

GUIDE TO THE RETIREMENT VILLAGES (MISCELLANEOUS) AMENDMENT BILL 2023



MESSAGE FROM THE MINISTER



I am pleased to release the draft *Retirement Villages (Miscellaneous) Amendment Bill 2023* (the Amendment Bill) for community consultation.

Retirement villages provide an important accommodation option for older South Australians. There are 530 villages in South Australia, which are home to approximately 26,614 residents.

The current *Retirement Villages Act 2016* (the Act) commenced in 2018 and introduced significant reforms aimed at balancing consumer protection with the interests of operators across the diversity of the retirement village sector.

The Act included a provision requiring that it be reviewed after three years of operation. The Review, conducted by PEG Consulting, was completed in 2021. One hundred and eighty-seven submissions were made by residents, operators, peak bodies and other interested parties during the review period. I thank every respondent for taking the time to participate and share their feedback.

The Review found that while many parts of the Act are operating as intended and achieving an appropriate balance between consumer protections and the interests of operators, there is still room for improvement.

The Amendment Bill introduces important reforms recommended by the Review to strengthen the operation of the Act, increase consumer protection and provide clarity for residents and operators. In addition, I am also seeking feedback on several additional reforms aimed at enhancing consumer protections, and to seek feedback on what the impact on consumers and business may be.

One of these amendments is the proposed statutory buyback period. To help ensure that the statutory buyback period model adopted is best suited to the South Australian operating environment, the Amendment Bill canvasses stakeholder views on three possible models. The new models being proposed are based on similar provisions that are either already operational or in the process of being introduced in other Australian jurisdictions.

I am committed to ensuring that Retirement Village legislation is robust in its protections for residents while also supporting the growth and sustainability of the sector. The proposed reforms will establish a contemporary, balanced, and comprehensive framework for the regulation of retirement villages in South Australia, which puts consumer protection at the forefront while also minimising any unnecessary impacts on retirement village operators.

I urge all people and organisations with an interest in retirement villages to consider the draft Amendment Bill and provide feedback on the proposed reforms.

Hon Chris Picton MP
Minister for Health and Wellbeing

CONTENTS

PART 1 OVERVIEW	6
1.1 Background.....	6
1.2 About the draft Bill	6
1.3 About this guide	7
1.4 Have your say.....	7
PART 2 BEFORE MOVING INTO A VILLAGE	9
2.1 Residence contracts	9
2.1.1 Refurbishment, renovation and maintenance	9
2.1.2 Type of occupancy	9
2.1.3 Fees and Charges	9
2.1.4 Premises condition report	10
2.2 Disclosure Statements	10
2.2.1 Exit fees.....	11
2.2.2 Composition of occupants in village.....	11
2.2.3 Embedded networks.....	12
2.3 Information required before signing a residence contract	12
2.4 Deposits.....	13
2.5 Repayment of ingoing contribution after rescinding contract.....	14
PART 3 AMENDMENTS APPLICABLE WHILE LIVING IN A VILLAGE	15
3.1 Recurrent charges.....	15
3.2 Meetings.....	16
3.2.1 Financial reporting.....	16
3.2.2 Proceedings and meetings	17
3.2.3 Mandatory consultation with residents' committee in relation to annual budget.....	18
3.3 Residence rules	18
3.4 Provision of required documents to residents free of charge	19
3.5 Emergency plans	20
3.6 Lease of land	21
3.7 Requirement to insure retirement village	22
3.8 Dispute resolution	22
3.9 Management of retirement villages	24
3.10 Disqualified persons	25

PART 4 AMENDMENTS APPLICABLE TO LEAVING A VILLAGE.....27

4.1 Termination of residents' rights.....	27
4.1.1 Termination during the settling-in period	27
4.1.2 Termination of a resident's right of occupancy.....	27
4.1.3 Abandoned property	28
4.2 Exit Entitlements	28
4.2.1 Timeframe for payment of exit entitlement	28
4.2.2 Requirement to provide details for payment of exit entitlements	32
4.2.3 Payment of capital fund contributions deducted from exit entitlement.....	32
4.3 Arrangements if resident is absent or leaves	33
4.4 Remarketing.....	34

PART 5 MISCELLANEOUS 35

5.1 Registration and termination of a retirement village scheme	35
5.1.1 Termination of a retirement village scheme	35
5.1.2 Voluntary termination of a retirement village scheme	35
5.2 Registration of multi-site villages	36
5.3 Consultation with new operator.....	36
5.4 Registrar	36
5.4.1 Registrar's functions.....	36
5.4.2 Registrar's power to require information.....	37
5.4.3 Registrar's obligation to preserve confidentiality.....	38
5.5 Register.....	39
5.6 Enforcing the Act	40
5.6.1 Enforceable voluntary undertakings	40
5.6.2 Offences.....	41
5.6.3 Limitation period for prosecutions	42
5.7 Publication in the public interest.....	42
5.8 Review of the Act.....	42

PART 1: OVERVIEW

1.1 BACKGROUND

The *Retirement Villages Act 2016* (the Act) commenced on 1 January 2018 and is the primary legislation concerned with regulating retirement villages in South Australia and the rights of retirement village residents. It applies to all retirement villages operating in South Australia.

The Minister for Health and Wellbeing is the Minister responsible for the Act. The Act is administered by the Office for Ageing Well (OFAW) within the Department for Health and Wellbeing.

Section 68 of the Act requires that the operation of the Act be reviewed three years after its commencement.

As a first step towards reviewing the Act, in January 2021 OFAW released a discussion paper¹ canvassing 36 key topic areas. The opportunity to provide feedback was widely promoted across operators, residents, peak bodies and other interested persons and parties. 187 submissions were received from a wide range of stakeholders.

The OFAW then engaged PEG Consulting to conduct an independent review of the Act. The Review focussed on the operation of the legislation and considered the submissions provided in response to the discussion paper.

PEG Consulting provided its report on its independent review of the *Retirement Villages Act 2016* in September 2021. The Review made 60 recommendations relating to reforming and strengthening legislation, policy and the Better Practice Guidelines.

Many of the recommendations propose amendments to the *Retirement Villages Act 2016*. These amendments are aimed at:

- increasing consumer protections
- strengthening standards applying to retirement village operators and village staff
- strengthening the powers and functions of the Registrar.

The Review's recommendations also considered the potential growth of the retirement village sector, the challenges of an ageing population putting increased demand on the sector, and the wide variety of operators in the retirement village sector.

1.2 ABOUT THE DRAFT BILL

The principal purpose of the draft *Retirement Villages (Miscellaneous) Amendment Bill 2023* (the Bill) is to give effect to recommendations of the Review report that require legislative amendment.

In addition, the draft Bill also introduces additional reforms to enhance consumer protections and ensure the efficient and effective operation of the Act.

The draft Bill is released as a consultation draft to enable interested stakeholders to provide feedback. In particular, feedback is sought on whether:

- the proposed amendments achieve the intent of the relevant recommendation made by the independent review
- the proposed amendments that do not relate to a review recommendation are appropriate and achieve their intended purpose
- there are any potential unforeseen impacts that need to be considered.

¹ <https://yoursay.sa.gov.au/67038/widgets/330496/documents/197209>

1.3 ABOUT THIS GUIDE

This guide assists stakeholders to understand the draft Bill. It provides information about the proposed amendments to the Act and explains some of the complex issues and reasoning behind these proposed changes.

This guide groups information about the proposed reforms into categories that relate to the consumer experience on matters:

- before moving into a Village (Part 2)
- while living in a Village (Part 3), and
- leaving a Village (Part 4).

This guide also describes miscellaneous amendments that address enforcement, registration and powers and functions of the Registrar and Minister under the Act (Part 5).

1.4 HAVE YOUR SAY

The draft *Retirement Villages (Miscellaneous) Amendment Bill 2023* is now released for public consultation and feedback.

Feedback is sought from (but not limited to) retirement village residents, operators, peak bodies and other interested members of the community.

The consultation period commences on **31 March and closes on 19 May 2023**.

