory supervision under Section 41 Retirement Villages Act 2003. The Registrar of Retirement Villages decides to make any grant applying criteria listed in Regulation 55 Retirement Villages (General) Regulations 2006.

⁸¹ Some transparently targeting those aged 55 and over, such as Bloom Living, explicitly sought legal advice and registrar clarification about their development to check they need not register: bloomliving.co.nz/

⁸² Section 6(4) Retirement Villages Act 2003. Facilities and services are defined in section 5

⁸³ cffc.govt.nz/retirement-villages/monitoring-and-reports/monitoring-reports/ and see Section 6(3) Retirement Villages Act 2003

The Act imposes no specific obligations to provide information about residential care services on offer under the ORA. There is only the same general obligation for an ORA to include information, including within the

Disclosure Statement, about services and facilities, the associated charges and the basis for charging, frequency, and extent of access to prescribed services.⁸⁴

A framework review should explore the extent to which the presence of care changes the nature of a retirement village from a housing proposition to a health proposition. It should also explore whether the definition of a retirement village needs modifying to include a wider range of lifestyle developments (including those arrangements that do not include an ORA as noted above).⁸⁵

Consultation on proposed changes to occupation

This is noted as area of concern by some residents. There can be disagreement between residents and owners when changes are made (or fail to be made) to the village.

Residents and intending residents have a right to promptly receive information on matters likely to have a material impact on the terms of their occupancy, charges levied or services and facilities they receive.⁸⁶ The Act does not require consultation with residents on those matters but some residents believe the Code requires operators to consult on almost any changes they believe affect them.⁸⁷

The combined effect of clause 28 of the Code and right 3 of the CoRR requires operators to consult residents about the content of proposed new rules, changes to existing rules, proposed changes to services and benefits, or charges that residents pay. Right 3 qualifies the right to be consulted about proposed changes to services, benefits or charges happens when those proposals will or might have a material impact on the residents' occupancy or ability to pay for services and benefits.

The matters about which residents must receive information are listed in section 34(3) of the Act

and spread through the regulations. The duty to inform residents depends on whether the matter is required to be included in an ORA or in a disclosure statement, and whether any proposed change is material to warrant informing residents. Materiality obviously remains a value judgement for operators and residents.

An operator must also notify the registrar of retirement villages and statutory supervisor of the village (if there is one) of any material changes in any registered documents or change of operator or an operator's controlling interests.⁸⁸

Should they object to a change, some residents are powerless to uphold the disclosure information they may have relied on when entering the village. Despite mandatory legal advice, some residents either do not understand, or forget how operators retain a general right in the ORA to develop the village land and buildings over time. For example, if an operator disclosed the village was complete at the time they chose to enter into an ORA and residents were later informed about proposed new building construction in the village, or disclosed a particular facility was planned but later informed of delays delivering it.⁸⁹

⁸⁴ Regulation 19 Retirement Villages (General) Regulations 2006 list the specific services for which information must be set out in the disclosure statement

⁸⁵ Some developments proposed as retirement villages appear to do so to optimise local council planning and building requirements. Registered as retirement villages, some have more care suites or care facilities and far less than 50% independent living. For example, Rawhiti Estate, Auckland has 48 care suites and 27 serviced apartments offering higher levels of care service. Arguably the village is more a full-time care facility as there is very little truly independent living in the village at all.

⁸⁶ Section 34 Retirement Villages Act 2003

⁸⁷ *Gatley and others v Metlife Poynton Ltd* - 2018 Dispute panel decision - cfc.govt.nz/retirement-villages/complaints-and-disputes/disputes-panel-decisions/ where an operator did not consult residents about an increased minimum entry age for new residents at the village but did inform them about it. The Panel held section 34 did not require consultation on that type of matter. A change of entry age was not a change in any rule in the village, so the operator was not required to consult under clause 28(2)(b) of the Code.

⁸⁸ Section 17 Retirement Villages Act 2003.

⁸⁹ See Appendix - examples provided by the RVRANZ

PART 9: LOOKING AHEAD – OPTIONS ANALYSIS

Four options exist for the regulatory future of the sector:

1. Maintain the status quo

Under this option, the Code would be amended only in response to problems as they arise, and only when there is broad support for any amendment. This would be a continuation of self-regulation by the sector and does not address the broader issues raised in this paper.

