Review of the *Retirement Villages Act 2016* (SA)

SEPTEMBER 2021

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Executive Summary

The *Retirement Villages Act 2016* (the Act) was introduced in order to improve consumer protections for residents of retirement villages, whilst achieving a balance between the rights and responsibilities of residents and operators of retirement villages. This purpose provides the framing of this Review's considerations.

The Act was one element of measures implemented to improve the operation of the retirement village sector. The other two elements were the production of Better Practice Guidelines aimed at promoting best practice amongst retirement village operators and the commencement of an advocacy service for retirement village residents, through the Aged Rights Advocacy Service.

The Review considers that these reforms have contributed significantly to improvements in the sector. However, submissions made in response to the Discussion Paper that initiated this Review identified many issues. It is not practical to respond to every suggestion that was made or every view that has been put in submissions. This Report provides recommendations on the most significant issues that were identified. Any changes to be made to the Act should be the subject of specific consultation.

This Report of the Review is presented in three Parts.

Part 1 of the Report provides the context of the Review, the legislative background and sector context.

Part 2 considers if the Act's intended outcomes are being achieved and the Review's conclusions based on themes that emerged from submissions. The key recommendations in this part of the Report focus on the need to enhance the Registrar's scope of powers, including increased compliance and enforcement powers, and to improve the use of the Register so that more information is publicly available, and a more robust, risk-based model of monitoring and oversight can be achieved.

Part 3 considers the feedback on the Discussion Paper released by the Office for Ageing Well (OFAW) and makes specific recommendations to amend the Act. It follows the structure of the Discussion Paper, framing the issues against the context of the residents' retirement village journey of before entering a village, while a resident, and exiting a village.

In considering matters before someone enters a village, there is a spectrum of operator performance. There is not a consistent approach by operators to ensure transparency and informed decision-making to the level intended by the Act. The Review considers generally that those operators who demonstrate best practice should not be further burdened by regulation, but those who do not should have obligations in this area enforced. The Review

considers there is also a need for increased awareness of what a resident is purchasing, and what the associated costs are, before they sign a residence contract.

For matters concerned with living in a retirement village, the Review found that issues relating to governance, definitions, and obligations could be strengthened, but that not all solutions sit with changes to the legislation - some are policy and practice based.

For matters relating to exiting a village, most submissions highlighted that the fees and terms for payments require attention. However, the views of operators and residents are inevitably diametrically opposed on this issue. The Review considers that insufficient time has lapsed, and insufficient data is available, to determine whether the 18-month exit payment time frame could be reduced without adversely impacting operators. However, recommendations are made to provide greater clarity about a range of fees.

While this Review is focused on the legislation, the nature of issues raised were often complex and potential solutions or improvements sat across the Act, guidelines, policy, or practice. As a result, there are four different avenues of change recommended:

- Legislative changes to the *Retirement Villages Act 2016* and the *Retirement Villages Regulations 2017*
- Policy changes that could be implemented by the Registrar within the scope of her current legislative powers
- Better Practice Guidelines changes that could give better effect to the intention of the Act
- Issues which may require legislative change, but which the Review was not satisfied it had the required information to make a recommendation at this point in time.

A summary of recommendations against these four avenues of change is provided below.

Table of Recommendations

LEGISLATIVE CHANGE RECOMMENDATIONS Where a recommendation refers to the Act, this means either the Act or Regulations as appropriate.		
Issue	**No.**	**Recommendation**
Disclosure Statement: Code of Conduct and Accreditation	2	The Disclosure Statement should include whether or not the Operator is a signatory to the Code of Conduct and is accredited. If the Code of Conduct signatory or accreditation status changes during the life of the resident's contract, the operator should be required to notify the resident of this fact, stating the reasons for it and actions to be taken.
Training	4	There should be a training requirement about the Code of Conduct for retirement village staff.
Village Management	5	The Act should require village managers, senior managers and operators to meet a fit and proper person test.
Enforcement Options	6	Additional enforcement options should be available to the regulator under the Act. 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.
Confidentiality	8	Confidentiality obligations on the Registrar in section 9 should be removed or amended to enable disclosure of compliance matters on the Register.
Future Review	11	To enable a more fulsome passage of time since the commencement of the Act and increased and more detailed data collection, the Act should provide for a future review, five years after the commencement of any Amendment Bill.
Village Rules	13	The Act should address the process of amendment for residence rules.
Deposits	14	The Act should make clear what the obligations and rights are in relation to any deposit paid by a prospective resident.
Disclosure Statements – Embedded Networks	15	Section 21(2)(iii) should be amended to make it clear in a Disclosure Statement if a resident is required to purchase utilities or services from particular providers.

Disclosure Statement: Exit Fees	16	A Disclosure Statement should include worked calculations for a prospective resident exiting the village at the two, five and 10-year mark. Calculations are to be sufficiently detailed to provide clarity about all exit costs and include clear explanations of inbuilt assumptions.
Contract: Services and Facilities	20	Regulation 5, which requires an operator to set out details of services and facilities available in a retirement village in the residence contract, should be amended to specify this only relates to services and facilities provided or arranged by the operator.
Disclosure Period	22	The Act should allow a waiver of the 10-business day disclosure period if a prospective resident has obtained legal advice.
Cooling-Off: Reimbursement	23	In the event the contract is formally rescinded as per the cooling-off provisions, the Act should require any funds paid by the new resident to be reimbursed, not including interest, within a 10-business day period.
Premises Condition Report	24	The Act should require that the Premises Condition Report is provided as early as possible to the incoming resident. The cooling off period should not be able to be waived if a resident has not received the premises condition report, and if the premises condition report is not provided prior to the signing of the contract, the entitlement to cool-off should run from the date of provision of the premises condition report.
Settling In: Termination	26	The Act should provide better protection for residents who terminate during the settling- in period.
Audit Statements	27	The Act should require audit statements to be able to be clearly compared with financial reports and budgets.
Audit Statements: Annual Meeting	28	The Act should be amended to 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.
Fees: Recurrent Charge Increase	30	The Act should provide greater protection to residents in relation to increasing recurrent charges.
Fees: Consultation obligations	31	An operator is required to meet with a resident's committee twice (or once if the committee agree) before the Annual Meeting to discuss the budget. The Act should mandate that recurrent charges, and any potential increase, be discussed at this time.

Committees: Annual Budget	32	The Act should provide that for the purpose of section 38, the operator is allowed to provide non-finalised financial statements.
Special Resolution and Quorum	33	The Act should clarify the Special Resolution provision applies to 75% of those present (or absentee voting) and for a quorum.
Committee Minutes	34	Regulation 12 should be amended to clarify that the requirement of a Resident's Committee to provide an operator with minutes after a meeting of the committee has occurred includes the annual meeting.
Committee Rules	35	A simple, default set of rules for a Resident Committee should be included in the Regulations.
Dispute Resolution Policy	37	The Act should provide that an operator must follow its dispute resolution policy, and only where agreed between the operator and resident, can some other dispute resolution approach (e.g. mediation) be followed.
Disputes: Jurisdiction	38	The Act should permit SACAT to determine a wider range of disputes.
Leases	39	The Act should provide separately for commercial and residential leases in retirement villages.
Residential Lease Term	40	The five-year maximum lease term on residential leases should be removed from the Act.
Rental Tenants	41	The rights of rental tenants within retirement villages should be updated to give them the same non-financial voting rights afforded to residents of retirement villages; and to avoid duplication, otherwise they should have the same rights and obligations as rental tenants under the *Residential Tenancies Act*.
Termination Notice	43	The Act should require that the operator give the resident a notice of intention to terminate before lodging a termination application with the tribunal.
Notice to Vacate: Remaining in Residence	44	The Act should be amended to clarify that the resident can continue to live in the residence after giving the notice of intention to vacate, but that the operator does not have to pay the exit entitlement until the residence has been vacant for a period of three months (or when the specified conditions of a contract are fulfilled).
Alterations	45	The Act should require the operator to include a clause in the residence contract, which outlines: a) the approval process for a resident seeking to

		make an alteration to their residence; and b) the process for dealing with operator approved alterations when the resident vacates the residence.
Data: Vacancy and Turnover	48	To enable future measurement of the impact of the 18-month exit provision, data on the vacant possession, re-licence period (turnover) of units in retirement villages should be collected by the Registrar.
Exit Entitlement - extension	49	The criteria to which the Tribunal should have regard in section 27(8) of the Act should be amended to "exceptional circumstances".
Exit Entitlement – payee details	50	The Act should require residents or their representatives to provide payee details to an operator.
Definitions and drafting	52	OFAW should refer points made in submissions regarding specific drafting to Parliamentary Counsel for consideration when any Amendment Bill is drafted.
Abandoned Goods	54	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.
Terminations	56	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.
Terminations: Resident legal advice	57	The Act should state that an operator must, when commencing discussions with residents about terminating a village, ensure that residents are afforded a reasonable opportunity to seek legal advice.
Enforcement Clarity	58	The sections of the Act that impose obligations should be clear who can be held accountable for failure to comply with those obligations (operator or manager or both).
Enforcement: Commencement of Proceedings	59	The Act should permit a prosecution to be brought within two years after an offence first comes to the attention of the regulator.

REGISTRAR POLICY RECOMMENDATIONS Through powers available to the Registrar under the Act.		
Issue	**No.**	**Recommendation**
Register: Code of Conduct and Accreditation	1	If OFAW determine that the industry standards are appropriate and able to be attained by all operators, the Register should record whether an operator has accreditation and whether they are a signatory to the industry Code of Conduct. The information should be easily accessible and comparable between different retirement village operators.
Publication of Enforcement Activity	7	Formal enforcement action taken should be recorded on the Register. Audit activity conducted by the Registrar should be made public (for example, in an Annual Report or published online).
Register: Online	9	The Register should be published online, with accessible and easily navigable functionality.
Register: Expanded Content	10	Additional information on individual retirement villages should be collected and made easily accessible to prospective residents via the Register. This should include information that relates to: formal enforcement action; SACAT 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.
Insurance	12	Operator's relevant insurance information should be provided to the Registrar, be publicly available on the Register, and be kept up to date.

BETTER PRACTICE GUIDELINES RECOMMENDATIONS This is a document produced and able to be updated by the Office for Ageing Well.		
Issue	**No.**	**Recommendation**
Exit Fee Calculator	18	The Better Practice Guidelines should encourage operators to supply an online exit fee and entitlement calculator to prospective residents so they can model a range of financial scenarios to inform their decision making.
Marketing Transparency	19	All marketing and entry material relating to Type 1 retirement village schemes should state explicitly that the property is not what is being purchased, but rather it is a lease/ licence/share to live in the property, and the property remains owned by the operator.

Fees: Definitions	21	The Better Practice Guidelines should promote that terminology relating to fees is used in a consistent manner across the sector.
Meetings	36	In relation to meetings with residents, the option for online meetings should be promoted in the Better Practice Guidelines.
Exit and recurrent charges	47	The Better Practice Guidelines should clarify what costs should be classified as recurrent charges and that the Act's six-month cap on recurrent charges at exit is the benchmark period for the payment of like costs after exit.
Village Type Transparency	53	To help prospective residents be clear on the type of village they are entering, the Better Practice Guidelines should recommend that information about the proportion of existing residents within a village that have made an ingoing contribution is provided to prospective residents.

WHERE FURTHER ADVICE IS RECOMMENDED		
Issue	**No.**	**Recommendation**
Legislative Interface	3	The Commissioner for Consumer Affairs should be asked to consider if some activities and charges of retirement village operators are or should be covered by the *Land Agents Act 1994*.
Disclosure Statements	17	To improve transparency and completeness of Disclosure Statements the amendments recommended in this Report should be considered along with the outcome of any audits conducted by OFAW of Disclosure Statements.
Village Type: New Developments	25	The OFAW should seek legal advice on how the Act would apply and what amendments might be necessary to deal with issues relating to buying off the plan, and with multi-story or mixed lease premises.
Fees	29	Consultation should occur regarding the inclusion of specific provisions relating to Capital Maintenance and Replacement fees in any future Amendment Bill.
Health and Safety	42	Advice should be sought by the OFAW to determine the extent to which retirement village operators are bound by the Work Health and Safety Act 2012. If there are gaps or doubts in the regulatory framework then amendments should be considered.