How to provide feedback

There are a number of ways to learn more about the draft Bill and provide feedback. For information about the proposed reforms, as well as planned public and operator information forums, please visit:

SA Health: www.sahealth.sa.gov.au/reviewsandconsultation

YourSay: <https://yoursay.sa.gov.au/RVActAmendmentBill>

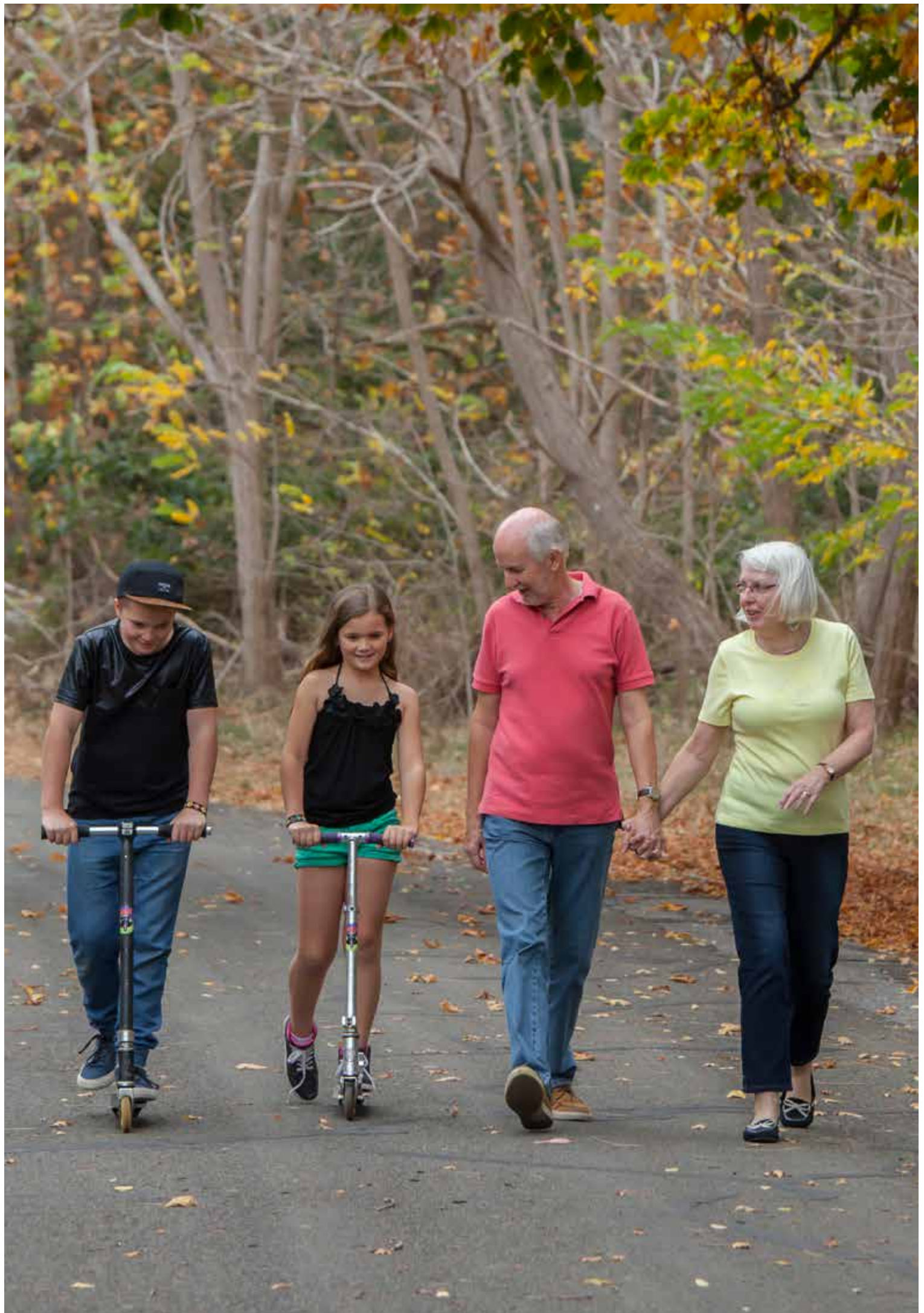
A feedback form has been developed and can be submitted in the following ways:

- Online Survey: provide your formal feedback by completing the online survey – <https://www.surveymonkey.com/r/RVActAmendmentBill>
- Email: provide your formal feedback via email - rvactreview@sa.gov.au
- Post: Retirement Villages Review, Office for Ageing Well, PO Box 196, Rundle Mall, Adelaide SA 5000

Feedback closes on **Friday 19 May at 5.00pm** and late submissions will not be considered.

If you have any questions about providing feedback, or need assistance, please contact OFAW by telephone 08 8204 2420 or by emailing retirementvillages@sa.gov.au

Your submission or its contents may be made publicly available. Submissions may be subject to Freedom of Information and other laws. OFAW reserves the right not to publish information that could be seen to be defamatory or discriminatory. If you would like your submission to remain confidential please clearly state this on the submission.



PART 2 - BEFORE MOVING INTO A VILLAGE

2.1 RESIDENCE CONTRACTS

Residence contracts - Clause 13 (amendment of section 20 of the Act)

A residence contract outlines the relationship between the prospective resident and the retirement village operator. It must comply with the requirements set out in section 20 of the Act. The Review recommended a number of changes to the provisions relating to the residence contract, which are outlined below.

2.1.1 Refurbishment, renovation and maintenance

The Review recommended the residence contract should provide greater clarity around costs and responsibilities for refurbishments, renovations and maintenance.

It is important that a resident's rights and responsibilities concerning alterations and additions to the residence are clear. This ensures transparency and minimises disputes over these matters at the end of a resident's occupation (recommendation 45).

The Bill proposes to amend the Act to introduce a requirement that an operator must include information in the residence contract about whether a resident may make alterations to the residence. This must include information about any approval process and any obligations that apply at the end of the resident's occupation in relation to alterations made by the resident.

2.1.2 Type of occupancy

The Review recommended that terms such as 'purchased' should not be used when a person is entering into a licence, lease or share to live in a residence in a retirement village (recommendation 19). This terminology can be misleading and may result in people believing they are purchasing a residence.

The Bill proposes to amend the Act to make clear that if a right to occupation under a residence contract is under a lease, or licence, or by ownership of shares; this must be clearly stated at the front of the residence contract, along with a statement that the person entering into the contract is not purchasing the residence.

The Bill also makes it an offence for a person to represent that a resident or a prospective resident purchases a residence if they do not (clause 18).

2.1.3 Fees and Charges

The Bill clarifies that the residence contract must include information about the fees and charges that a resident will be responsible for. Currently some of this information is contained in the disclosure statement or remarketing policy.

Information that must be in the residence contract will include:

- any fee or charge relating to the remarketing of the residence at the end of a resident's occupation, including the manner of calculation, and
- the amount or manner of calculation of any exit fees that will be payable if the resident exercises their right to terminate their occupation.

This amendment supports the response to recommendations 16 (relating to exit fees) and 52 (relating to definitions and drafting considerations).

2.1.4 Premises condition report

Premises condition report - Clause 16 (substitution of section 23)

When the Act came into effect in 2018, it introduced changes intended to clarify premises condition reports for all parties by removing information about responsibilities for costs of repairs and including this information in the residence contract instead. The premises condition report now contains only information about the condition of the fixtures, fittings and furnishings provided in the residence at the time of entry.

The Review noted that the changes that commenced in 2018 have caused some confusion. It recommended that an operator provide a premises condition report as early as possible, and the ability to cool off should be linked to the provision of this report (recommendation 24).

The Bill introduces a requirement that a premises condition report must be completed by the operator and provided to the prospective resident at the same time as the residence contract. A resident is entitled to cool off within 10 business days after signing the contract. This will mean that the premises condition report is always provided to the incoming resident at an early stage and will ensure there is only one cooling off period applicable. The Regulations will provide guidance about the requirement for a resident to complete the report after occupation and any dispute that arises about the condition of the premises.

The amendments will not apply to a residence contract entered into before the commencement of the amendment act.

Questions:

1. Do the proposed changes to residence contracts achieve greater clarity for prospective residents, particularly around fees and charges, refurbishment and types of occupancy within a village?
2. Will the inclusion of a premises condition report in the residence contract appropriately address concerns that the premises condition report is not always provided as early as possible to the incoming resident? Are there any unforeseen consequences or matters that need to be considered?

2.2 DISCLOSURE STATEMENTS

Disclosure Statements - Clause 14 (amendment of section 21)

When the Act commenced in 2018, it introduced the requirement for a Disclosure Statement to be provided to prospective residents of retirement villages to ensure they better understand their contracts and all fees and charges for which they will be responsible.