This option also presents a risk for government agencies. MBIE, MHUD and the CFFC are aware of some deficiencies in the Code. Residents may say changes do not address broader consumer issues with the framework or business model adequately.

Proposing variations to the Code simply in response to issues as they arise risks poor alignment with the legislation and regulations. From an administrative perspective, the variation process generates transaction costs, and is accompanied by delays and lag times. It may also trigger further compliance costs for operators needing to amend their registered documentation and potentially make variations to many existing ORAs.

For a growing sector that includes a vulnerable population, relying on a framework that is nearly 20 years old poses a risk.

This option is not recommended.

2. Approve a Code variation to add some consumer protections

Under this option, the RC would recommend the Minister approves adding consumer protection clauses to the Code, but otherwise maintains the status quo. Mooted changes would include those outlined in Part 6.

Some of these changes would start to address the allocation of risk to residents and fairness of terms in ORAs and are more likely to be supported by residents than operators. It may be possible that the process of proposing variations to address consumer issues could trigger some operators to start offering innovative new ORA terms (although it is likely that capital would need to remain as consideration).

However, the Act limits the scope of what the Code can achieve. A Code variation cannot require an operator to do something more than required by the Act. By contrast, a proposed change that was within scope, but which appeared to extend existing requirements unfavorably for operators may be at risk of legal challenge by opponents.

This calls into question the Code's efficacy as a significant mechanism for ensuring consumer protection. As mentioned in Option 1, managing issues through repeated variations to the Code risks inconsistencies or poor alignment with the legislation and regulations over time. The variation process generates significant transaction costs and may be accompanied by extended delays and lag times. Code changes take considerable time – as much as a year – even with the sector's support.

This option is not recommended.

3. Conduct a regulatory systems assessment

This activity is part of the regulatory stewardship of government agencies. Under this option, MHUD would carry out a regulatory systems assessment of the retirement villages framework, to see how well the regulatory system is working within the existing policy and institutional framework.

A regulatory systems assessment does not assess the strategies and capabilities of government agencies involved in a system and is not an analysis of what the rules should be – that is the role of policy review.⁹⁰

The focus of a regulatory system assessment is narrow. It involves a whole-of-system, lifecycle view of regulation, and analyses system performance rather than framework performance. This option would not address consumer issues with the framework or prevailing business model.

This option is not recommended.

4. Conduct a policy framework review

Under this option, MHUD, with the support of the CFFC, would review the full policy framework – that is, the Act, Regulations and the Code. The system has not been reviewed for almost two decades since the Act was introduced in 2003.

A policy review of the framework would be a timely look at foreseeable industry and demographic trends. It should examine, among other things, whether the current regulatory framework -

- is consistent and sustainable
- enables operators to respond to changing demographic and housing trends
- sufficiently protects the business interests of operators
- contains sufficient consumer protections including an accessible, cost-effective and fair complaints mechanism

- limits the sector's development through provisions relating to the payment of capital and the definition of a retirement village in the Act
- enables best-practice Code review processes

It should also specifically consider the recommendations made to the Associate Minister for Housing by CFFC. The Minister will be briefed in 2021 after the feedback on this White Paper has been received and considered and these recommendations will be based on those included in Parts 6 and 8.

The policy review could also consider possible impacts from other policy settings in relevant areas such as health, building, and other forms of housing.

A policy review would consider the rights and duties imposed through the Act, regulations, and codes to ensure their settings are future proof. It provides a more effective response to the requests for greater protection of residents' interests and would give operators plenty of time to consider and plan for any changes.

The terms of reference for a policy review could also include a comparison of Australian retirement village frameworks. It could consider the extent to which their legislative instruments create rights and compel duties in specified ways by statute instead of leaving matters to be given effect to under operational Codes or under ORAs.⁹¹

Importantly, a policy review could result in legislative clarification reducing the considerable cross-referencing between the Act, Regulations, and Codes, making the retirement villages regulatory framework easier for consumers and operators to understand.

The terms of reference for a policy framework review should be subject to consultation before finalisation.

This is CFFC's recommended option.