Aged Care Interface	46	When it is clear what the Federal Government's response is to the Aged Care Royal Commission recommendation to phase out Refundable Accommodation Deposits, section 30 of the Act could be amended.
Certificate of Title	51	OFAW should consult with the Registrar-General and assess whether changes to section 56 of the Act are desirable.
Exemptions	55	OFAW should assess if there are any exemptions no longer considered appropriate and obtain advice as to whether any additional legislative power is necessary.
Aged Care Interface	60	OFAW should monitor the implementation of recommendations resulting from the Aged Care Royal Commission that relate to home care services, to determine whether any legislative amendments or changes to education in relation to retirement villages are required.

PART 1: Review Context

Terms of Reference for the Review

Section 68 of the *Retirement Villages Act 2016* ("the Act") requires that the Minister must undertake a review of the Act three years after its commencement. The Act commenced on 1 January 2018. A report on the outcome of the review must be tabled in both Houses of Parliament within twelve sitting days of its completion.

The Office for Ageing Well (OFAW) released a Discussion Paper in January 2021 as the first step in the review. Written submissions and survey responses were received from stakeholders. PEG Consulting was engaged to conduct the review ("the Review") in accordance with the Terms of Reference after the release of the Discussion Paper and has produced this report ("Report"). PEG Consulting has undertaken this Review independently, but records its appreciation to the OFAW for the assistance and information it has provided, and specifically the assistance of Ms Vanessa Clarke and Ms Sophia Biermann.

The Terms of Reference for the Review are to:

a) Assess the impact of regulatory reforms introduced with the commencement of the Act in 2018.

b) Consider if the Act provides sufficient consumer protections to residents of retirement villages while still maintaining a balance between the rights and responsibilities of residents and operators of retirement villages.

c) Consider if the Act meets its objects of:

- encouraging best practice management among operators
- ensuring proper disclosure of information to prospective residents of retirement villages
- effectively regulating the making, content, operation, and termination of residence contracts
- ensuring residents are properly consulted about matters affecting their residence in retirement villages
- providing for effective dispute resolution processes.

d) Consider reviews and reforms undertaken in other Australian jurisdictions.

e) Consider the implications of retirement village operators or other organisations providing Commonwealth or privately funded home care services to residents of retirement villages.

f) Provide a report to the Minister for Health and Wellbeing about the outcomes of the review to enable the Minister to consider the need for legislative changes.

Feedback on the Discussion Paper was the primary input into the Review, and this is detailed in Part 3 of this Report. Stakeholder representative meetings were also undertaken.

Some recommendations propose changes to the Act or the *Retirement Villages Regulations 2017* ("the Regulations"). However, many of the issues raised are complex. Potential solutions do not necessarily require legislative amendment. For example, changes to Better Practice Guidelines and the Registrar's processes and policies (that are consistent with the Registrar's current powers under the Act) were sometimes deemed a more appropriate response to issues. There were a small number of issues which the Review considered may require legislative change, but it was not satisfied it had the required inputs or legal advice to make a recommendation. For these matters it is recommended the OFAW seek further advice. Any Amendment Bill should be the subject of specific consultation.

Legislative History

The Act was introduced in response to a 2013 Parliamentary Select Committee review into the predecessor 1987 Act (the *Retirement Villages Act 1987*).[1]

The Select Committee's Terms of Reference included investigating the rights and obligations of residents and operators of retirement villages, contractual disclosure, financial obligations, compliance and regulation, and dispute resolution under the 1987 Act.

[1] Parliament of South Australia "Report of the Select Committee on a Review of the Retirement Villages Act 1987" dated 27 November 2013

The Select Committee's report aimed to improve clarity around contractual and some administrative matters in retirement villages while maintaining a balance between the interests of residents and not placing onerous restrictions on operators.

In 2015, the Government released the *Retirement Villages Bill* for public consultation. The Regulations to support the new Act also underwent public consultation. The public consultation resulted in the *Retirement Villages Act 2016* commencing on 1 January 2018.

The objects of the Act are in section 3:

(a) to provide a regulatory framework for the operation of retirement villages in South Australia under which a balance is achieved between the rights and responsibilities of—
- *(i) residents of retirement villages; and*
- *(ii) operators of retirement villages;*

(b) to encourage best practice management standards among the operators of retirement villages;

(c) to ensure that there is proper disclosure of information to prospective residents of retirement villages;

(d) to regulate the making, content, operation, and termination of residence contracts;

(e) to ensure that residents are properly consulted about matters affecting their residence in the retirement village;

(f) *to provide for dispute resolution processes.*

Significant reforms introduced in the Act included:

- the introduction of an obligation on operators to provide a disclosure statement to improve transparency and clarity
- the introduction of the repayment of an exit entitlement to a resident within 18 months of a resident vacating their residence (if not relicensed prior to this time)
- an increase in the transparency of village funds, including breaking down of management fees, requiring consultation with residents regarding the village budget and requirements to meet with a resident's committee about finances, and
- an increase to penalty amounts to deter breaches of the Act.

The Minister for Health and Wellbeing is responsible for the Act and the Regulations, which are administered by the Department for Health and Wellbeing, through the OFAW.

As recommended by the Select Committee, the Government also introduced an advocacy service for retirement village residents through the Aged Rights Advocacy Service (ARAS) and released Better Practice Guidelines for operators of retirement villages.

Retirement villages can be subject to multiple different legislative requirements (both State and Federal). The Review understands there are currently twelve villages in South Australia

(SA) that must comply with both the *Retirement Villages Act 2016* and the *Supported Residential Facilities Act 1992.* The Director of the OFAW is the Registrar and regulator for retirement villages. Local government is the licensing authority for the *Supported Residential Facilities Act*.

In addition to State legislation, the Australian Consumer Law (ACL) contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* applies to consumer contracts, including retirement village contracts. The ACL includes protections against unfair contract terms and unconscionable and misleading conduct.

This Review is focused on the *Retirement Villages Act* and its Regulations. However, some consideration has been given to the interface with other legislation in this Report.

Data

Discussion Paper method and engagement

The OFAW undertook the consultation process that informed the Review. This commenced on 29 January 2021 with the release of a Discussion Paper posing questions to inform the feedback of interested persons and parties.

The opportunity to engage in the consultation was promoted by the OFAW, which wrote to all retirement villages in South Australia with information that could be posted on notice boards; distributed information via the SARVRA village representatives; published the opportunity in media, including local papers; and undertook a direct mailing promotion to the OFAW stakeholder list. Submissions closed on 16 April 2021. A list of submissions appears in Appendix 3.

Interested persons and parties were invited to share their views and provide a response to questions posed in the Discussion Paper via the following four methods:

- An online forum hosted on the South Australian -Government's YourSay website
- Completing the interactive feedback form (online survey)
- Making an online (written) submission
- Emailing or posting their feedback to the OFAW.

The Discussion Paper provided background information and an overview of the legislative framework. Drawing on the experience of the OFAW, including complaints or issues raised by residents and operators of retirement villages and other key stakeholders since the commencement of the Act, it provided a discussion of the components of the legislation under Topic headings, and posed related questions. These questions were reflected in the interactive feedback form (online survey) and the template for the online submission.

These 36 Topic headings were grouped in line with a resident's 'journey': before moving into a village; matters related to living in a village; leaving a village; and miscellaneous/other issues. That format is followed in Part 3.

Respondents by stakeholder type – categories for analysis

To analyse feedback (online survey and written submissions) to the Discussion Paper, the following stakeholder categories were defined and are variously used in this Report:

- Resident of a Village: by commercial, not for profit, community based or not stated
- Resident Committee: by commercial, not for profit, community based or not stated
- Operator: by commercial, not for profit, community based or not stated
- Retirement Village Manager: by commercial, not for profit, community based or not stated
- Family member of a retirement village resident
- Peak Organisation
- Local Government
- State Government
- Political representatives
- Aged/Community Services/Advocacy Group
- Legal Representatives
- Other interested party

Online survey (interactive feedback form) responses

The opportunity to engage via an interactive feedback form was delivered through an online survey, stepping the respondent through the questions posed in the Discussion Paper. All questions in the online survey were optional.

The online survey commenced by asking the respondent for their name, email address, to designate their stakeholder type[2] and if relevant, the retirement village in which they reside. Following this, 98 questions were posed, of which 33 were binary in nature (yes/no answer) and the remaining 65 allowed an open text response.

Once duplicates and survey entries with responses to no questions were removed, the online survey data set consisted of 93 survey respondents. Very few surveys were fully completed, with the response rate to questions varying between 30% and 70%.

As survey respondents were asked to name their retirement village, where they did so, the Review was able to further categorise the responses into the stakeholder categories named

[2] Note the stakeholder categories in the survey were used as a base and then expanded on for the purpose of the Review analysis.

above. Namely, whether the relevant village was a commercial, not for profit or community-based retirement village.

In terms of respondents, 70 of the 93 online survey respondents were residents, 10 were retirement village operators or managers and the remaining 13 were mostly family members of a village resident (6) and other interested parties (5), with one peak organisation and one aged and community services and/or advocacy group.

Of the resident respondents, 32% of the survey responders self-identified as being from residential villages operated by one for-profit operator.

An overview of responses to the binary questions is provided in Appendix 2. The open text responses were collated by question and considered along with the written submissions.

Written submissions

The Review received a total of 94 written submissions, this included 14 submissions made via the online submission form and 80 submissions emailed or posted to the OFAW.

Most of the respondents targeted their response at certain questions from the Discussion Paper or parts of the Act. There was minimal feedback from respondents outside the scope of the Discussion Paper questions. However, issues raised by the respondents caused the Review to identify systematic issues beyond the scope of the questions and these issues are canvassed in Part 2 of this Report.

In terms of respondents, 71 of the 94 written submissions were from residents (56 respondents) or resident committees (15 respondents), five were from retirement village operators and the remaining 18 were from peak organisations, aged and community services and/or advocacy groups, legal representatives, political representatives, government and statutory bodies, and other interested parties.

Of the written submissions, 22% of all responses came from residents or resident committees related to one for-profit operator.

Retirement village community and rate of engagement with consultation process

There are currently 534 registered retirement villages with an estimated 26,400 residents in South Australia.[3] A proportion of the respondents to the consultation are from representative groups (e.g. resident committees), but as exact figures were not given, the Review cannot determine the exact percentage of engagement in the consultation by different stakeholder groups. However, the Review notes the following:

- Resident respondents far outweighed operators in responses to all questions

[3] Based on the estimated rate of single verses couple occupancy.

- One third of resident respondents reside in villages owned by one for profit operator
- Only 13% of written submissions and 7% of online survey responses came from residents / resident committees of not-for-profit villages

Summary of online survey and written responses

In reviewing the written responses, the following themes were apparent:

- The current Act is perceived as taking a positive step toward consumer protection compared with its predecessor.
- The balance between consumer protection and enabling flexibility in a sector that is growing and evolving, must be carefully considered.
- Central to the frustrations of resident respondents is a perceived lack of clear communication from the operator of their village. Clarity, simplicity of information and transparency – particularly in relation to financial matters at point of entry, during their residence and at the point of exit, was of concern.

Resident respondents in general wish to be an active part of their retirement village community, this extends to being consulted on decisions made by operators that impact on their daily lives. There appears to be a gap in some villages between practice and resident expectations in this regard.

Meetings

A series of meetings with stakeholder representatives were held to further clarify themes arising from the submissions and discuss potential recommendations. Meetings were held with representatives of ARAS, ACSA, COTA SA, LASA, PCA and SARVRA. It was the unanimous view in these discussions with both operator and resident representatives, that more enforcement activity by the regulator would be welcomed.

Retirement village resident survey – February 2020

In February 2020, the OFAW surveyed residents of retirement villages on the introduction of the *Retirement Villages Act 2016*. This survey attracted over 800 responses and the data from that survey, published as a report,[4] has also been considered by this Review.

The survey focussed on matters that the new Act sought to address, including the level of detail provided in an operator's financial statement, operation of the surplus and deficit policy, mandating an operator to meet twice with a resident's committee when preparing the annual budget, and matters relating to the drafting, distribution, and accuracy of minutes from meetings with residents.