The Review found that while the Disclosure Statement had improved transparency, there was still a need for greater clarity around financial matters on entering, living in and leaving a retirement village.

The Bill proposes amendments to the Act to ensure that Disclosure Statements provide appropriate clarity to prospective residents on the residence contract. These amendments are outlined below.

2.2.1 Exit fees

The Review found that it would be highly beneficial to prospective residents to understand the implications of exit fees and how these varied depending on the length of time a resident lived in a retirement village. This information would also benefit the prospective resident's family and legal and financial advisers.

For this reason, the Review recommended that the Disclosure Statement should include worked calculations for a prospective resident exiting the village at the two, five and 10-year mark. It also recommended that calculations should be sufficiently detailed to provide clarity about all exit costs and include clear explanations of inbuilt assumptions (recommendation 16).

As recommended by the Review, the Bill introduces a requirement that the Disclosure Statement contain an estimated exit entitlement, which includes exit fees under the residence contract in the event the right to occupation of the residence is terminated after two years, five years and 10 years. This estimated statement must explain the calculations and assumptions used for the exit entitlement and exit fees, and when the exit entitlement is payable.

2.2.2 Composition of occupants in village

The Review recommended that operators should provide information to prospective residents about the proportion of existing residents within a village who have made an ingoing contribution and the proportion who are residing in the villages under a residential tenancies arrangement (renting) (recommendation 53).

The Bill proposes amendment to the Act to require information about the types of occupancy within a retirement village to be included in a Disclosure Statement. The Disclosure Statement will be required to state the proportion of residents occupying a residence within the village under the following various occupancy rights:

- pursuant to a lease or licence (licence to occupy)
- occupation via ownership of shares
- purchased (strata/community title) - ownership with restricted disposal
- rental (lease or licence granted under the *Residential Tenancies Act 1995*).

2.2.3 Embedded networks

Some villages have embedded networks that limit a resident's freedom of choice of supplier for utilities such as internet or electricity. Embedded networks are becoming more common, especially with apartment-style living, and prospective residents must be aware of these arrangements before signing a residence contract.

To promote transparency where residents are required to purchase utilities or services from particular providers, the Review recommended that the Act should be amended to make it clear in the Disclosure Statement if a resident is required to purchase utilities or services from particular providers (recommendation 15).

The Bill includes an amendment to require that the Disclosure Statement must include information about any limitation or requirement that applies, or is known to apply, at a future time concerning a resident's choice of provider for utilities, services and facilities that are provided or available to residents of the village (such as electricity, telephone or internet services).

This will apply to Disclosure Statements given to a person after the commencement of the amendment act.

Questions

3. Do the proposed amendments to the Disclosure Statement ensure that a prospective resident is provided with enough information to aid decision-making?

2.3 INFORMATION REQUIRED BEFORE SIGNING A RESIDENCE CONTRACT

Information to be provided before residence contract entered into - Clause 15 (amendment of section 22)

Section 22 of the Act sets out the information that an operator must provide to a prospective resident before a residence contract is entered into. This information must be provided to the prospective resident at least 10 business days before signing the residence contract.

This is intended to improve contractual disclosure and ensure potential residents better understand their contracts by giving them time to seek independent legal and financial advice. However, the Review found that some prospective residents wish to move into a village immediately.

For this reason, the Review recommended that the Act should be amended to allow a prospective resident to waive the 10-business-day disclosure period if they have received legal advice (recommendation 22).

The Bill amends the Act to allow a person to enter into the contract before the 10-business-day period has expired:

- if they have received all required documents, and
- the persons' legal representative has confirmed in writing to the operator that legal advice has been provided, and
- they provide the operator with written notice that they wish to enter the contract before the consideration period has expired.

Question

4. Is the proposed process to allow a person to enter into the contract before the 10-business-day period has expired clear and easily understood?

2.4 DEPOSITS

Residence contract deposits - Clause 16 (substitution of section 23)

The Review noted that while the payment of a deposit to ‘hold’ a certain residence before a contract is signed is customary, the Act is currently silent on this matter.

The Review found that there were various views on this matter. However, it considered that the Act should deal with deposits so that it is clear to residents and operators how deposits should be treated. The Review recommended that the Act should make clear what the obligations and rights are in relation to any deposit paid by a prospective resident (recommendation 14).

The Bill introduces:

- a maximum limit of \$1,000 for a deposit (or an amount as prescribed by the Regulations)
- a requirement that if an operator accepts a deposit from a prospective resident for a particular residence, the operator must hold the residence for the prospective resident for (whichever is later):
 - 12 business days after the prospective resident has received the documents required under section 22 of the Act, or
 - a day agreed between the operator and prospective resident at the time the deposit was paid
- a requirement that if an operator enters into a residence contract earlier than allowed (being 12 business days or a day agreed to between the operator and the prospective resident), the prospective resident who paid a deposit may apply to South Australian Civil and Administrative Tribunal (the Tribunal) for an order that the residence contract entered into in contravention of this section is void and of no effect
- a requirement for a deposit to be repaid within 10 business days if a prospective resident gives notice to the operator that they do not intend to sign the residence contract, or an operator enters into a residence contract with another person for the residence.

The Bill also makes consequential amendments to the definition of ingoing contribution in section 4 to make clear that any residence contract deposit paid is treated as part of an ingoing contribution.

These provisions only apply to a residence contract deposit paid after the commencement of the amendments.

Question

5. Is the proposed process for managing contract deposits clear and easily understood? Are there any unforeseen consequences?

2.5 REPAYMENT OF INGOING CONTRIBUTION AFTER RESCINDING CONTRACT

Rights in relation to the residence contract - Clause 17 (amendment of section 24)

The Act is currently silent on the process and period within which a new resident is reimbursed for payments made on signing the contract, should they elect to rescind the contract during the cooling-off period.

The Review observed that resident respondents were of the view that the Act should protect them in such circumstances and supported a 10-business-day period for any funds to be reimbursed once the contract was rescinded. The Review recommended that the Act should be amended to provide for this (recommendation 23).

The Bill proposes to amend the Act to clarify that if a resident elects to rescind the contract during the cooling-off period, an operator must refund an ingoing contribution within 10 business days.



PART 3 AMENDMENTS APPLICABLE WHILE LIVING IN A VILLAGE

3.1 RECURRENT CHARGES

Recurrent charges - Clause 25 (Insertion of section 31A)

Residents pay the running and operational costs of a village through a monthly recurrent charge.

In 2018, the Act introduced reforms that aimed to ensure that:

- all items included in recurrent charges are transparent
- residents have ample information about costs included in their recurrent charges, and
- residents have information about the reasons behind any increases and the opportunity to ask questions about the recurrent charges.

The Review found that these reforms have not achieved an appropriate balance for recurrent charges. It noted that residents have little recourse when there is a dispute over increases to recurrent charges. An operator is not required to seek agreement from residents to increase fees, and a number of disputes relating to recurrent charges have been taken to the Tribunal.

In its written submission, the Tribunal recommended that South Australia consider adopting an approach similar to that taken in New South Wales, where an increase is restricted to CPI unless otherwise agreed by residents at a meeting of residents or approved by the Tribunal since the Act commenced.

The Review recommended that the Act should provide greater protection to residents in relation to increasing recurrent charges, given the significant implications for them (recommendation 30). It also noted that there is merit in the approach taken by New South Wales and that this model should be considered.

To provide greater protection to residents regarding increases in recurrent charges the Bill removes the current section 34(7), which relates to increases in recurrent charges, and inserts a new provision that provides stronger protections for residents.

The new section specifies that an operator must provide residents with at least 10 business days' written notice of any proposed change to recurrent charges (and that a resident is not required to pay any increase unless this written notice is provided).

The Bill also makes clear that an operator must not increase recurrent charges payable under a residence contract by:

- an amount that is greater than any amounts specified in the residence contract, or
- in accordance with an amount calculated under a fixed formula as specified in the residence contract, or
- in any other case, an amount prescribed by the prescribed CPI variation

unless a majority of residents whose recurrent charges will be affected by the increase agree to the increase by majority resolution passed at a meeting of those residents.

This reflects the model in operation in New South Wales.