**Commission for Financial Capability
November 2020**

⁹⁰ www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/our-assessment-of-regulatory-systems/

⁹¹ Some states in Australia are strengthening their frameworks using legislative review to improve consumer protection issues. In Queensland an operator must buy back certain units 18 months after termination, or 14 months after probate if the resident has died. An operator may still apply to extend the buy-back time with reasonable excuse - Department of Housing and Public Works, Queensland Government, Info sheet, January 2020. In NSW mandatory buy back times are proposed with adjusted times to recognise different resale needs in urban and rural located villages - December 2017 Greiner Inquiry Report

APPENDIX:

RESIDENT CASE STUDIES

The following sample of case studies, supplied by the Retirement Village Residents Association of New Zealand, has either been abridged in the third person or explained in residents' own words.

Resident forced to pay unit and care costs while villa “unnecessarily” refurbished

The resident had to move from her unit into a care facility. For seven months, she was forced to pay unit service fees of \$7,500 and assisted care costs of \$9,000 while tradesmen renovated her unit for resale. She says the unit could have been ready for reoccupation much earlier. Furthermore, the bathroom and kitchen, although in perfect order, were demolished and replaced, and she was forced to foot the bill. She says it was unfair that she had to pay unit fees for services she was unable to enjoy. She also says the operator did not follow the consultation process as set out in the code of practice.

Timing of any sale leaves resident stranded

“I came to the village with my wife six years ago. Unfortunately, she died three years later and now I have health problems that will get worse and I do not want to be a load on my family and friends.

“I would like to leave here and go to an apartment at another village where there is a continuum of care this village does not yet have. There is a suitable apartment there that I have a deposit on. The problem is that the sale of this villa must occur before I can be bought out under the present ownership.

“My occupancy right agreement is still the old [type] when we were told at the time of signing up that if circumstances significantly change the village might buy that person out, and I know this has taken place on at least three occasions.

“The present owners don't want to honour this aspect. The fact is that the circumstances have changed with death of a mate and now chronic illness that will only get worse and debilitating, and this village cannot provide for that.

“The trouble is that I need to be bought out as I can't afford to buy into the change and even bridging finance is too expensive.”

Eight months of refurbishment and eighteen months of waiting and still no sale

The resident died, and the operator decided to “refurbish” the vacated unit. This involved reducing the unit to a shell and replacing the kitchen and bathroom. The work was performed by a builder who was also renovating three or four other units at the same time. The work took eight months, during which there was no prospect of finding a new buyer. Eighteen months on, the unit was still vacant, although a contract pending had been pending for four months.

Weekly fees were accruing, and no capital had been paid out because an eventual buyer had not come through with funds.

Ocean-view unit took year to sell

“I purchased an occupational right in a new unit in November 2017, sold as being in a prime position with ocean views. My husband was diagnosed with dementia about the same time as the transaction was completed and as a result, I could not move in. The manager said it would not be a problem as those units sold like sweet cakes. I paid \$1.32 million for the unit.

“Several months passed without any interest in the unit. Several purchasers were given options and allowed time to sell their homes. All these fell through. The unit was eventually sold in September 2018. In that time, they sold 20 other new units.

“The purchase price was amortised for the full period, even though I never lived there, and the weekly fees were also deducted from my initial payment. My conclusion is that they had the benefit of my capital deposited in their bank and therefore had no incentive to sell my unit quickly, as was verbally promised.”

Unit took 15 months to sell

The occupant died after having lived in the unit for only a brief time. No refurbishment work was needed. According to neighbours, the price was set too high and no prospective buyers viewed the unit for five months. It took 15 months before the unit sold.

Dust and noise aplenty as care centre takes years to materialise

“When I first made inquiries, I was assured, by the then manager, that there would be a care centre built within the next six months. That sounded fine, as at that stage I was in a reasonable state of coping, but I knew I would require help later. At the time, there was no indication of the village being sold and although I felt that I should have the facts in writing it was indicated that there was no cause for worry.

“I later checked at the council office that consent had been given for the care centre and was disturbed that no consent had been given. When I queried this with the management here,

I was then told that a purchase of farmland had been made, which was more suitable, and though it would take longer to complete the structure, it was in hand. I gave it a few weeks, then checked with the council to see that consent had been given – no joy, and then was told, when I queried with management they had decided on another piece of farmland, which would be more accessible for ambulances and general traffic.