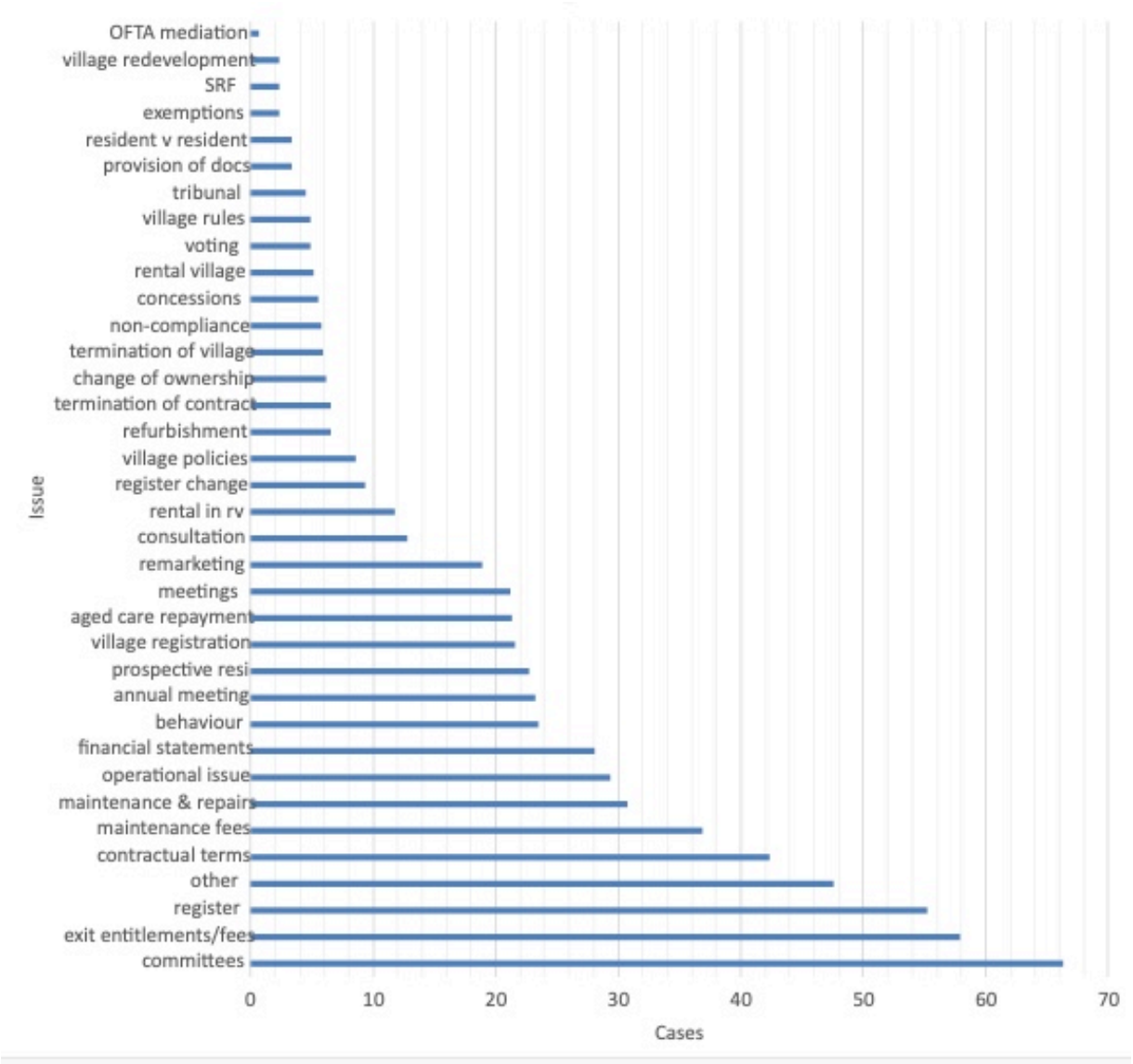
[4] https://www.sa.gov.au/__data/assets/pdf_file/0009/623691/2020-07-10-resident-feedback-survey-result-2020.pdf

OFAW Case Management Data

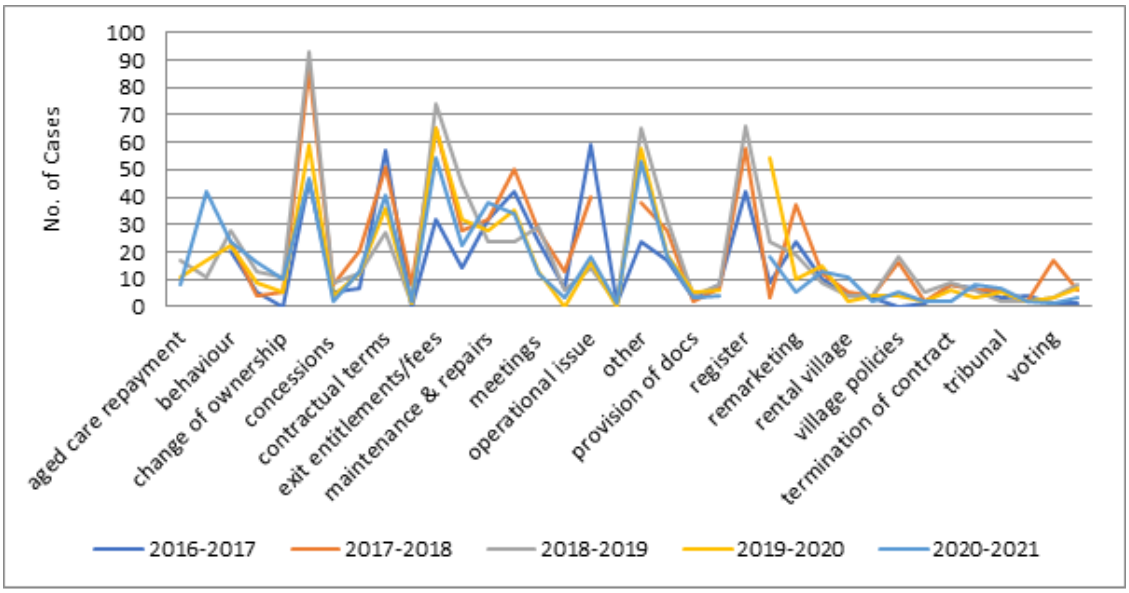
The Review requested OFAW provide data relevant to the Act's operation. The data that is collected by the OFAW about contacts received is recorded in the OFAW's case management system according to type of inquiry. For the purposes of this Report these records are called "cases".

The graph below shows the average number of cases recorded by issue per year, across five years from 2016-17 to 2020-21. This includes a period of time before the Act commenced on 1 January 2018 and afterwards.

AVERAGE ANNUAL CASES RECORDED BY OFAW BETWEEN 1 JULY 2016 AND 30 JUNE 2021



CASES RECORDED BY OFAW PER YEAR BY ISSUE



The peaks in the above graph in the number of cases experienced in 2018-19 are believed to be attributable, at least in part, to the commencement of the new Act. It is positive to note that across most categories the number of cases has declined since that time. Whilst it is not determinative, from a quantitative perspective it tends to suggest that overall, the Act has had a positive impact.

However, it is not possible for the Review to assess from this data what the impact of various provisions have been, for example, the requirements around provision of financial information or what the impact or the 18-month exit entitlement has been. In the absence of this information, the Review was reliant on qualitative data and anecdotal feedback from submissions and stakeholder meetings referred to above. With increased data collection and the passage of more time, a fuller assessment of the impact of these changes would be able to be conducted and should be planned for.

Potential Growth of Sector

The Review considered the existing challenges within the context of an ageing population. The retirement villages sector can be expected to continue to experience increased demand in the future.[5] However, operators point out that any such demand will only be met by the market if the conditions, including the appropriate level of regulation, makes it a viable product for them to provide.

Advocates representing residents consider there is a need for Government to consider aged living in a holistic way from both a regulatory and a support and information perspective. They refer to a shortage of affordable options for the ageing population and particularly for older women.

In the past two decades, the number of people aged 85 years and over in Australia increased by 117.1%, compared with a total population growth of 34.8% over the same period.[6]

The 2021 Intergenerational Report found:

> *Health and aged care are projected to be the fastest growing areas of spending over the next 40 years. Growth in these areas reflects pressures from the ageing of the population as well as non-demographic factors such as technology, changing consumer preferences and rising incomes.* [7]

The Discussion Paper noted that the number of villages in South Australia has grown from 459 in 2007-2008 to 534 in 2020-2021.

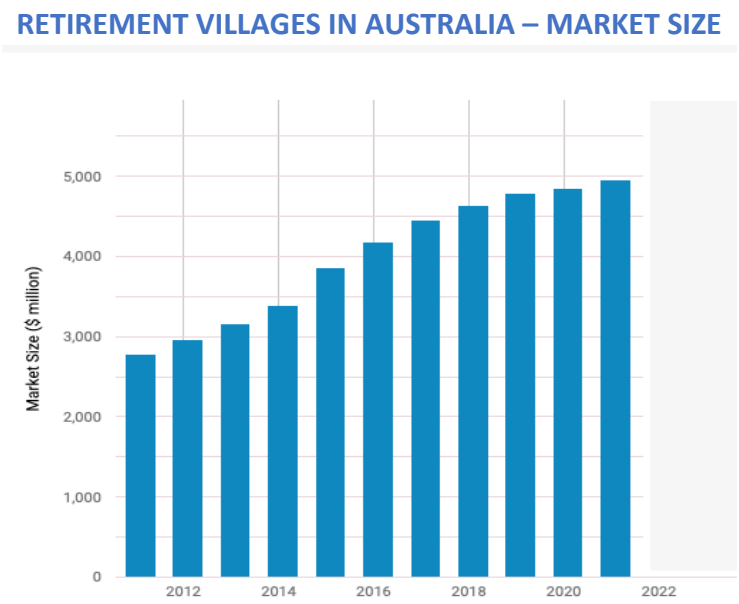
The retirement village market size has also grown consistently, including 2% in 2021 when it represented a $5b market size in Australia. Retirement villages in Australia annualised market size growth from 2016-2021 was 3.5%[8]:

[5] This context also supports the recommendation that a future review be scheduled, due to the growing and changing nature of the sector.

[6] https://www.abs.gov.au/ausstats/abs@.nsf/0/1cd2b1952afc5e7aca257298000f2e76

[7] Intergenerational Report 2021, https://treasury.gov.au/sites/default/files/2021-06/p2021_182464.pdf

[8] https://www.ibisworld.com/au/market-size/retirement-villages/



A robust industry and regulatory framework that can respond to future challenges is desirable. However, settling an ideal approach is complicated as the composition of the operator sector is quite diverse, ranging from small to large villages, and from not-for-profit local providers to national for-profit providers.[9] A number of operators have villages across multiple jurisdictions and differences in how the sector is regulated in each jurisdiction adds complexity and a cost to doing business.

9 At the present time in South Australia commercial operators account just over half of the residences in retirement villages, and non-profit organisations just under half.

PART 2: Operation of the Act

In considering the feedback in submissions and surveys in their totality and feedback from stakeholder meetings, the Review concluded that there are some key high-level issues about the operation of the Act that should be addressed in addition to the specific topics and questions posed in the Discussion Paper.

This part of the Report focuses on recommendations to improve the operation of the Act based on the Act's objects and the priority given to clarity, transparency and improved protections. These recommendations endeavour to provide encouragement to all operators to operate in accordance with best practice, without addressing every issue by legislative change.

Consumer Protections

The Terms of Reference require the Review to assess the impact of regulatory reforms introduced with the commencement of the Act in 2018. The Review was limited by the lack of data that could measure the impact of the changes. After deep consideration, it is the Review's position that this assessment is hampered due to the relatively short passage of time that has passed since the Act's commencement. As the average length of stay of residents is more than eight years in South Australia,[10] many who entered a retirement village under the current Act have not yet exited or lived there for a substantial period of time.

Retirement village operators and their employees are engaging with people undergoing a meaningful change in their lifestyle. Entering a retirement village is a significant, complex, and unique form of legal and financial transaction. Prospective residents can be vulnerable. Equally, many residents of retirement villages are not vulnerable and engage regularly and assertively with operators and require a high degree of information. This is the importance of the balance that is referred to in the Terms of Reference.

When determining whether the Act provides sufficient consumer protections while still maintaining a balance between the rights and responsibilities of residents and operators of retirement villages, the Review considered the Act against the more prevalent form of residential accommodation by non-owners, residential tenancies. The issue of balance should not be confined to a consideration of the Retirement Villages Act. It is also valid to consider what consumer protections exist in analogous sectors to assist in forming a view about whether there is an appropriate balance.