The Bill also recognises that there may be rare circumstances where it will be necessary due to business viable reasons for an operator to increase recurrent charges above the amount specified in the Bill. For this reason, it provides that an operator may apply to the Tribunal for an order that the increase in recurrent charges can take effect if a meeting of residents resolves not to agree to an increase. Where such an application is made, the Bill includes a range of factors the Tribunal can consider, including:

- the level and cost of services and facilities provided for in the proposed annual budget
- any proposed variations (including additions) to those services and facilities, being variations to which the residents have agreed
- the cost of general services required to be provided by the operator
- the frequency and amount of past variations of the recurrent charges
- any other relevant matter.

These amendments will apply irrespective of whether a residence contract was entered into before or after the amendment act.

Question

6. Do the proposed changes to recurrent charges achieve the aim of providing additional consumer protection? Are there any alterations required to more effectively achieve this?

3.2 MEETINGS

Convening meetings of residents - Clause 27 (amendment of section 33)

3.2.1 Financial reporting

In 2018, the Act introduced new requirements around annual financial reporting. These matters are discussed at both the Annual Meeting and the meetings that precede it.

The Review observed that all parties benefit from financial arrangements and obligations being clear from the outset and on an ongoing basis. However, it observed that the Act currently does not provide for a consistent level of detail across different types of expenditure.

The Review found that updates are required to increase clarity for residents and operators around how village spending should be reported and recommended that the Act should be amended to:

- require audit statements to be able to be clearly compared with financial reports and budgets (recommendation 27), and
- clarify that the requirement of an operator to provide an audited statement of accounts for the previous financial year with the annual meeting notice, requires a description, but not the monetary value, of each item relating to management expenditure (recommendation 28).

As recommended by the Review, the Bill amends section 33 of the Act to:

- require that audited statements from the previous financial year can be clearly compared with estimates of income and expenditure for the current financial year (the budget) for all accounts that a resident contributes to (recurrent charges, capital fund, sinking fund and any other)
- clarify that the requirement of an operator to provide an audited statement of accounts for the previous financial year with the annual meeting notice requires a description, but not the monetary value, of each item relating to management expenditure, and
- allow the Regulations to prescribe standards or principles for the financial statements.

3.2.2 Proceedings and meetings

Proceedings at meetings - Clause 28 (amendment of section 34) and Clause 3 (amendment of section 4)

The Review observed that residents, operators, and other respondents were unanimous that the special resolution provision should be clarified to mean a majority of not less than three-quarters, based on the number of residents who are present at a meeting and entitled to vote or exercising an absentee vote.

It recommended that the Act should clarify the Special Resolution provision applies to 75 per cent (75%) of those present (or absentee voting) and for a quorum (recommendation 33).

The Review also observed that there is a level of confusion amongst resident respondents in terms of the role and responsibilities of a Residents' Committee and a meeting of residents.

The Bill will amend the Act to clarify that:

- the convenor of a meeting is responsible for complying with requirements relating to the distribution of minutes of any meetings convened under the Act, and
- an amendment that a special resolution is determined by at least 75 per cent (75%) of residents who vote at a meeting.

In making recommendation 33, the Review noted that there were not substantial responses to whether a quorum should be introduced, and the responses received generally favoured a low threshold. There is a strong risk that introducing a requirement for a quorum could impede necessary decision-making for the efficient administration of the village. After careful consideration, it is not proposed to introduce a requirement for a quorum. The Act already requires that residents must be given at least 15 business days written notice of the meeting, along with a statement of the proposed special resolution. This is considered sufficient time for a resident to consider the proposal and make arrangements to attend the meeting or vote by way of absentee vote.

3.2.3 Mandatory consultation with residents' committee in relation to annual budget

Mandatory consultation with residents' committee in relation to annual budget - Clause 30 (amendment of section 39)

Section 39 of the Act currently requires an operator of a retirement village to have two meetings with the village's residents' committee to discuss matters set out in section 33(6), including audited financial statements. Operators and residents' committees provided the Review with feedback that the audited statements are often not prepared in time for these meetings, and the Act needs clarification on this point.

The Review noted that both resident and operator respondents supported the provision of non-finalised statements for the purpose of the two meetings ahead of the Annual Meeting. It recommended that the Act should be amended so that the operator can provide unaudited financial statements (recommendations 31 and 32).

The Bill proposes to amend the Act to:

- require that the operator ensure recurrent charges and any potential increase are discussed at the two budget meetings (or one if agreed between the parties) held with the members of the residents' committee before the annual meeting is held, and
- permit the operator to provide non-finalised financial statements for the purposes of these meetings.

Question:

7. Do the proposed changes increase clarity around the convening of annual meetings and the documents that are required to be provided?
8. Do the proposed changes make clear the responsibility for minutes and clarify that consultation about the budget does not require finalised accounts?

3.3 RESIDENCE RULES

Residence rules - Clause 31 (Substitution of section 41)

The Review found that there should be a mechanism for dealing with retirement village disputes that may not necessarily otherwise fall within the scope of s 46(3)(c), such as a dispute arising from a village's rules. This supports recommendation 38, which is that the Act should permit the Tribunal to determine a wider range of disputes.

The Bill provides that if a residence rule or provision of a residence rule is harsh, oppressive, unconscionable or unjust, the rule or provision is void. It also broadens the type of matters the Tribunal can hear, to include disputes between an operator and resident relating to the application of a residence rule (see 3.8).

The Bill also provides greater clarity regarding the process for varying residence rules, including:

- a requirement that an operator can only alter residence rules by following requirements prescribed under the Regulations
- clarify that altering a residence rule includes varying a residence rule, adding a new rule or omitting a rule that is in force.

This section should be read in conjunction with 3.8 – Dispute resolution.

3.4 PROVISION OF REQUIRED DOCUMENTS TO RESIDENTS FREE OF CHARGE

Documents to be supplied to residents - Clause 32 (amendment of section 42)

The Review recommended that relevant insurance information should be provided to the Registrar and be made publicly available (recommendation 12).

While it is not the role of the Registrar to receive, monitor and make public the insurance information of villages, it is important that residents have access to this information to clearly understand what insurance provisions are in place at the village.

Section 42 of the Act currently requires an operator to provide certain documents to residents on request, including a copy of the residence contract, a copy of the residence rules and an estimated exit entitlement. The Bill expands on these requirements and will amend section 42 to:

- require an operator to provide a resident with details of current insurance policies concerning the retirement village, and
- require information provided under this section to be made available within 10 business days.

This section should be read in conjunction with 3.7 - Requirement to insure village.

Question

9. As an operator, will you be able to readily provide the required insurance information to a resident upon request?

3.5 EMERGENCY PLANS

Duty of operator to provide safe premises - Clause 33 (Insertion of section 43A)

The Act currently contains no requirements around emergency plans for retirement villages. There are different arrangements across retirement villages, including regarding how the *Work Health and Safety Act 2012* applies.

The Review considered that there should be obligations on operators in relation to emergency/evacuation plans and other health and safety requirements. It recommended that OFAW seek advice on whether there are any gaps in the regulatory framework and, if so, recommended that amendments should be considered (recommendation 42).

To ensure that all retirement villages have a robust and comprehensive response to emergency management within the village, the Bill amends the Act to make clear that each retirement village must ensure that the village is reasonably safe. Operators will be required to:

- prepare, maintain and implement emergency plans and make these available to residents
- take reasonable steps to ensure that all residents and staff are familiar with the emergency plan
- at least once a year, undertake a safety inspection of communal areas (if any), and make a safety inspection report on the findings of each inspection available to residents
- ensure that prescribed safety information is clearly displayed in communal areas (if any) within the retirement village and is provided to residents, and
- take such other action as required under the Regulations to ensure that the village generally is reasonably safe.

Prescribed safety information means:

- a map indicating the location of assembly areas, exits and fire extinguishers and other emergency equipment for the communal areas and residences concerned, and
- instructions concerning the evacuation of residents and staff from the communal area and residences concerned in the event of a fire or other emergency, and
- any other information of a kind prescribed by the Regulations.

Question

10. Do the proposed emergency planning requirements appropriately address risks to safety?

3.6 LEASE OF LAND

Lease of land in a retirement village - Clause 37 (Substitution of section 57)

Section 57 of the Act currently allows an operator to grant a lease or licence to occupy land within a retirement village to an eligible person (being a person retired from full-time employment and over the age of 55 years). This lease cannot be for more than five years, and rental tenants do not have the same rights as other retirement village residents. The Act does not provide for commercial leases in a retirement village (such as for a café or hairdresser).