“I could go on at great length but feel sure you have an idea of how things have gone from bad to terrible over the years. From what I have heard, this happens in various other establishments, so is not an isolated incident.

“I was 74 when I moved in, having sold my large home, and hoped that my stay, in any village, would have been only two or three years. As it worked out, my villa was on the edge of a building site for at least six years, then the building continued a bit away from my villa, but sadly the dust, noise and mess were still prevalent – and in fact still goes on. I am now 80. This is not the outcome I had envisaged for my old age.”

Disclosure statement does not deliver on promises

“When [the village] first started, the disclosure statement included an astro-turf tennis court, and this encouraged people to become residents but was later cancelled and the land repurposed for an additional villa.

“There was also a 50 per cent capital gain included, which attracted most of the current residents, as they assumed that their estate would benefit from this, and the houses would be easier to sell as incoming residents would have the same deal.

“Now we discover that this has changed and when we questioned it, it was described to us as a “marketing strategy.” Why are operators allowed to present this document when it outdates and becomes a false document?”

Definition of chattels residents must maintain “too wide”

“Our ORA required residents to repair or replace all internal fittings that belong to the operator at our expense for the time the resident lived in his or her villa.

Our manager has said that had we not agreed to sign up to this clause we would not have been allowed to buy into the village.

“Down the track, residents have found they have had to replace expensive fittings such as range hoods, sink garbage disposal units in some cases three times, garage door openers, electric wiring to down lights that fused in the ceiling, and other fittings too many to mention. The most contentious of all has been the repair or replacement of hot water cylinders that are all in the roof of our villas and not inside the walls in a cupboard for instance.

“Our residents cannot climb up into the roof space to see if the cylinder is leaking, or strapped down properly, and it only shows up when the water comes through the ceiling. Our residents consider that the cylinder in the roof belongs to the owner outside of our internal walls, but our owner says no, it is the responsibility of residents to pay for a plumber to inspect the cylinder at a regular interval.

“We consider these clauses unfair and draconian and would like to see the law changed so that these clauses are not allowed to be included in ORAs. In our village we do not own any of these fixtures or fittings, we do not gain any capital gain when the [unit] is sold with these fittings replaced or repaired already by the outgoing resident. We are worse off than a tenant under the Residential Tenancies Act. We would also like this clause struck out retrospectively.

“Our residents must pay the owner’s insurance excess to the tune of \$1,000 for any damage to the owner’s property in our villas because the owner chose that excess and to insure the village buildings under an indemnity insurance and no longer full replacement.

“However, the disclosure statement we signed states that our insurance is for full replacement value, so the owner has broken our contract by changing this insurance cover.”

Resident learns the hard way that newly built units get sales priority

“We accepted an offer on our house. The potential buyer was 64 and after losing his house in the quake decided to move into a retirement village. He soon realised he had made an error, being young and healthy, so decided to move out. He was told there was a huge waiting list so would have no problem selling.

“As time went by, with extensions given on our part, he had only two viewings. My suspicions grew so I phoned the village as a potential buyer looking for an existing villa and was told there were not any available, but they had new ones being built. I came clean then a short time later the (presumably) sales manager phoned me asking to see us.

“He arrived very quickly and eventually admitted they won’t sell existing villas until all the new builds have sold so there was no way our buyer could proceed. His words to us were: ‘The only way out is to move into a dementia wing or die.’ As we told the manager we were going to, we at once popped around

to see our buyer to enlighten him and tell him no hard feelings as we realised he would have to back out.

“While there, he got a phone call to see if we were there and as we left the manager was walking over to his villa. Our buyer later phoned to say he had to accept there was no way he was going to be able to move from there.

”When talking to the [village owner] here a few months ago about the empty villas we had at that time, he passed the comment there was no hurry to sell. That was of concern to us, given that attitude could apply to our villa down the track, particularly if the existing criteria is still in the contracts then.

“When a villa is vacated here, full fees continue to be paid for three months then it is reduced to 50 per cent for a further three months, but there is no timeframe for villas to be sold. Most sit for several months, in one case since we have been here, it was over a year, before being sold. The only advertising, I am aware of is on TradeMe. It would be great to see a time limit of six months before the capital is paid back to the owner or estate. That would change the attitudes of operators!”