[10] PWC/Property Council Retirement Census, Property Council of Australia / Retirement Living, 2020

The *Residential Tenancies Act 1995* prescribes significant detail as to the nature of agreements that can be entered into between landlords and tenants, and as to the rights and obligations of tenants and landlords. For example, two different forms of tenancy are available, fixed term or periodic. A standard form of lease is offered (but not prescribed) under that Act, and the Act deems certain things to be part of a residential lease. The Review understands that most residential tenancies use standard REISA rental agreements. The payment of a bond and a rent is also a comparatively straightforward transaction but nevertheless quite regulated. Issues like entry to premises, repairs, maintenance, alteration to premises and so on are all governed by the legislation.

Conversely, the *Retirement Villages Act* is not prescriptive and permits a wide range of arrangements, the details of which are left to the contract between the operator and resident. These contracts can be confusing and difficult for prospective residents to understand, and clearly at this juncture the operator holds the power.

The Act's definitions of a retirement village scheme illustrate in (a) to (d) the variety of arrangements that might apply:

> ***retirement village scheme*** *or* ***scheme*** *means a scheme established for eligible persons and their spouses or domestic partners, or predominantly for eligible persons and their spouses or domestic partners, under which—*
>
> *(a) residences are occupied pursuant to a lease or licence; or*
>
> *(b) a right to occupation of residences is conferred by ownership of shares; or*
>
> *(c) residences are purchased from the operator subject to a right or option of repurchase; or*
>
> *(d) residences are purchased by prospective residents on conditions restricting their subsequent disposal,*
>
> *but does not include a scheme under which no resident or prospective resident of a residence pays an ingoing contribution in consideration for, or in contemplation of, admission as a resident under the scheme;*[11]

The arrangement under (a) or (b) (which the Review will call "Type 1") confer no property ownership on the resident, just a right of occupation. The arrangement under (c) and (d) ("Type 2") does confer ownership.[12]

This flexibility for operators correlates with a high burden on the part of a prospective resident to understand the type of contractual arrangement they are entering into. The Review understands that there are few legal practitioners who are expert in advising

[11] s 4 of the Act

[12] OFAW advises that presently there are only two Type 2 retirement village schemes in South Australia.

prospective residents about retirement village schemes and the intricacies of the contractual arrangements. This is unfortunate.

In relation to contractual arrangements, the balance is in favour of the operator. Operators draft the contract. They can change the fees residents are charged during the term of the contract and can change the rules that apply to residing in the village.

Each operator might group and refer to fees and charges in different ways, some of which are not intuitively able to be understood. Submissions to the Review highlighted that such terms do not always have the meaning that a prospective resident might expect. For example, a contract might talk about a capital gain being shared with a resident, but then provide for a formula for calculation of the capital gain that effectively means no gain is ever possible from the resident's perspective.[13]

The Review considers that residents of retirement villages are generally not afforded the same level of protections as residents under the *Residential Tenancies Act*. What stood out to the Review is that the resident of a retirement village is making a more significant initial financial commitment than a *Residential Tenancies Act* tenant, and there can be significant costs to be borne at exit.

However, the Review was also persuaded by the submissions of operator representatives about the impact of inflexible regulation on the operation of the diverse sector. Operator representatives are at pains to stress that the majority of operators are doing the right thing and that operators are equally desirous of residents having a positive experience.

Furthermore, the Review notes that a large number of resident submissions came from residents living in villages that have the same operator. Overall, there were not a high number of submissions from residents from diverse villages, which might suggest that dissatisfaction is not pervasive.

This lends support to the views expressed by both operator and resident representatives that the regulator having the right tools and resources to take enforcement action is critical to ensuring consumer protection. The Review considers that other legislative changes should primarily be directed towards improving providing maximum transparency before a resident enters a village, including by providing information to the Registrar. If it is clear to prospective residents what the arrangements are, this minimises the potential for dispute.

Other relevant contextual information of note is that there are a number of retirement village operators who also operate in the "land lease" sector and this is a developing market in South Australia. This model involves a person leasing land, but owning the (usually transportable) dwelling placed on it. The Review understands some potential residents might consider both residential parks and retirement villages when considering their retirement living options.

[13] Submission 31

In South Australia, this model is primarily covered by the *Residential Parks Act.* At present, retirement villages and residential parks are administered by different Ministers and regulated by different agencies. There might be benefits for residents, operators and government if decisions about the regulation and legislation for each of these models is cognisant of the other. The Review considers there would be benefits if OFAW worked more closely with Consumer and Business Affairs, who regulate residential parks. Further, with the Local Government Association advocate for Government to consider the interface between the *Supported Residential Facilities Act* and the *Retirement Villages Act*.

Standards applying to Operators

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

In addition, industry has been proactive and introduced both a Retirement Living Code of Conduct and an accreditation process. In December 2018 the Property Council of Australia (PCA) and Leading Aged Services Australia (LASA) launched a Retirement Living Code of Conduct ("the Industry Code"). This came into full effect on 1 January 2020, and retirement village operators can voluntarily subscribe to the code.

The Industry Code's intent is to promote and protect the independence, privacy, dignity, happiness, safety and security of older people through the provision of specialised, quality housing and support services, within a community environment. It covers all aspects of a resident's experience in a retirement village: from signing the contract and moving into a retirement village, the on-site living experience, to leaving a village and re-marketing of the unit or apartment. The Code of Conduct is regulated via a voluntary self-assessment against standards. [14]

Accreditation of retirement villages is a separate voluntary process. The Australian Retirement Village Accreditation Scheme (ARVAS) is the main accreditation scheme for retirement village and seniors housing operators in Australia, again an initiative of the PCA and LASA. The ARVAS Standards are designed to work directly with the Retirement Living Code of Conduct. To apply for accreditation under ARVAS, an operator must be an active subscriber to the Industry Code. There is a cost to operators to enter the scheme, which the Review understands is not excessive.[15]

The Review has not considered the process or requirements of this accreditation in any detail, but has no reason to think it is anything other than a positive step that encourages best practice. The Review notes that the diversity of the operator market and different

[14] Annual costs of subscribing to the Code is: $220 per village + $2.75 per unit operated (members) + $110 one-off application fee; › $550 per village + $6.88 per unit operated (non- members) + $275 one-off application fee

[15] https://www.qip.com.au/find-the-right-accreditation/retirement-villages-aged-care/

types of villages may be factors that impact on the possibility of particular villages or operators attaining accreditation or complying with the Code of Conduct.

Nevertheless, the Review recommends that an operator's current Industry Code commitment and accreditation status should be publicly available via the Register and Disclosure Statements. These recommendations are designed to encourage more operators to consider making additional efforts to meet best practice. If this information is included in the Register, it will enable prospective residents to compare village operators. If also included in the Disclosure Statement, this will ensure that residents who do not consult the Register in their decision making are made aware of the operator's commitments.

On a related issue about standards and accreditation, the Review understands that some retirement village operators impose a charge that is called a marketing fee or commission in relation to exiting a village and re-marketing of a unit. This was a contentious issue in submissions. From the *Retirement Villages Act* perspective, operators are unregulated in this activity (except by the terms of the contract), just like a private sale. It might be that some activities being undertaken are or should be covered by the *Land Agents Act 1994*. If retirement village operators or managers are not covered by the *Land Agents Act*, the Review is not convinced of the merit of this aspect of their activity not being included in the scope of that Act. OFAW should ask that this issue be considered by the Commissioner for Consumer Affairs. If there is to be any further regulation of this aspect of retirement village operations, it would be preferable for it to align as far as appropriate with frameworks already in place.

Recommendation 1 – Register: Code of Conduct and Accreditation

If OFAW determine that the industry standards are appropriate and able to be attained by all operators, the Register should record whether an operator has accreditation and whether they are a signatory to the industry Code of Conduct. The information should be easily accessible and comparable between different retirement village operators.

Recommendation 2 **- Disclosure Statement: Code of Conduct and Accreditation**
The Disclosure Statement should include whether or not the Operator is a signatory to the Code of Conduct and is accredited. If the Code of Conduct signatory or accreditation status changes during the life of the resident's contract, the operator should be required to notify the resident of this fact, stating the reasons for it and actions to be taken.

Recommendation 3 - Legislative Reach
The Commissioner for Consumer Affairs should be asked to consider if some activities and charges of retirement village operators are or should be covered by the *Land Agents Act 1994*.

EXAMPLE

One Submission provided a pertinent example of the inequitable power base and complexity of contractual arrangements, and the need for external advice and support.[16]

A woman entered into a retirement village in 2001 paying $100 000 entry payment on a "market value" type contract, where she would be entitled to an exit payment of 75% of the next licence payment. Her contract stipulated that the exit entitlement was to be calculated on the market value of the residence.

When the woman left the village, the operator gave the valuer two sale prices for market value sales without information that these sales were not made under the same contract conditions, and this changed the market value. The units used as the examples for the valuer were "donation entry" type payment, with lower entry payment and minimal (if any) repayment to the resident at termination. This resulted in a significantly lower valuation for the woman's unit.

The valuer and the resident's daughter were not advised that the valuation was done on a different basis to the woman's contract type. The daughter was advised that the valuation was $80 000, and the proposed refund was $60 000.

To provide an indication of the significant difference in purchase price based on contract conditions, in 2010 a 2-bedroom unit in the village was available for either $67 000 with no pay-out after 4 years; or $127 000 with a 65% refund amount after 4 years.

The daughter persisted, received assistance from OFAW and eventually the operator did seek another valuation based on the woman's contract and the valuation came back 50% higher than the amount originally offered by the operator.

The daughter says there was no acknowledgement that the original proposed refund was not per the contract. It took over a year to get this outcome and the resident was financially disadvantaged as she had to pay interest on an unpaid aged care bond amount.

[16] Submission 87. The Review notes the impact of the operator's decision making was only discovered due to the diligence of the resident's daughter.

Village Management

Submissions to the Review highlighted that issues often arise between retirement village managers and residents. Retirement village managers hold a position of power in relation to residents and some submissions suggested that this position makes residents vulnerable.

> "*ARAS has assisted residents who have been bullied and harassed by Operators. This in turn can lead to fear of retribution with residents not willing to speak up.*"[17]
>
> "[COTA SA] *remain concerned that there continue to be instances of poor management, dysfunctional relationships with residents and, we understand, bullying and harassment experience by residents from time to time.*"[18]
>
> "*SARVRA receives many reports from members of intimidatory behaviour from village staff, who because of their inability to participate in reasonable consultation, resort to bullying to closedown many a discussion.*"[19]

The Review acknowledges that there is a potential spectrum of approaches to address the problem of relationships between residents and village managers. This could range from enhanced advocacy and advice availability, training of managers, through to screening or a system of registration.

There are two substantive issues in relation to village managers (or senior managers or operators) – firstly an issue in relation to fitness and propriety, and secondly in relation to training and skill.

The Act prohibits certain people from being concerned in the administration or management of a retirement village.[20] However, there is no requirement for any fitness and propriety check, when one might expect at least a police-check or Department of Human Services screening for a village manager. By contrast, under the *Land Agents Act 1994*, land agents, sales representatives, auctioneers and property managers acting for an agent under that Act are required to be registered. Registration includes a fitness and propriety test, as well as training or qualifications.[21]

The Review considers that residents of a retirement village – who in many instances are akin to a long-term tenant or lessee - should not have significantly less protection than other forms of accommodation seekers. It is reasonable that a similar standard should be in place for retirement village managers and senior managers as property managers. The Review is

[17] Submission 89
[18] Submission 92
[19] Submission 94
[20] s 60 *Retirement Villages Act 2016* (SA)
[21] For example, the qualifications for property managers can be found at https://www.cbs.sa.gov.au/sites/default/files/approved_qualifications_property_manager-1.pdf?timestamp=1625182313831

conscious of the diversity of the operator market and that registration requirements might impact more significantly on some operators than others. The Review recommends that there should be some type of fitness and propriety test for village managers / senior managers / operators.

There should be specific consultation on this proposal to assess what the most appropriate model is. Moving to a system of registration as is in place for property managers acting on behalf of Land Agents, would be a significant step. It would impose costs on government, operators, and residents. However, it is appropriate that fit and proper and trained individuals fulfil the role of village managers. On a risk assessment basis there is no reason to consider that any particular type of village results in less risk to a resident.