The Review found the Act should provide separately for commercial and residential leases (recommendation 39). It also recommended that the five-year maximum term on residential leases should be removed from the Act and the Act should be updated to give rental tenants the same non-financial voting rights afforded to residents of retirement villages (recommendations 40 and 41).

As recommended by the Review, the Bill amends section 57 to provide separately for:

- lease of land within a retirement village for commercial purposes, and
- lease of a residence in a retirement village to a rental tenant (being an eligible person as defined under the Act).

It also amends the Act to:

- remove the maximum term of five years for residential leases, and
- update the rights of rental tenants to allow them to be elected as a member of a residents' committee, to participate in a meeting of residents and to vote on issues arising for consideration (other than issues directly related to the village's financial management).

Questions

11. Does the separation of residential and commercial rental within a village provide the clarity recommended by the Review?
12. Will these amendments improve the inclusion and participation of rental tenants in the village community?

3.7 REQUIREMENT TO INSURE RETIREMENT VILLAGE

Duty to insure - Clause 37 (Insertion of section 57C)

The Review found that current requirements for village insurance information in the Disclosure Statement do not ensure that a retirement village has appropriate insurance in place. It recommended that an operator's insurance information should be provided to the Registrar, be publicly available on the Register, and be kept up to date (recommendation 12).

While it is essential that retirement villages maintain adequate insurance, there is little benefit in requiring operators to provide information about their insurance arrangements to the Registrar for inclusion on the Register. Rather, it is important that this information is readily available to residents upon request.

The Bill proposes to amend the Act to make clear that that retirement villages must maintain adequate insurance that covers damage, costs incidental to the reinstatement or replacement of insured buildings, public liability, and provides for the reinstatement of property to its condition when new.

Questions

13. Are the proposed obligations regarding village insurance reasonable and appropriate?
14. For a resident, does the proposed amendment give you confidence that the appropriate level of insurance is held?

3.8 DISPUTE RESOLUTION

Dispute resolution - Clause 35 (amendment of section 45)

Application to Tribunal for the resolution of retirement village dispute - Clause 36 (amendment of section 46)

A transparent process for resolving disputes is beneficial to all parties. In 2018, the Act introduced important requirements around what should be included in a village's dispute resolution policy.

The Review considered the existing provisions relating to dispute resolution and recommended strengthening these to:

- expressly stipulate that an operator must follow its own dispute resolution policy and, only where agreed between the operator and resident, can some other dispute resolution approach (for example, mediation) be followed (recommendation 37), and
- permit the Tribunal to determine a wider range of disputes (recommendation 38).

In making these recommendations, the Review made clear that the jurisdiction of the Tribunal should be limited to disputes between operators and residents; and that it is not appropriate for the Tribunal to adjudicate disputes between residents.

The Review also suggested that the Tribunal should be empowered to issue a restraining order, but only if it is incidental to some other application before the Tribunal and not as an originating application. This aligns with the Tribunal's powers under the *Residential Tenancies Act 1995*.

As recommended by the Review, the Bill introduces amendments to:

- require an operator to follow its dispute resolution policy unless all parties agree to an alternative approach
- define 'retirement village dispute' to mean a dispute between an operator of a retirement village and a resident of the retirement village about the parties' rights and obligations under the Act or the resident's residence contract, and includes a dispute arising in connection with the application of a residence rule
- broaden the Tribunal's ability to make orders regarding retirement village disputes
- allow the Tribunal to order that a residence rule or provision of a residence rule is void or modified, and
- allow the Tribunal to issue a restraining order in connection with applications before the Tribunal, if the Tribunal is satisfied that there is a risk the person will engage in the conduct, and the conduct will result in a breach of the Act, residence contract or residence rule.

Question

15. Will the proposed amendment to broaden the matters that the Tribunal can hear capture common disputes that arise between an operator and resident?

3.9 MANAGEMENT OF RETIREMENT VILLAGES

Codes of Conduct - Clause 41 (amendment of section 63)

The *Retirement Village Regulations 2017* contain a high-level Operator and Residents Code of Conduct in Schedule 1.

The Review found there should be a training requirement about the Code of Conduct for retirement village staff (recommendation 4). It noted that adherence to the Code of Conduct in the Regulations should be supported by minimum training requirements and that there is a spectrum of approaches available to achieve this.

The Bill amends the Act to:

- make clear that the Regulations may prescribe codes of conduct to be observed by operators, village managers, senior managers, other retirement village staff and residents of retirement villages (currently there is only provision to make codes of conduct for operators and residents)
- extend the penalty provisions relating to breaching a relevant code of conduct to village managers, senior managers and other persons employed or engaged to work at the retirement village
- require the operator of a retirement village to ensure that staff at a retirement village undertake training (of a kind approved by the Minister) in respect of the code of conduct applying to them upon employment and then every three years
- require an operator to ensure retirement village staff undertake training on the village's operational policies and procedures, as appropriate to their roles and responsibilities, and
- provide a 12-month transitional period for existing retirement village operators and staff to complete training requirements.

This training will form an important component of requiring a person to be 'fit and proper' to work in the industry and should be read in conjunction with 3.11 Disqualified persons.

The Review also recommended that the Disclosure Statement should include whether or not the operator is a signatory to the voluntary industry Code of Conduct and is accredited (Recommendation 2). This recommendation is not supported.

Schedule 1 of the Regulations provides a comprehensive, mandatory and enforceable code of conduct applicable to all operators and residents. Under the Act, this Code of Conduct must be provided to a prospective resident at least 10 business days before a person, enters into a residence contract. It is preferable that all operators and staff are required to adhere to the state-based and enforceable Code of Conduct contained within the Retirement Village Regulations that has been specifically developed for the South Australian context.

An update of the Operator and Residents Code of Conduct in Schedule 1 is also planned and there will be opportunities to provide feedback once this occurs.

Question

16. Is the 12-month transitional period for existing retirement village operators and staff to complete training requirements reasonable and appropriate?

3.10 DISQUALIFIED PERSONS

Disqualified persons not to be involved in certain roles or functions at retirement villages - Clause 40 (Substitution of section 60)

Currently, section 60 of the Act provides that certain people are disqualified from being involved in the administration of a retirement village. This applies to people who are insolvent or have been convicted of, or imprisoned for, an offence to the person or an offence involving fraud or dishonesty in the past five years.

The Review observed that retirement village operators and senior staff can be in a position of power in relation to retirement village residents and that it is important that suitably trained individuals who are fit and proper persons fulfil these roles. For this reason, the Review recommended that there should be some type of fitness and propriety test for operators, senior managers and village managers (recommendation 5).

The Bill introduces additional probity requirements that must be met by retirement village operators, senior managers and village managers. This includes expanding the circumstances in which a person is disqualified from operating or undertaking certain roles and functions within a retirement village to include:

- where a person has been found guilty of an offence relating to rape or other sexual offences, or
- where a person has been convicted of, or served a sentence of imprisonment for, an offence against the person or an offence involving fraud or dishonesty in the last five years.

A disqualified person is prohibited from being an operator, senior manager or village manager. An operator is also guilty of an offence if they engage a disqualified person as a senior manager or village manager.

These proposed amendments are supported by those outlined in 3.10 Management of retirement villages, which establish new ongoing training requirements for retirement village operators, senior managers and village managers. Together, these provisions establish a framework for increased accountability and training, promoting deeper consideration of whether a person is ‘fit and proper’ to work in a retirement village.

In making Recommendation 5, the Review noted that one option for introducing a fit and proper test would be to require operators and certain staff to obtain a screening check from the Department for Human Services. This option was explored but not considered feasible as the Department for Human Services does not currently offer a suitable screening product and it is not feasible at this time to establish a new scheme. This would involve considerable costs which would ultimately be passed from operators to residents. A preferable approach is to expand the types of offences that will disqualify a person from working in the retirement village sector. This, combined with a strong focus of professional standards, training and professional development, will provide a robust framework for ensuring unsuitable people are not engaged to work in the retirement village industry.

Question

17. Do you agree with the expanded list of offences that will disqualify a person from being an operator of a retirement village or being engaged as a senior manager or village manager? Are there any additional offences that should be included?



PART 4 AMENDMENTS APPLICABLE TO LEAVING A VILLAGE

4.1 TERMINATION OF RESIDENTS' RIGHTS

Termination of residents' rights - Clause 34 (amendment of section 44)

Section 44 of the Act contains information about what happens when a resident terminates their right of occupation or when an operator applies to the Tribunal to terminate a resident's right of occupation.

4.1.1 Termination during the settling-in period

The Act allows residents to terminate their residence contract during a 90-day settling-in period. The settling-in period aims to allow a resident to terminate their residence contract without paying the exit fees that would apply if they terminated after this time.

Under the Act, if the resident terminates during the settling-in period, they are liable to pay fair market rent minus any amount paid for services that would otherwise be included in the assessment of fair market rent. The resident is also responsible for other amounts payable under the residence contract. The Act prohibits residents from being charged a penalty for terminating during this period.

The Review found that this provision does not adequately clarify the fees to be charged if a resident terminates during this period and what would be considered a penalty. It recommended that the Act should provide better protection for residents who terminate during the settling-in period (recommendation 26).

In line with this recommendation, the Bill amends section 44 of the Act to clarify that where a resident terminates during the settling-in period, the resident is liable to pay only:

- fair market rent instead of the maintenance fee, or where a maintenance fee is charged, this must be deducted from the fair market rent
- remarketing fees
- a refurbishment fee in exceptional circumstances only, such as if refurbishment is necessary due to damage that occurred during the resident's occupation.

4.1.2 Termination of a resident's right of occupancy

The Review noted that there is confusion around the process when an operator applies to the Tribunal to terminate a resident's right of occupancy. The current procedure requires the operator to apply to the Tribunal before providing notice to the resident.

The Review recommended that the sequence should be altered, so that the notice to terminate is provided to the resident and then lodged as an application with the Tribunal (recommendation 43).

As recommended, the Bill proposes to amend section 44 to require that an operator give the resident a notice of intention to terminate at least five business days before lodging a termination application with the Tribunal.

4.1.3 Abandoned property

Regulations – Clause 47 (amendment of section 69)

The Review observed that the Act is currently silent on the management of abandoned property. It recommended that the Act should provide a clear process in relation to abandoned goods when a residence is vacated, including timeframes and appropriate warning and communication with the former resident or their representative (recommendation 54).

The Bill amends the Act to allow the Regulations to make provisions concerning property left at a residence by a resident who has ceased to reside in the retirement village (abandoned property). Office for Ageing Well will conduct a separate consultation with operators, residents and other interested parties to develop a clear process for managing abandoned goods.

Questions

18. Do the proposed amendments provide better protection for residents who terminate during the settling-in period?
19. Will the proposed amendments enable a resident to leave during this period without accruing significant fees and charges?

4.2 EXIT ENTITLEMENTS

Exit Entitlements - Clause 19 and 20 (amendment of section 27)

4.2.1 Timeframe for payment of exit entitlement

In 2018, the Act introduced a requirement for operators to pay an exit entitlement 18 months after a resident vacated their residence if it has not already been paid under the terms of the contract. The Act also introduced a provision for a resident to provide the operator with their notice to terminate their licence and remain living in the residence while it is remarketed. In this situation, the resident must vacate the residence a clear three months before receiving their exit entitlement.

The Review noted that while resident submissions found the 18-month period too long, operators believed it should not be shortened. The Review ultimately found that more data on vacant possession and the re-licensing period for residences is required to make appropriate recommendations around exit entitlements.

To ensure the exit repayment model strikes the most appropriate balance for operators and residents in the South Australian context, the Bill provides two alternative models for the repayment of exit entitlements. These are based on the approaches currently in place or being implemented in other States.

These jurisdictions recently strengthened (or are strengthening) their statutory models relating to repayment periods following legislative review and South Australia may also benefit from the introduction of a similar model.

Any reform to exit entitlement arrangements in South Australia will need to ensure certainty for residents regarding the timeframe for repayment of their entitlements when they permanently vacate a residence, while still providing operators with adequate time to remarket the residence.

OPTION 1 (CLAUSE 19)

Option 1 reflects the statutory repayment model implemented in New South Wales. This option will allow some residents to apply for a Tribunal order to receive their calculated exit entitlement within a specified period.

Under this option, where all of the below criteria are met, the Tribunal may make an order only if satisfied that the operator has unreasonably delayed the remarketing of the residence.

This option proposes amendments to the Act to provide that a resident who has ceased to reside in a retirement village can apply to the Tribunal for an order that the operator pays their exit entitlement if all the following conditions are met:

- the residence contract entitles the resident to at least 50 per cent (50%) of any capital gain, and
- a sale price has been agreed between the resident and operator, or an independent valuation has been obtained within 30 days of the application, and
- the operator is not making payments on behalf of the resident to an aged care facility under section 30 of the Act, and
- the relevant prescribed period has passed.

The relevant prescribed period is:

- if the residence is located within metropolitan Adelaide – six months (plus 20 business days for refurbishment) have passed since the resident provided vacant possession, or
- in any other case – 12 months (plus 20 business days for refurbishment) since the resident delivered vacant possession of the residence.

In the event that a resident is ineligible to apply for early repayment (that is, the resident does not meet the conditions described above), they are to be repaid in accordance with their contract or 18 months if the residence is not relicensed sooner.

It is important to recognise that all jurisdictions operate differently. In providing feedback on this option, respondents should carefully consider the South Australian context, including the average timeframes² for relicensing a premises.

The ability for a resident to provide notice that they wish to remain in occupation of their residence while it is being re-licensed has been removed. However, transitional arrangements are provided for situations where a resident gave notice before the commencement of the proposed amendment.

² <https://f.hubspotusercontent40.net/hubfs/2095495/2021%20PwC%20Property%20Council%20Retirement%20Census%20Snapshot%20Report.pdf>

Questions for operators

20. Do you support this option being implemented?
21. If yes, are there any changes you would make?
22. If you do not support this option, why not?
23. Is the proposed 20-business-day refurbishment period feasible?
If not, why not?

Questions for residents

24. In this model, is it clear that it is the responsibility of the resident to make an application to the Tribunal if all the relevant conditions are met?
25. In this model, is it clear that the Tribunal is only empowered to make an order if it is satisfied that the operator has unreasonably delayed the remarketing of the residence and in all other circumstances the existing 18-month repayment period will continue to apply?
26. Do you support this option?
27. If yes, are there any changes you would suggest?
28. If you do not support this option, why not?

OPTION 2 (CLAUSE 20)

Option 2 reflects the timeframe proposed in the final report of the independent review of timelines for exit payments in Queensland retirement villages.

Option 2 proposes to amend the Act to:

- reduce the statutory payment period for all exit entitlements to 12 months (plus 20 business days for refurbishment), and
- remove the ability for a resident to remain in-situ while a residence is re-licensed.

The 12-month period begins 20 business days after the resident vacates to allow time for the operator to refurbish the residence. It applies if the exit entitlement has not become due earlier under the terms of the contract.

Questions for operators

29. Do you support this option being implemented?
30. If yes, are there any changes you would make?
31. If you do not support this option, why not?
32. Is the proposed 20-business-day refurbishment period feasible?
If not, why not?

Questions for residents

33. In this model, is it clear that the operator is responsible for paying the exit entitlement within the statutory period and that no application to the Tribunal is necessary?
34. In this model, is it clear that the timeframe for the statutory repayment of an exit entitlement is 12 months, plus an additional 20 business days for refurbishment?
35. Do you support this option?
36. If yes, are there any changes you would suggest?
37. If you do not support this option, why not?

OPTION 3

Maintain status quo

Under option 3, the existing provisions relating to the payment of exit entitlements will be retained.

This includes that the exit entitlement becomes payable when:

- specified conditions are fulfilled under the residence contract, or
- 18 months have passed since the resident left the residence vacant, or
- 18 months have passed since the resident gave written notice that they were leaving the residence, the last three months of which the resident did, in fact, leave the residence vacant, or
- the operator otherwise agrees to pay the exit entitlement earlier.

38. Is it clear that this model will retain the existing provisions relating to the statutory repayment of exit entitlements set out in the Act?
39. If yes, are there any changes you would suggest?
40. If you do not support this option, why not?

Under all options, an operator can apply to the Tribunal for an extension of the period to pay the resident the exit entitlement. The Tribunal can take into account any matter that it considers relevant when considering an operator's application for an extension of time. This allows for consideration of extraordinary circumstances, such as the impact of COVID-19.

The Tribunal can also consider any possible financial hardship for the operator if the order is not made, and whether the operator has taken reasonable steps to fulfil the conditions specified in the residence contract for the payment of the exit entitlement (such as remarketing conditions).