In relation to training, question 2.9 of the Discussion Paper asked "should there be a requirement for training of village staff?" on the Code of Conduct - 63% of respondents said yes and 5% said no (31% did not respond).

In written submissions, resident respondents supported training. Non-resident respondents tended to support training, but the cost implications and whether it should be legislated were questioned. The Review considers that adherence to the Code of Conduct in the Regulations should be supported by minimum training requirements. The implementation of this might depend on what form of fitness and propriety test is introduced. Again, there is a spectrum of approaches available.

Recommendation 4 - Training

There should be a training requirement about the Code of Conduct for retirement village staff.

Recommendation 5 - Village Management

The Act should require village managers, senior managers and operators to meet a fit and proper person test.

The role of the Regulator

Enforcement and compliance

Since the commencement of the Act, no formal enforcement action has been taken by the OFAW. This was noted in the Discussion Paper and has been commented upon in submissions to the Review by both residents and those representing them, and by representatives of operators.

Many submissions articulated the necessity for OFAW to be more adequately resourced to undertake compliance activity and the Review agrees with this. Enforcement is critical for consumer protection and to protect the reputation of the industry. Both operator representative bodies and resident representative bodies submit that enforcement of the Act has been lacking and they would like to see these efforts and resourcing increased. It is beyond the scope of the Review's Terms of Reference to make a specific recommendation about resourcing, however, in considering its response to the Review the Government should note that this is the one area where resident and operator representatives express a unanimous view.

Parliament has provided the potential for significant penalties if operators do not comply with Division 1 of Part 3 of the Act - those sections of the legislation that relate to residence contracts, disclosure statements, information to be provided before residence contracts are entered into, and premises condition reports. These particular offences are not expiable, and a court may impose a fine of up to $35,000. This reflects the importance Parliament attaches to compliance with these provisions – they are key areas from a consumer protection perspective.

In response to a query from the Review, the OFAW advised that it has conducted assessments of operator compliance with the Act. Over the first and second year of the operation of the Act, OFAW advises that 15 % of operators were assessed for compliance with the financial provisions of the Act, through an audit of documents. The OFAW has worked with some operators to improve their performance in this area. However, this would not necessarily be apparent to residents or operators (unless they were themselves involved) as it has not been made public.

For a risk based regulatory approach to be successful, the Review considers it is critical that there is adequate support, information, advice, and advocacy available to residents. This is particularly important while Codes of Conduct and operator accreditation are voluntary and so much is reliant on the terms of individual contracts. The ability for OFAW to audit documentation provided by operators to residents (and making the fact that they are conducting such audits known) is important.

The Review also notes that options for the OFAW to take enforcement action is currently limited under the Act to prosecution or expiation. OFAW notes in the Discussion Paper that it has required several operators to enter into undertakings regarding potential breaches of the legislation.

The Review is of the view that there would be benefit in additional enforcement options being available under the Act. In particular, the Review recommends that a model of enforceable undertaking is considered by the Minister for inclusion within the legislation.

An enforceable undertaking operates as an alternative to a prosecution for some types of alleged contraventions and is a written, legally binding commitment to implement effective initiatives. An enforceable undertaking aims to:[22]

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

This model is used in other scenarios where there are compelling reasons for an enforceable remedial approach to be adopted, such as in the *Work Health and Safety Act*.[23] In that case, an enforceable undertaking will only be accepted if it demonstrates:

- benefits to the workplace
- benefits to their industry; and
- benefits to the community.

The Retirement Villages Unit Enforcement Framework released in 2021 contemplates that additional enforcement methods might be used (such as warnings). Consideration should be given (and legal advice sought by OFAW) as to whether any of these methods would benefit from legislative backing.

The Review is also of the view that particular types of enforcement action (such as prosecutions and enforceable undertakings) should be recorded in the Register and be easily accessed by prospective and current residents. This provides transparency to residents and prospective residents and promotes best practice.

Whilst the Registrar is permitted to include information that the Registrar considers appropriate, section 9 of the Act imposes confidentiality obligations on the Registrar. The operation of this provision would need to be considered in light of this recommendation and be removed or amended. The Review considers that this obligation on the Registrar

[22] M Nehme: Enforceable Undertakings: Are they Procedurally Fair? Sydney Law Review - Available at http://classic.austlii.edu.au/au/journals/SydLawRw/2010/21.pdf

[23] See https://www.safework.sa.gov.au/enforcement/enforceable-undertakings for detail and examples

should be reconsidered in any event for transparency purposes. It is not a common encumbrance for State regulators.

The Review notes the *Residential Parks Act 2007* states *in s 134(2)*:

> *The Commissioner may, if of the opinion that it is in the public interest to do so, publish information (in such manner as the Commissioner thinks fit) relating to any action taken by the Commissioner to enforce this Act.*

Recommendation 6 - Enforcement Options
Additional enforcement options should be available to the regulator under the Act. 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 7 - Publication of enforcement activity
Formal enforcement action taken should be recorded on the Register. Audit activity conducted by the Registrar should be made public (for example, in an Annual Report or published online).

Recommendation 8 – Confidentiality
Confidentiality obligations on the Registrar in section 9 should be removed or amended to enable disclosure of compliance matters on the Register.

Data collection and the Register

The Review considers that the Registrar, the Minister, and the Parliament would be in a better position to assess the effectiveness of the legislation at any given time, and the operation of the industry, if additional information is required to be provided to the Registrar. This would assist the Registrar in discharging her functions, enable trend data to be collected, and assist Government to make informed decisions about the sector. Capturing, monitoring and publishing relevant data would better support current residents or prospective residents, and may have other benefits for the industry.

At present, the Register contains only the limited information prescribed in the Act. The Register is of no practical assistance to a prospective resident, nor is it available online. The Review understands that it is occasionally accessed by legal advisers to operators, but rarely accessed by residents or prospective residents. Its utility is limited, and it is not easily accessible.

If additional information was made available on the Register and it was more easily accessed, it could assist residents and prospective residents to consider issues and compare some factors relating to a particular village before deciding on a village.

For example, one of the most contentious areas is exit fees.[24] It is difficult for residents to know what the market is in the sector in terms of price of entry and exit and time taken to pay exit entitlements. The transactions are private to parties. This contrasts significantly with land sale data which is publicly available, and rental data which is frequently published. The Review recognises the transaction process is more complicated in retirement villages as there is not a single transaction, but several complex transactions, including the final exit fee. For this reason, there is a high onus on the Disclosure Statement to provide the transparency required. However, there is also an opportunity for the Registrar, through the Register, to increase the availability of information to prospective residents to assist their decision-making process.

The Review suggests an investment in, and overhaul of, the Register to enable greater use and accessibility to inform decision making by multiple parties.

Information on the Register might usefully include:

- what model the retirement village operates under (per the definition of retirement village scheme)
- the insurance arrangements for a village – certificates of currency or an update could be provided to the Registrar on an annual basis for key items of insurance cover[25]
- whether enforcement action has been taken against a retirement village and the outcome
- the average length of time for an exit entitlement to be paid out by that village
- entry and exit contribution payment information
- Industry Code of Conduct signatory status
- accreditation status.

Some (or all) of these matters may not require legislative change given that the Registrar can include on the Register "any other information that the Registrar considers appropriate". However, as discussed above, s 9(1)(a) of the Act requires the Registrar to preserve confidentiality of information gained during the performance of the Registrar's functions if that information could affect the competitive position of the operator of a retirement village.

[24] Exit fees are discussed more fulsomely in Part 3.

[25] Section 100 of the NSW Act provides that insurance that provides for the reinstatement of property to its condition when new is mandatory. This is an alternative approach but might not address all of the risks to residents and operators (and ultimately government).

The Review acknowledges that having more things on the Register would put an additional reporting burden on operators, but this in turn could be minimised if the Registrar is able to put a system in place for operators to provide the information online.

Alternatively, SARVRA suggests that some of these matters could be required to be included in Disclosure Statements. The Review notes that Disclosure Statements are already multiple pages in length and, in some cases, complicated. The Disclosure Statement could indicate that this information is available on the Register. This would be an acceptable approach, subject to the Register being more accessible, including online, and having functionality that supported informed decision making. For example, the Register might enable a short report to be generated on key information for a particular retirement village which could be attached to a Disclosure Statement or generated at any point in time. The benefit of this is that some information is time sensitive (e.g. average time for an exit payment) and it would enable a consistent approach for comparative purposes.

Regardless of approach, the Review is mindful that this will result in an increased resource demand on OFAW both in terms of capital costs for the system and operating costs to administer this new model of transparent information sharing between operators and the public. However, it is the view of the Review that this investment is necessary if the intention of the Act is to be realised in relation to supporting residents and prospective residents in being able to make informed decisions.

This will also have an impact on operators, who may pass any compliance costs on to residents. However, the costs should not be excessive, and there should be a benefit to most parties from the increased transparency.

It is not possible for the Review to assess from the data currently held by OFAW what the impact of various provisions have been, for example, the requirements around provision of financial information or what the impact or the 18-month exit entitlement has been. With increased data collection and the passage of more time, a fuller assessment of the impact of these changes would be able to be conducted and should be planned for.

Recommendation 9 - Register Online

The Register should be published online, with accessible and easily navigable functionality.

Recommendation 10 – Register: Expanded Content

Additional information on individual retirement villages should be collected and made easily accessible to prospective residents via the Register. This should include information that relates to: formal enforcement action; SACAT 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.

Recommendation 11 - Future Review

To enable a more fulsome passage of time since the commencement of the Act and increased and more detailed data collection, the Act should provide for a future review, five years after the commencement of any Amendment Bill.

Advocacy

Advocacy can support a person by standing behind, beside and in front of a person ensuring they are able to exercise their rights and access their entitlements. An advocate can ensure the voice of the person is heard on matters that are important to them by supporting with information to self-advocate, provide support with advocacy to full representation. The Royal Commission into Aged Care Quality and Safety recently affirmed the importance of older people having access to advocacy support to raise matters of human rights and entitlements was crucial to older people and recommended a significant immediate increase in funding to the National Aged Care Advocacy Program.[26]

It is clear to the Review that the OFAW provides a valuable and essential service to both residents and operators and the recommendations about the Register and other OFAW functions in this Report are designed to enhance this. Other bodies such as SARVRA, the Catalyst Foundation, ARAS and COTA also provide valuable support to residents. They all could do more, with more resourcing. It is far better, and more economical, for effective

[26] Submission 89

dispute resolution mechanisms to be available to assist in addressing matters than for parties to resort to SACAT if their involvement is not necessary.

The importance of industry bodies in setting and pursuing standards is also recognised by the Review. The efforts of these non-government bodies can significantly impact on the role that the Government (and legislation) needs to play in the sector.

Insurance

The Review understands that insurance for villages is usually recouped from residents through the maintenance fee.

The Act provides that the Disclosure Statement must include information about the insurance arrangements that are in place in relation to the village. The Review is not convinced of the utility of this provision. It does nothing to ensure that the insurance is adequate to cover the risks (particularly the risks to residents). Insurance arrangements are also able to be changed at will by the operator. There may be many insurance policies held by the operator – for example, public liability, professional indemnity, cyber, management liability, building, machinery breakdown, electronic, workers compensation, personal accident voluntary workers.

If retirement villages are under-insured, this would present a risk to residents, operators and potentially the Government. The Review considers that operators insurance information should be provided to the Registrar and kept up to date. If this information forms part of the Register this can take the place of it being in Disclosure Statements.

The Review notes that the *Strata Titles Act 1988* (SA) by comparison requires strata corporations to keep all buildings and building improvements insured to their replacement value and that other insurance requirements can be included in the Regulations. The NSW Act also imposes insurance requirements on operators.[27] The Review has no evidence to suggest that provisions like this in the Act are needed at this time, and instead prefers a transparency approach that provides OFAW with information as well as residents.

Recommendation 12 - Insurance

Operator's relevant insurance information should be provided to the Registrar, be publicly available on the Register, and be kept up to date.

[27] Section 100 Retirement Villages Act (NSW)

Village Rules

The Discussion Paper did not ask a specific question about village rules; however, the Review has included this point given the potentially significant impact on residents from changes to rules and the submission from SACAT.