4.2.2 Requirement to provide details for payment of exit entitlements

The Act requires an operator to pay an exit entitlement within 10 business days but does not require a person to provide details to the operator to enable them to make the payment.

The Bill amends exit entitlement provisions to ensure it is not an offence where an operator does not pay an exit entitlement within 10 business days but has a reasonable excuse. This amendment would cover situations such as those mentioned above where a person fails to provide an operator with the details necessary for them to make a payment (recommendation 50).

4.2.3 Payment of capital fund contributions deducted from exit entitlement

Payment of capital fund contributions deducted from exit entitlement – Clause 21 (amendment of section 28)

In 2018, the Act introduced the requirement that all fees and charges a person is responsible for when leaving a village must be included in the Disclosure Statement. However, the Review found that exit fees remain a source of complaint for residents. It recommended further consultation should occur regarding the inclusion of any specific provisions relating to Capital Maintenance and Replacement fees in the draft Bill (recommendation 29).

It is important that contributions to capital funds deducted from the exit entitlement are fair and transparent. The Bill introduces amendments to prescribe that if any amounts are deducted from an exit entitlement as contributions to capital funds, then the amount deducted must not exceed the lesser of the following:

- one per cent (1%) of the current market value of the residence to which the exit entitlement relates, multiplied by the number of years (including any part years) of occupation of the residence under the residence contract, or
- an amount that is 12.5 per cent (12.5%) of the current market value of the residence to which the exit entitlement relates.

This provision provides a cap on the deductions. If the residence contract provides for some lesser amount as the deduction, then this provision will not apply.

For the purpose of the proposed amendments, current market value is defined as:

- the amount paid by the new purchaser as an ingoing contribution if the residence has been relicensed, or
- in any other case, calculated in the manner provided in the residence contract but as if the consideration paid on the sale of the right to reside in the retirement village was the current market value of the residence.

These amendments would apply to residence contracts entered into before and after the commencement of these changes.

Questions

41. Do you support the introduction of a cap to contributions to a Capital Fund?
42. Is the percentage reasonable? If no, what should it be?
43. Will the capping of Capital Fund contributions affect the operations of the village?

4.3 ARRANGEMENTS IF RESIDENT IS ABSENT OR LEAVES

Arrangements if resident is absent or leaves - Clause 22 (amendment of section 29)

The Review noted that it was accepted that a resident is responsible for the payment of recurrent charges for a maximum period of six months after leaving a village. For many residents, rates and levies are included in the recurrent charge. The Review observed that it is a matter of frustration for other residents that 'recurrent-like' charges such as council and water rates, and the emergency services levy continue to be charged beyond the six-month period. These things are usually payable by the owner of the property.

The Review noted that respondent submissions had varied views on this topic, with resident respondents supporting greater clarity about what can be charged for during the six-month period and operator respondents being of the view that these details are already covered in the Disclosure Statement and residence contract.

The Review found that any regular charges from an operator to a resident, such as water or council rates, that are not included in the recurrent charge as defined in the Disclosure Statement and contract, should, if charged on exit at all, be capped at six months on exit. In doing so, the Review proposed that the Better Practice Guidelines be updated (recommendation 47).

It is essential that the fees and charges that a resident is liable for after exiting a village are fair, consistent and transparent. For this reason, in addition to updating the Better Practice Guidelines, the Bill introduces an amendment that limits the liability of a former resident to pay recurrent and recurrent-like charges to a maximum of six months.

This proposed amendment is intended to provide certainty for residents regarding what their obligations are with respect to recurrent and recurrent-like charges and brings the timeline for which the resident is responsible for these types of charges in line with other recurrent charges.

4.4 REMARKETING

Currently, the Act requires that an operator have a remarketing policy. During the review period a small number of respondents provided feedback regarding the process of remarketing, with a particular focus on the process, costs and timeframe. In addition, the Review observed that the practice of some operators charging a marketing fee or commission in relation to exiting a village and remarketing of a unit was a contentious issue, given operators are generally not regulated by the *Land Agents Act 1994*.

The Review recommended that the legislative reach of these activities be considered (recommendation 3). It also recommended that relevant definitions be considered as part of the response to recommendation 52, which relates to Topic 2.30 of the discussion paper released in 2021.

To address the matters raised by the Review, the Bill defines remarketing as ‘the activity undertaken by or on behalf of the operator in advertising or otherwise marketing the sale of a right of occupation of the residence’ (Clause 3). It also proposes amendment to prevent an operator from charging a resident remarketing fees that are not contained in the contract. If the contract was entered into before the commencement of the amendment, the remarketing fee cannot exceed the reasonable costs incurred by the operator in relation to the remarketing of the residence.

The existing provision allowing a resident to undertake their own remarketing after nine months, has been removed (Clause 26). This provision will no longer be necessary if amendments to exit entitlements outlined at paragraph 4.2 are adopted.



PART 5 MISCELLANEOUS

5.1 REGISTRATION AND TERMINATION OF A RETIREMENT VILLAGE SCHEME

5.1.1 Termination of a retirement village scheme

Termination of a retirement village scheme - Clause 39 (Insertion of section 59A)

The Review found the Act needed to include clear obligations for operators wishing to terminate an occupied village, including the obligation to ensure that residents are afforded a reasonable opportunity to seek legal advice (recommendation 57).

The Bill amends the Act to state that an operator must:

- notify the Registrar in writing of their proposal to terminate before commencing discussions with residents about terminating a retirement village, and
- notify each resident in writing of the proposed application and grounds for termination, and a recommendation and reasonable time within which to seek legal advice.

The Bill also provides that the Registrar may require the operator to reimburse reasonable legal costs of residents seeking advice and notify residents that they are entitled to reimbursement.

5.1.2 Voluntary termination of a retirement village scheme

Voluntary termination of a retirement village scheme – Clause 38 (amendment of section 59)

The Review found that the Act does not clearly state that the Minister can make a determination to terminate a scheme where there are no residents remaining and also noted that the Act does not specifically cover a scenario where an operator wishes to terminate just one site of a multiple site village.

The Review recommended that the Act should clarify that the Minister can make a determination to terminate a retirement village scheme even where there are no residents living in the village (recommendation 56).

The Bill amends section 59 of the Act to:

- clarify that the Minister can decide to terminate a retirement village scheme even when there are no residents living in the village, and
- clarify that the Minister may terminate part of a retirement village scheme.

5.2 REGISTRATION OF MULTI-SITE VILLAGES

Notification of information required for register – Clause 10 (amendment of section 13)

The Bill amends section 13 to allow the registration of a single retirement village to consist of multiple sites. This is an administrative amendment that reflects what already occurs in practice, where retirement villages may consist of several sites that share common community areas (Clause 10).

5.3 CONSULTATION WITH NEW OPERATOR

Consultation with new operator – Clause 29 (amendment of section 36)

The Bill clarifies that before a change of operator occurs, a meeting of residents must be called by the current operator 10 business days prior to the change taking effect. This provision clarifies that the existing operator calls the meeting to introduce the new operator and provide an opportunity for the new operator to answer any questions and present any plans for the village.

If the change of operator occurs without this required meeting, both former and new operators are guilty of an offence.

Question

44. Are the obligations for operators wishing to modify or terminate an occupied village clear?

5.4 REGISTRAR

5.4.1 Registrar's functions

Registrar's functions - Clause 5 (amendment of section 7)

Part 2, Division 1 of the Act establishes that the Minister must appoint a Public Service employee to be the Registrar under the Act. The Bill updates section 7 of the Act to provide a comprehensive description of the current role and responsibilities of the Registrar, as well as the additional functions recommended by the Review.

The Bill amends the Act to provide that the Registrar's functions are to -

- provide guidance and advice to operators of retirement villages in relation to the operation of, and matters arising under the Act, in particular, the obligations of operators under the Act, and
- provide guidance and advice to residents and prospective residents of retirement villages in relation to the operation of the Act, in particular, the rights and liabilities of residents and prospective residents under a residence contract and the Code of Conduct, and
- gather and maintain current information about retirement villages and retirement village schemes in South Australia, in particular, information about the operations of retirement villages, such as information relating to occupation rates, ingoing contributions, recurrent charges, exit entitlements, dispute resolution, terminations of residence contracts, enforceable voluntary undertakings and prosecutions for offences against the Act, and
- advise the Minister on the operation of the Act, and
- perform any other function assigned to the Registrar by the Minister.

5.4.2 Registrar's power to require information

Registrar's power to require information - Clause 6 (amendment of section 8)

The Review made a number of recommendations relating to the types of information that should be gathered by the Registrar (see, for example, recommendations 10 and 48). This includes information relating to formal enforcement action, Tribunal proceedings, average length of time for an exit entitlement to be paid out by a village, and entry and exit contribution payments of a village.

The Bill proposes to amend the Act to allow the Registrar to gather information about the retirement village sector and operations, where the Registrar reasonably requires the information for the performance of the Registrar's functions. The requirement that information must be provided to the Registrar by statutory declaration is also amended to provide the Registrar with discretion regarding when a statutory declaration may be required.

This amendment will ensure that the Registrar is able to gather the information required to fulfil their functions, while minimising the resource impact on operators. Information will only be sought where it is required to fulfil the Registrar's functions under the Act. In addition, in many cases the information sharing process will be streamlined and operators will be able to upload a broader range of information directly onto a new secure online platform rather than be required to verify the information by statutory declaration.

This should be read in conjunction with paragraph 5.4 - Registrar.

5.4.3 Registrar's obligation to preserve confidentiality

Registrar's obligation to preserve confidentiality - Clause 7 (Repeal of section 9)

The Review observed that while the Registrar is permitted to include information that the Registrar considers appropriate, section 9 of the Act imposes confidentiality obligations on the Registrar. It noted that section 9 does not promote transparency and is not a common encumbrance for State regulators. It will also operate to impede the Registrar in publishing enhanced information as part of the Register.

For these reasons, the Review recommended that confidentiality obligations on the Registrar in section 9 should be removed or amended to enable disclosure of compliance matters on the Register (recommendation 8).

The Bill amends the Act to remove section 9 and the Registrar's obligation to preserve the confidentiality of information gained in performing the Registrar's functions under the Act. This will enable the Registrar discretion to disclose compliance and other relevant matters on the Register. This amendment will ensure transparency of compliance actions and enable prospective residents, residents and operators to be aware of non-compliance.

This amendment ensures consistency with the objects of the Act and brings the Act in line with equivalent legislation in other states with no confidentiality obligations.

The Bill will also amend section 14 of the Act to provide that the Registrar is an authorised officer for the purposes of the Act. This is an administrative amendment to enable the Registrar to effectively fulfil their functions under the Act.

Question

45. Do you think the draft Bill captures all of the powers required to fulfil the functions of the Registrar?

5.5 REGISTER

Register - Clause 9 and 10 (amendment to Sections 12 and 13)

Section 12 of the Act establishes the requirement for the Registrar to maintain a Register which contains information about retirement villages in South Australia.

The Review suggested an investment in, and overhaul of, the Register to enable greater use and accessibility to inform decision-making by multiple parties. It recommended that the Register should be published online, with easily navigable functionality (recommendation 9). This will increase the ability of residents, prospective residents and other interested parties to easily find information about retirement villages.

The Review also recommended additional information on individual retirement villages should be collected and made easily accessible to prospective residents via the Register (recommendation 10).

Amendments in the Bill strengthen the Registrar's ability to seek a broader range of information under the Act. The Bill allows information that the Registrar obtains under the Act to be published on the Register at the Registrar's discretion.

The Bill proposes to amend the Act to enable the following information to be included on the Register (at the Registrar's discretion):

- enforceable voluntary undertakings
- findings of guilt for offences under the Act
- information about Tribunal or criminal proceedings of which the Registrar is aware, where the Registrar considers it is in the public interest to include information about the proceedings on the Register.

The Bill also proposes amendments stipulating that the Register be published online and be publicly available.

Questions

46. Do the proposed changes achieve the intent of making the Register a significant source of information about the operation of the retirement village sector in South Australia?
47. Is it clear that while the Registrar has increased information gathering powers to fulfil their functions under the Act, not all information will form part of the Register or be made publicly available?

5.6 ENFORCING THE ACT

5.6.1 Enforceable voluntary undertakings

Enforceable voluntary undertakings - Clause 43 (Insertion of section 64A)

The Review found that it would be beneficial to have additional enforcement actions available under the Act. Currently, enforcement actions are limited to prosecution or expiation. Additional enforcement options, such as warnings and undertakings, would align with the current practice of an escalating enforcement response.

The Review observed that a model of enforceable undertakings (which is a written, legally binding commitment to implement effective initiatives) operates in other scenarios as an alternative to a prosecution for some types of alleged contraventions. It noted an enforceable undertaking aims to:

- protect the public
- prevent similar future breaches from occurring
- change the compliance culture of an organisation, and
- correct the effect of the contravention.

The Review recommended that a model of enforceable undertaking should be considered by the Minister for inclusion in the legislation. Consideration should be given as to whether any of the enforcement action contemplated in the OFAW Enforcement Framework would benefit from legislative backing (recommendation 6).

The inclusion of additional enforcement actions under the Act will support a risk-based approach to enforcement of the Act. The Bill amends the Act to allow the Minister to accept a written undertaking in connection with a matter relating to a contravention or alleged contravention of the Act.

Under the proposed amendment, an enforceable voluntary undertaking:

- will not constitute an admission of guilt in relation to the contravention or alleged contravention, and
- can be varied or withdrawn at any time with the written agreement of the Minister.

Other features include:

- a breach of an undertaking will be considered an offence, and the Minister may apply to the Magistrate's Court to enforce the undertaking
- the Minister will notify the Registrar of the acceptance of an undertaking and provide the Registrar with a copy of the undertaking and details of the contravention or alleged contravention to which the undertaking relates
- no proceedings may be brought for a contravention or alleged contravention of the Act against a person if an undertaking is in effect in relation to that contravention or if the undertaking has been completely discharged
- an undertaking will not prevent the Minister from bringing proceedings for the contravention or alleged contravention of the Act to which the undertaking relates if the Minister receives additional information relating to the contravention that they consider significantly increases the seriousness or extent of the contravention, and
- the Minister will be empowered to accept an undertaking before proceedings have been finalised.

Question

48. Do the proposed reforms provide appropriate legislative backing to support a risk-based approach to enforcement of the Act?

5.6.2 Offences

Offences - Clause 44 (amendment of section 65)

The Bill amends the Act to require the Minister or a person who commences prosecution for an offence against the Act to notify the Registrar of the prosecution, provide details of the prosecution, and notify the Registrar of the outcome of the prosecution.

5.6.3 Limitation period for prosecutions

Limitation period for prosecutions - Clause 45 (Insertion of sections 65A and 65B)

Breaches of legislation will often not come to the attention of the administrators of the Act within the timeframe given in the Act. For example, breach of contract and Disclosure Statement requirements may not come to light until a resident has been in a village for many years or leaves the village.

For this reason, the Review recommended that the Act should permit a prosecution to be brought within two years after an offence first comes to the attention of the regulator (recommendation 59).

The Bill amends the Act to set out prosecution timelines to allow proceedings for an offence against the Act to be brought within the latest of the following periods:

- Within two years after the offence first came to the notice of the Minister.
- If an enforceable undertaking has been given concerning the offence within six months after:
 - the undertaking is contravened, or
 - it comes to the notice of the Registrar that the undertaking has been contravened, or
 - the Minister has agreed to the revocation of the undertaking.

These amendments only apply to proceedings for an offence where the conduct constituting the offence was engaged in after these amendments commenced.

5.7 PUBLICATION IN THE PUBLIC INTEREST

The Bill amends the Act to allow the Minister to publish information relating to any action taken by the Minister in connection with the enforcement of the Act if the Minister believes that it is in the public interest to do so.

5.8 REVIEW OF THE ACT

Review of Act - Clause 46 (amendment of section 68)

Recommendation 11 of the Review is that to enable a more fulsome passage of time since the Act commenced and increase the amount and detail of data collected, the Act should provide for a future review, being five years after the commencement of any Amendment Act.

The Bill amends section 68 of the Act to require the Minister to review the operation of the Amendment Act five years after its commencement.

For more information

Office for Ageing Well
Department for Health and Wellbeing
11 Hindmarsh Square
Adelaide 5000
Telephone: (08) 8204 2420
www.sahealth.sa.gov.au

Public I2 – A2



<https://creativecommons.org/licenses/>

© Department for Health and Wellbeing, Government of South Australia.
All rights reserved. FIS: 230031 March 2023