SACAT noted that when retirement village rules are provided to the prospective resident before the contract is signed, a change after a contract is signed can give rise to disputes. SACAT suggest that this might be addressed by including a 'no adverse impact' criterion for change, or a requirement that changes can only occur at particular intervals, or a change triggering a permission to vacate without adverse cost consequences. At present, the Code of Conduct in the Regulations provides that changes to the residence rules should be the subject of reasonable consultation. Whilst the failure to do this can give rise to action against the operator under s 63 of the Act, this does not remedy the matter from a resident's perspective. Whilst it might be possible for a resident to take action in SACAT, the Review considers that in a matter of this nature it is preferable to have a clearer position about rule changes than simply a consultation requirement.

The New South Wales legislation is quite prescriptive in the process by which villages rules can be amended. The NSW Act provides that residents, via a special resolution, must approve an amendment to village rules and further, residents themselves (a resident committee or 5 residents / 10% of residents (whichever is greater)) can propose an amendment to a village rule.[28]

Given the diversity of matters that resident rules can cover, and the impact that this can have on residents, the Review supports residents having more power in relation to rule changes. However, the Review is also mindful of comments from operator representatives about the need for flexibility and these views should be considered when addressing this issue.

Recommendation 13 - Village Rules

The Act should address the process of amendment for residence rules.

[28] Section 51 Retirement Villages Act (NSW)

PART 3: Recommendations from the Questions in the Discussion Paper

This Part considers the Topics in the Discussion Paper with reference to the survey responses and written submissions received as set out in Part 1.

Before moving into a village

Deposits (Topic 2.1)

The Act is currently silent on a financial deposit paid by a prospective resident to 'hold' a certain residence before a contract is signed. The payment of such a deposit is, however, customary practice.

In the written submissions, resident respondents were in favour of the Act dealing with the payment and refund of a deposit in the event the contract does not proceed. Respondents favoured an upper limit of $1000 and a refund within 10 days if the prospective resident chose not to proceed.

Operator respondents did not hold a synonymous view, the middle ground being that if the Act had provisions about deposits, it should not make a deposit mandatory.

The Review notes that in New South Wales it is prohibited for an operator to require a deposit from a prospective resident to hold a residential premise in a retirement village.[29]

The Review considers that the legislation should deal with deposits in order that it is clear to residents and operators how deposits should be treated. The Review suggests that the Act should clarify that deposits are to be treated as part of the ingoing contribution and be refunded if the resident exercises their right to cool-off. The deposit will 'hold' a residence from the time it is paid until a person signs a residence contract; but an operator should be under no obligation to hold the residence if the person has not entered into a contract 10 business days after that person has received the information required under section 22 of the Act.

Recommendation 14 - Deposits

The Act should make clear what the obligations and rights are in relation to any deposit paid by a prospective resident.

[29] s 22 *Retirement Villages Act (1999)* NSW

Disclosure Statements (Topic 2.2)

Disclosure Statements are in place to provide transparency and relevant information for prospective residents in decision making. Under the Act, the Disclosure Statement must provide a prospective resident with information about any fees and charges they will be responsible for.

The online survey revealed that 41% of respondents do not think that the Disclosure Statement is meeting its intended purpose and 28% of respondents think that it is (31% did not respond).

A strong theme throughout the submissions is the need for greater clarity in terms of financial matters on entering, living in, and exiting a retirement village.

In the written submissions, resident respondents felt that the Disclosure Statement has improved the situation, but there is still a lack of clarity and understanding in relation to the various retirement village fees and charges. Operator respondents were unanimous in the view that the Disclosure Statement is meeting its purpose and requires no further changes. Some operators noted in discussions with the Review that there can be variations and nuances in the way villages operate and charge fees that Disclosure Statements do not accommodate.

There is significant concern about the lack of comparability between different models as to how a resident enters a retirement village, and the subsequent variation in how fees and charges are expressed.[30]

The Review has formed the view that changes to the Disclosure Statement to deliver greater clarity and transparency would be beneficial. The Disclosure Statement is considered by the Review to have been a positive step forward, but these can still be quite lengthy, complicated, and difficult to compare between villages.[31] Despite this, they do not necessarily include all information that might be helpful to prospective residents, such as whether the operator is a signatory to the Industry Code of Conduct or is accredited.[32]

SARVRA stated "*The complexity of most retirement village contracts makes a comparison between a short list of villages almost impossible for many consumers. Consumers have a*

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[30] Exit fees are complicated and usually calculated as a percentage of either: the entry price, with a separate arrangement regarding the apportionment of any actual or notional capital gain that may accrue when the home is sold, leased, or licensed to a new resident; OR the re-sale price when the home is sold, leased, or licensed to a new resident, which necessarily considers any actual or notional capital gain that may accrue. The value of seeing and being able to question worked examples is considered an important component of Disclosure Statements, to promote transparency to avoid disputes at a later date.
http://www.itsyourlife.com.au/retirement_villages_departure_fees.asp

[31] This is due to complexity of different structures of schemes and unfamiliar language, amongst other things. The Review benefitted from some operators sharing examples of their Disclosure Statements and we thank those operators for doing so.

[32] The Review makes suggestions earlier in the Report about matters that could be required to be included in either an updated, online Register or in Disclosure Statements.

right to be made aware not all village contracts are alike." [33] Good practice operators provide exit calculators or similar tools on their websites so the financial outcome of exiting can be determined in a range of scenarios. However, the comparability of these between providers can vary greatly due to the different composition of charges.

The Review therefore considers it would be highly beneficial for prospective residents (and their family, legal and financial advisers) to be able to clearly understand the total financial impact of exit fees. The Review considers this could be helpfully presented as worked calculation examples of three exit points –at two, five and 10 years.

The Review notes that the Queensland *Retirement Villages Regulations 2018 requires* Disclosure Statements to include:

> *for any exit entitlement relating to the accommodation unit—*
>
> *(a) the scheme operator's best estimate of the entitlement; and*
>
> *(b) details of how the entitlement is to be worked out, including—*
>
> > *(i) the scheme operator's best estimate of the entitlement after 1, 2, 5 and 10 years of residence; and*
> >
> > *(ii) any cost, charge or fee to be deducted from the entitlement; and*
>
> *(c) when the entitlement is payable.*

The Review notes there has not yet been any auditing process by the OFAW to ensure Disclosure Statements meet the standard as prescribed in the Act and Regulations. The Review considers that this would be a useful source of intelligence for the Registrar and could help inform future changes to Disclosure Statement requirements. Combined with the queries that the OFAW receives from residents, these two sources of information would also be valuable in assessing the utility of the Disclosure Statements and determining changes that would deliver greater clarity. Consideration should be given to how capital gains / loss can be dealt with consistently to enable comparisons.

Disclosure statements provided under the *Residential Parks Act 2007* are in a standard form, which makes comparisons between sites simpler for prospective residents. As the requirement for a Disclosure Statement has only been in place for three years, it is difficult to know, at this point in time, just how effective they have been. Most people who entered with the benefit of the Disclosure Statement would still be in residence in a village and so the extent to which the Disclosure Statement has made the whole journey of entering, living, and leaving a village clearer, is still untested in most cases.

[33] Submission 94

SARVRA suggest an addition to s 21(2)(iii) so that it is clear if residents are required to purchase utilities or services from particular providers. In some villages there are embedded networks which limits freedom of choice of an electricity supplier (irrespective of whether the operator has an interest in it). The Review agrees with this suggestion for transparency reasons.

Recommendation 15 - Disclosure Statements: Embedded Networks

Section 21(2)(iii) should be amended to make it clear in a Disclosure Statement if a resident is required to purchase utilities or services from particular providers.

Recommendation 16 - Disclosure Statements: Exit Fees

A Disclosure Statement should include worked calculations for a prospective resident exiting the village at the two, five and 10-year mark. Calculations are to be sufficiently detailed to provide clarity about all exit costs and include clear explanations of inbuilt assumptions.

Recommendation 17 – Disclosure Statements

To improve transparency and completeness of Disclosure Statements the amendments recommended in this Report should be considered along with the outcome of any audits conducted by OFAW of Disclosure Statements.

Recommendation 18 - Exit Fee Calculator

The Better Practice Guidelines should encourage operators to provide an online exit fee and entitlement calculator to prospective residents so they can model a range of financial scenarios to inform their decision making.

Information to be provided before a contract is signed (Topic 2.3)

The Act specifies in section 22 the information that is to be provided before a residence contract is entered into.

> ***22—Information to be provided before residence contract entered into***
>
> *The operator of a retirement village must, at least 10 business days before a person enters into a residence contract, give the person a copy of each of the following documents:*
>
> *(a) the residence contract;*
>
> *(b) the disclosure statement;*

(c) if the contract relates to a retirement village already established—

(i) the financial statements presented at the last annual meeting of residents of the village, including a written statement of any subsequent change in the affairs of the village and the operator that may significantly affect the resident's decision to enter the village; and

(ii) a copy of the minutes of the last 2 annual meetings of residents of the village (if 2 or more such meetings have been held) or of the last annual meeting (if only 1 such meeting has been held);

(d) the residence rules;

*(e) the policy of the operator to be applied for the remarketing of residences (the **remarketing policy**);*

(f) any code of conduct to be observed by the operator or residents;

(g) any other document prescribed by the regulations.

40% of online survey respondents do not think the information provided before signing a contract allows a person to make an informed decision and 29% of respondents think that it does (31% did not respond).

Some prospective residents are not sure where to seek legal advice on the contract and the Review understands that there are few or no legal practitioners who are known to specialise in providing advice on contracts to prospective residents. Examples were given in the submissions where legal advice had been sought, but due to the complex nature of the contract, material issues were not advised on.

Requests for further information that resident respondents nominated included:

- planned large capital expenditure of the retirement village
- greater clarity on maintenance fees and schedules, and
- a declaration of how many SACAT proceedings have been brought against an operator in the last two years.

Operator respondents were unanimous in the view that enough information is provided, stating that further information may create confusion. It was noted in one submission that Regulation 5 (e) and (f) require an operator to list services and facilities available in the retirement village in the contract and sought clarification that the intended scope was services and facilities provided by the operator in that village. This would be a sensible clarification when the Regulations are next amended as the Review assumes that this is what was intended.

The Review has recommended in Part 2 that additional information should be available via the Register, before a contract is signed. Information such as previous sale and re-sale prices of licences are also not generally available to prospective residents, which limits their ability to make an informed assessment about potential growth or stagnation in the future value or growth of the licence. The Review has recommended that some information, including that which is subject to change at the discretion of the operator, could be included on the Register rather than in the information provided to a resident.

The arrangements applying to retirement villages are not arrangements that ordinary members of the public generally have cause to understand. The terminology that is used in the sector does not necessarily assist with ease of understanding and contributes to lack of clarity and misunderstandings. Different operators call similar fees different things.

There can also be confusion regarding the nature of the financial outlay that residents are making. The complex nature of the contracts and terminology used (including in the Act) can lead some people (not necessarily residents, but perhaps their children) to think that retirement villages involve an investment in bricks and mortar, rather than a licence to live in a retirement village. This can be compounded by the nature of the marketing for villages where terms such as 'unit for sale' is used. Whilst this terminology might be suitable for a retirement village scheme that comes within part (c) or (d) of the definition of a scheme, it does not help with clarity for most situations which are a lease, licence or share arrangement in accordance with part (a) and (b) of the definition. At present the Review understands that there are only two villages in South Australia which involve a "purchase" as the term is used in part (c) and (d) of the definition.

This matter was also noted in the *Inquiry into the NSW Retirement Village Sector* by Kathryn Greiner AO in New South Wales, who noted advice to the Inquiry that:

> *"…the terminology used in marketing is often misleading and factually incorrect, which is likely to create confusion for potential residents. … terms such as such as 'purchase', 'buy', 'sale', 'owner', 'price' and 'price guide' were incorrectly used by operators in relation to leasehold contracts. These terms imply ownership of a dwelling while leasehold rights only confer the right to occupy a dwelling and has different financial implications."* [34]

This confusion has also impacted on concerns raised in relation to whether the resident should have to pay for remarketing costs and the extent to which (and when) they can be involved in the sale process (this is discussed further under Topic 2.22).

[34] Inquiry into the NSW Retirement Village Sector, Greiner, K., 2017, pg. 23
https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0008/381572/Inquiry_into_the_NSW_Retirement_Village_Sector_Report.pdf

To minimise confusion, the Review considers that terminology such as “purchase” should only be used where the retirement village scheme involves a purchase as set out by the Act in part (c) and (d) of the definition of scheme, and that otherwise the terms “lease” “licence” or “share” be used. The Review recommends that all marketing and pre-sale material relating to retirement village schemes meeting part (a) and (b) of the definition of scheme should state explicitly that the property is not what is being purchased, but rather it is a lease or licence to live in the property, and property still is owned by the operator. It might be helpful for the Act to distinguish between a Type 1 scheme (licence, lease or share - (a) and (b) in the retirement village scheme definition) or a Type 2 scheme (ownership subject to conditions - (c) and (d) of the scheme definition).

In the first instance this issue could be progressed through Better Practice Guidelines and/or the Code of Conduct, including the one promulgated by industry bodies. Some attention could also be paid to the language within the Act itself.[35] In addition, the Review’s recommendation that the Disclosure Statement clearly state which definition of the scheme applies to the village should assist in making it clear that schemes are generally a licence, lease or share arrangement.

As an extension of this, any policies which require residents to remove ‘improvement’ items from the property should be framed in the context that the property remains always the operator's asset, and in the case of Type 1 schemes, it is the licence to live in the property that the resident has purchased, not the property itself.

Recommendation 19 - Marketing Transparency

All marketing and entry material relating to Type 1 retirement village schemes should state explicitly that the property is not what is being purchased, but rather it is a lease/ licence/share to live in the property, and the property remains owned by the operator.

Recommendation 20 - Contract: Services and Facilities

Regulation 5, which requires an operator to set out details of services and facilities available in a retirement village in the residence contract, should be amended to specify this only relates to services and facilities provided or arranged by the operator.

Recommendation 21- Fees Definitions

The Better Practice Guidelines should promote that terminology relating to fees is used in a consistent manner across the sector.

[35] There are instances where the Act does not distinguish clearly between the different types of schemes. For example, the Regulations in r 17(1)(i) refers to the sale of a residence.

Disclosure Period (Topic 2.4)

The Act currently provides a 10-business day disclosure period before a person can enter a contract with a retirement village operator. The disclosure period is intended to provide the person with time to review the contract and seek legal or financial advice if they choose. However, some prospective residents wish to move into a village immediately.

33% of online survey respondents thought the current disclosure period provides prospective residents with sufficient time to get advice on the contract and the same proportion (33%) did not think it provides sufficient time (33% did not respond).

When asked whether a person should be able to waive this 10-business day period, 35% stated yes and 28% stated no (37% did not respond).

In the written submissions, resident respondents reflected the split view found in the online survey, but generally respondents thought that a waiver should be allowed if a person had legal or financial advice. This view was supported by operators, stating that the period was sufficient, with one larger operator commenting that in their experience, more prospective residents are now seeking legal advice. The Legal Services Commission warned that it can be difficult for a person to gain legal advice within the 10-business day timeframe.[36]

Representative bodies such as COTA consider these protections important. *"It is COTA SA's view that legislated protections should be inviolable thereby countering the risks associated with rushed decision-making including in what is often a high-pressure sales environment"*. The Review notes that in New Zealand it is mandatory for a prospective resident of a retirement village to seek legal advice before entering a contract.

LASA referred to its recent experience in Queensland and Victoria, where residents' representatives have advocated that it should be the choice of residents if they waive the disclosure period, noting that some people have an urgent need to move in to a village.

Given that a cooling off period is already able to be waived, the Review is cautious about removing the protection of the Disclosure Period in the absence of legal advice being obtained by a prospective resident.

Recommendation 22 - Disclosure Period

The Act should allow a waiver of the 10-business day disclosure period if a prospective resident has obtained legal advice.

[36] It would clearly be beneficial for legal advice to be more accessible for prospective residents, but this is not something a provision in the Act can improve. It may be something that OFAW, industry and the legal profession can take steps to address.

Cooling-off period (Topic 2.5)

Coupled with the disclosure period, the 10-business day cooling off period is a safe-guard for prospective residents, allowing cancellation of the contract. The Act (s 24 (4)(b)) already allows for a waiver of this period.

When asked if a prospective resident should be able to waive the disclosure and cooling off period, 39% of online survey respondents said no and 20% said yes (41% did not respond).

In the written submissions, resident respondents generally supported the provision of a cooling off period and the ability to waive it, noting flexibility is sometimes required. Here again, the provision of legal advice was considered an appropriate requirement for a waiver.

Operator respondents felt the current time was appropriate but supported a waiver if both parties agree. As with disclosure periods, the Legal Services Commission stated it is difficult for a prospective resident to gain legal advice within this timeframe, and SACAT also referenced the difficulty for people in obtaining legal advice and suggested a panel of lawyers could be established[37]. The PCA and a legal representative stated that the two periods (disclosure plus cooling off) were too long and supported a reduction of days with a waiver option.

Overall, the Review does not consider there is a compelling argument to change the cooling off provisions in the Act. Measures that support prospective residents being well informed, including clear Disclosure Statements and the ability to access advice, are preferred.

Repayment in cooling-off period (Topic 2.6)

The Act is currently silent on the process and timing within which a new resident is reimbursed for payments made on signing the contract, should they elect through the cool-off period to rescind that contract. It is noted that the 1987 Act provided for the reimbursement of the premium (incoming contribution) within 10-business days of the contract formally being rescinded.

In the written submissions, resident respondents stated they expected to be protected in such circumstances by the Act and supported a 10-business day period for any funds to be reimbursed once the contract was rescinded. One operator respondent stated that they have a process in place and another regional operator stated that guidelines would be helpful in this regard.

In terms of any interest payment, it was commented that if the funds are held in a Trust, then no interest is payable. The PCA stated they were not aware of issues related to reimbursements of fund processes.

[37] Submissions 46 and 78

Recommendation 23 - Cooling-Off: Reimbursement

In the event the contract is formally rescinded as per the cooling-off provisions, the Act should require any funds paid by the new resident to be reimbursed, not including interest, within a 10-business day period.

Premises Condition Report (Topic 2.7)

The Act introduced the requirement that a premises condition report be completed within 10 business days of a person entering occupation of a residence. The question asked as part of the Discussion Paper was "Has moving information about responsibility for repair or replacement of fixtures, fittings and furnishing from the premises condition report into the residence contract improved clarity about who is responsible for the costs of this work?" It is understood that this shift was done with the intention that this would minimise disputes about the condition of the premise at the point of exit.

In the written submissions, resident respondents stated that removing who is responsible for repair and maintenance out of the premises condition report to the residence contract has not provided clarity. People expect to see the schedule of repairs and replacements, plus the potential costs and who is responsible, in the premises condition report. Operator and other respondents support this view – stating the premises condition report is important as it can be compared to the vacate premises report on exit.

The Review accepts the logic behind the shift in the Act to have all cost-related matters together in the residence contract. It appears, however, that separating cost-related matters from information about the condition of the residence and the repair and replacement schedule of items in the residence in separate documents, has created confusion rather than clarity.

The Review further notes that if a resident enters into the contract without having seen a premises condition report, any dispute about the condition of the residence and, who pays for repairs and replacements that may not have been apparent when signing the contract, cannot be effectively dealt with through the premises condition report alone. The Review therefore recommends that the premises condition report is provided as early as possible in the contracting process, and that its provision impacts upon the expiry of cooling off.

Recommendation 24 - Contract and Premises Condition Report

The Act should require that the premises condition report is provided as early as possible to the incoming resident. The cooling off period should not be able to be waived if a resident has not received the premises condition report, and if the premises condition

report is not provided prior to the signing of the contract, the entitlement to cool-off should run from the date of provision of the premises condition report.

Purchasing off the plan (Topic 2.8)

The Discussion Paper posed questions in relation to entering into a contract for a residence that is not yet constructed. Very few responses were received to these questions.

Respondents did state that they expected protections to be in place and one respondent queried what happens if a person dies whilst the property is under construction.

The PCA noted that the situation is different with retirement villages compared with other off-the-plan purchases as progress payments do not apply. The Discussion Paper suggested that it is unclear when specific provisions of the legislation apply. One submission raised issues with multi-story, mixed lease premises.

The situations outlined above involve complex matters of contract and property law. The Review is not able to make any recommendations in relation to this issue, and instead suggests that the OFAW seek legal advice in relation to this matter, to assist in determining whether the Act strikes the appropriate balance between protecting prospective residents and not discouraging development in the sector.

The Review also notes that this matter is under consideration in other jurisdictions with the reviews of their Acts and a nationally consistent approach is desirable.

Recommendation 25 - Village Type: New Developments

The OFAW should seek legal advice on how the Act would apply and what amendments might be necessary to deal with issues relating to buying off the plan, and with multi-story or mixed lease premises.

Settling in period (Topic 2.9)

Section 4 (2)(B) of the Act provides for a "settling-in" period through which the resident is protected within the first 90 Days, from the financial penalty that would normally apply should they terminate their contract. The legislation means that, unlike in some other jurisdictions, there is effectively an extended cooling off option during the settling-in period.

Section 44(5)(a) stipulates the fees that can be charged during this 90- day period, namely *fair market rent* less any amount paid by the resident for services that would otherwise be included in the assessment of fair market rent. Further, the resident is responsible for any other amounts payable under the residence contract.

The question is whether some operators are including fees in the resident contract to be paid on exit during the settling in period, which in effect, duplicate the amount being charged through the fair market rent. The Discussion Paper indicated that some residents have been charged fair market rent in addition to maintenance fees already paid, plus six months of maintenance fees after leaving a village, as well as remarketing and refurbishment costs. These additional fees charged through the contract are effectively negating any benefit the resident might have in leaving a village during the settling-in period.

When asked if the Act should be amended to limit what an operator can charge a resident when exiting during the settling in period, 49% of online survey respondents said yes and 10% said no (41% did not respond).

In the written submissions, resident respondents expected protection from the Act and were of the view that if fair market rent was being charged, charging maintenance fees is in effect, double dipping. One operator stated they provide a six month 'change of mind guarantee' and another stated that rent plus maintenance fees should be allowed. The PCA advocated that no changes are required and that maintenance fees (recurrent charges) are charges for the general upkeep and running of a village and should be payable. ARAS is of the view the Operator should be prohibited from charging rent and maintenance at the same time.

The Disclosure Statement requires the amount of fair market rent and any other fees or charges to be specified for termination during settling-in. The Review understands that fair market rent is significantly higher than what the maintenance fee would be. Based on information provided by OFAW, the Review is concerned that the intention of s 44(5) to enable a resident to leave within the first 90 days without accruing significant fees and charges is not adequately achieved by the current provisions. There are protections in s 44(7), which prohibit a resident from paying a penalty if they terminate during the settling-in period. However, what constitutes "fair market rent …. less any amount paid for services" and what constitutes a "penalty" leaves too much to the contract.

The Review recommends that that the Act provides better protection for residents who decide within 90 days that retirement village life is not for them. It might provide that fair market rent applies instead of the maintenance fee, or that the maintenance fee is deducted from what would be fair market rent. It might be reasonable for remarketing fees to apply but should be only in exceptional cases that a refurbishment fee would apply. Alternatively, or in addition, the period of time for which maintenance fees can be charged might be capped. The Review abstains from making a specific recommendation in favour of the appropriate mechanism being the subject of further consultation.

Recommendation 26 – Termination during Settling-In

The Act should provide better protection for residents who terminate during the settling-in period.

Matters related to living in a village

Financial matters (Topic 2.10)

The Discussion Paper posed questions on financial matters relating to the level of detail provided in financial statements, village budgets and transparency of management fees. In the 2020 resident survey, one quarter (24.51 %; n 189) of all respondents said that the financial statements provided a good understanding of what management expenditure includes. However, 21.66 % (n 167) of respondents indicated that the financial statements did not provide an understanding of what management fees included.

In the written submissions on the Discussion Paper, particular pain points were the break-down and thus transparency of management or maintenance/recurrent fees. It is evident from submissions that in some cases, most particularly in for-profit villages, there can be a lack of trust between residents and operators about the fees that are charged. This is further exacerbated when the operator has an interest in another entity that provides services or utilities to a village.

Some residents would like much more detailed information than is provided by some operators. Of course, providing detailed information can itself be an impost on operators. The only source of funds for villages are the contributions made by residents, and so any additional costs for operators will be recovered from residents.

SACAT advises in its submission that financial disputes often relate to whether particular costs should be allocated to particular funds.

It is difficult for the Review to assess the extent to which any of the problems raised in resident submissions are applicable to most or all operators, or a minority.

Operator representatives also raised issues in relation to financial matters. The PCA indicated support for a measure that outlines that audit statements must be able to be compared with financial reports / budgets. A legal representative indicated that there is confusion as residents expect a specific monetary value and descriptor for items in management funds. LASA submitted that most good operators already have a very transparent budget process that explains line items in upcoming budgets. LASA and others have concerns about having to break down expenditure too much for items such as staff

wages for contractual and privacy reasons, but commented that a breakdown on capital expenditure is a reasonable request for large item expenses.

The NSW *Retirement Villages Act 1999* is more prescriptive around the issues of fees and charges than the South Australian Act. SARVRA in their submission propose the insertion of new sections in the South Australian Act that would particularise in more detail requirements in relation to Capital Maintenance and Replacement. These are modelled on the sections in the NSW Act,[38] whereby the operator may use fees charged to residents (e.g., recurrent fees or capital works fund) for capital *maintenance* but must bear the cost of capital *replacement*. SARVRA note that similar provisions were tabled by the then Shadow Minister, now Minister, the Hon Stephen Wade MLC, during debate on the 2016 Bill. The Review notes that the inclusion of these provisions in the Act might lead to an imbalance in the attention given to particular issues by the legislation – as the New South Wales Act is generally more prescriptive. The Review recommends that the inclusion of provisions such as these are subject of consultation with any Amendment Bill.

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

Recommendation 27 - Audit Statements

The Act should require audit statements to be able to be clearly compared with financial reports and budgets.

Recommendation 28 - Audit Statements: Annual Meeting

The Act should be amended to 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 29 - Fees: Capital Replacement and Maintenance

Consultation should occur regarding the inclusion of specific provisions relating to Capital Maintenance and Replacement fees in any future Amendment Bill.

Increasing Recurrent Charges (Topic 2.11)

The Act provides that an operator can increase recurrent charges, funded by the resident, on an annual basis. This must be stipulated in the Disclosure Statement. However, an operator is not required to present any change to the recurrent charges for the next

[38] Retirement Villages Act (NSW) 1999 S97

financial year in advance. Given the operator is not required to hold an Annual Meeting with residents until four months after the end of the financial year, residents may start paying an increased recurrent charge before it has been presented or explained to them.

The Review notes however that an operator is required to meet with the Resident's Committee twice before the Annual Meeting is held, thus it is not clear that a discussion in relation to recurrent fees at this meeting would be an additional impost.

When asked if the Act should provide for more information to be provided to residents about changes to recurrent charges before they occur 55% said yes and 8% said no (38% did not respond).

In the written submissions, resident respondent concerns related to what constituted a 'reasonable' increase as is required by s 34(7) of the Act. SACAT noted that this is a reasonably common area of dispute dealt with by the Tribunal, commenting that the provision in the Act "…*is inadequate to address a complex topic in relation to which residents are particularly vulnerable*." [39] Resident respondents commonly suggested that increases to recurrent charges should be linked to CPI.

The Review notes that the NSW Act[40] provides in Part 7 that operators must seek the residents' consent of the proposed expenditure if recurrent charges are increased either by more than CPI or more than the fixed formula set out in the village contract. This approach is similar to a recommendation made by the Parliamentary Committee in South Australia.

The Review considers that the Act does not strike the right balance on this point and that residents are very exposed. An individual resident would need to take action in SACAT to remedy an excessive increase. Given the significant implications for residents from a fee increase, the Review is persuaded that there should be greater protection for residents.

There is merit in the approach taken by the NSW Act. As the Review does not have the benefit of specific feedback from the consultation on these types of provisions, it is difficult to determine whether - or the extent that - they might unduly impost on operators and whether this would be outweighed by the benefit of reducing potential conflict for all parties. However, the fact that the provisions are in place in New South Wales affords some comfort. The New South Wales model should be considered, or another model that provides operators with flexibility, but greater clarity to all about what is "reasonable".

In relation to discussion with residents about budget and recurrent charges, some operators and the PCA highlighted the impost of holding an additional meeting (to the Annual Meeting (pre- and -post financial year).

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[39] Submission no. 78, pg. 4.

[40] Retirement Villages Act (NSW) 1999

Recommendation 30 – Fees: Recurrent Charge Increase

The Act should provide greater protection to residents in relation to increasing recurrent charges.

Recommendation 31 – Fees: Consultation Obligation

An operator is required to meet with a resident's committee twice (*or once if the committee agree*) before the Annual Meeting to discuss the budget. The Act should mandate that recurrent charges, and any potential increase, be discussed at this time.

Consultation with a Resident's Committee (Topic 2.12)

The Act mandates that the operator meets twice with a Resident's Committee (or once if the Committee agrees) before the Annual Meeting, for the purpose of residents being consulted on the annual budget. However, section 39(1)(a) refers to "the matters set out in section 33(6)(a)", and this section includes a reference to audited statements.

When asked if the Act should be amended to clarify that the meetings held with the Resident's Committee to discuss annual budget does not require the finalised statements, 33% of respondents said yes and 24% said no (43% did not respond).

In the written submissions, both resident and operator respondents supported the provision of non-finalised statements for the purpose of the two meetings ahead of the Annual Meeting.

Recommendation 32 – Committees: Annual Budget

The Act should provide that for the purpose of section 39, the operator can provide unaudited financial statements.

Surplus and Deficit Policy (Topic 2.13)

The Act included a new provision to require an operator to have policy in place that stipulated how any surplus or deficit of funds collected through recurrent charges are managed. The purpose of this was to increase transparency as the Act had previously been silent on the matter.

When asked if the Act should clarify the default surplus and deficit policy, 47% of respondents said yes and 11% said no (42% did not respond). The survey further asked whether the Act should be amended to include processes about what is to happen if

residents do not approve a change to the surplus and deficit policy, to which 56% of respondents said yes and only 4% of respondents said no (40% did not respond).

In written responses, resident respondents agreed that the Act should provide further clarity on the points raised above. Only one operator responded to this point, but this operator, the PCA and LASA were all of the view that the current arrangements are sufficient.

From the 2020 resident's survey, it appears that a relatively substantial number of respondents did not understand the surplus and deficit policy of their village. When asked if they knew what happened in their village if there is a surplus or deficit in the village's recurrent charges, 37% (n288) said yes it was clear to them, 34% (n264) said their village had a policy but it was not clear to them and 28% (n218) said they were not sure if their village had a policy and what happens to a surplus or deficit. This indicates that further education may be beneficial.

The Review considers that in the event a Special Resolution of residents does not approve a change to the policy, then the current policy would remain in place, and in the event there is not one in place, the default policy as per the Act would take effect. An educational approach may result in an improved understanding of the surplus and deficit policy of a village and the consequences of surplus and deficits for the ongoing management of the village. Therefore, no legislative change is recommended.

Proceedings and Meetings (Topic 2.14)

The Discussion Paper posed a range of questions in terms of resident voting rights (one per residence as is currently the case, or shifting to one per resident); whether the current articulation of a Special Resolution needs to be better articulated to avoid confusion; and how minutes or other matters in relation to meeting proceedings could be improved.

In written submissions resident respondents were particularly engaged in the question of voting rights. The majority supported the current provision of one vote per residence, the minority were in favour of one vote per resident, stating grounds of fair democratic process. Operators and other respondents supported one vote per residence also.

In response to whether a quorum should be introduced, there were not substantial responses, but the views presented favoured a low threshold quorum should one be introduced. The Review notes that the one vote per residence rule aligns with other legislation pertaining to accommodation: namely the *Strata Titles Act 1988* and the *Community Titles Act 1996*. In terms of a quorum at a general meeting, the *Strata Titles Act* requires that people entitled to vote from at least half of the units must be present. The *Community Titles Act* requires a similar size quorum. LASA and SARVRA support a quorum of 25%.

In terms of the Special Resolution provision, resident, operator, and other respondents were unanimous that it should be clarified to the meaning provided in the Discussion Paper. That is, that the majority of not less than three-quarters is based on the number of residents who are *present* at a meeting and entitled to vote or exercising an absentee vote.

In terms of other improvements, resident respondents often raised the issue of an operator representative at a meeting being able to capably answer questions raised. The Review notes that the Act already provides for questions taken on notice to be answered in writing, within 10 business days.

In relation to the other questions posed, there appears no compelling reason to further regulate Resident's Committees. Given the diversity of villages the Review is persuaded that regulating committees in relation to member numbers and other processes might cause as many problems as it solves.

On reviewing the submissions, the Review notes a level of confusion amongst resident respondents in terms of the role and responsibilities of a Resident's Committee and a meeting of residents (as convened by the operator).

Recommendation 33 - Special Resolution and Quorum

The Act should clarify the Special Resolution provision applies to 75% of those *present* (or absentee voting) and for a quorum.

Recommendation 34 - Committee Minutes

Regulation 12 should be amended to clarify that the requirement of a Resident's Committee to provide an operator with minutes after a meeting of the committee has occurred includes the annual meeting.

Consultation with residents (Topic 2.15)

The Resident's Committee is an important avenue through which the residents can consult with the operator of the retirement village. The functioning of such a committee is important to a retirement village - meaning that the committee must operate in an appropriate manner and the operator must undertake meaningful consultation with the committee as required. The Regulations include provisions to structure these actions.

When asked if the Regulations should contain a simple default set of rules to apply if a committee does not have rules in place, 56% of respondents said yes and 6% said no (38% did not respond). Very few written resident responses were submitted to this question,

however there was overall support for a default set of rules, with operators preferring that having a set of rules, or having a committee, not be made mandatory.

The online survey also asked whether residents of multiple sites should be able to form a representative committee, 41% of respondents said yes and 16% said no (43% did not respond). There were not sufficient written responses to add further to the survey responses. The Review notes that multi-site committees could create difficulties in some instances, where the matter being voted on is particular to one site. The Review is not persuaded that the Act needs changing to address this issue.

The online survey also asked whether the clarification of what constitutes reasonable consultation had improved consultation in retirement villages, 34% of respondents said yes and 28% said no (38% did not respond). In the written responses, many resident respondents questioned how one can define 'reasonable consultation', stating the view they did not feel adequately consulted. However, the survey results indicate that the amendments made in 2016 are starting to have an impact.

In a small number of written submissions, a request for a meeting to be held on an online/digital platform was raised, this was in the context of the experience during the COVID-19 pandemic. The Act does not preclude a meeting being held digitally, however guidance to how this can best occur and remain inclusive should be addressed as part of Better Practice Guidelines.

Recommendation 35 - Committee Rules

A simple, default set of rules for a resident committee should be included in the Regulations.

Recommendation 36 - Meetings

In relation to meetings with residents, the option for online meetings should be promoted in the Better Practice Guidelines.

Disputes (Topic 2.16)

The issue of how disputes between a resident and an operator are managed was raised strongly to the Select Committee in 2013. As a result, provisions in the former Act which stated an operator must have a dispute policy were expanded in the new Act to specify what it must include. The Act does not explicitly stipulate that an operator must follow its dispute policy. It is however a prerequisite of a party lodging an application to SACAT that they have made reasonable attempts to resolve the dispute in accordance with the operator's dispute resolution policy.

When asked if the Act should be amended to require an operator to follow a village's dispute resolution policy, 66% said yes and 3% said no (31% did not respond).

Written respondents from all stakeholder groups supported the intent of the provision. The Review notes that in New South Wales, there is an additional statement to provide that nothing in the Act (in terms of dispute resolution process) prevents the parties in a dispute from trying to resolve their dispute in an informal way. This slightly more flexible approach is supported by SACAT.

When asked if the changes to the dispute resolution policy improved handling of retirement village disputes, 30% said no and 18% said yes (52% did not respond.)

When asked if SACAT is the most appropriate place to hear retirement village disputes, 34% said yes and 15% said no (51% did not respond). Overall, written respondents also supported SACAT as the appropriate place.

Data collected by OFAW on the nature of contacts made with them, primarily being residents or their families, indicate that since the commencement of the Act, the top reasons for contact related to committees, contractual terms, and financial matters (exit entitlements, maintenance fees and repairs). Coupled with the prominence of these issues in respondents to this consultation, the importance of clear dispute resolution processes is magnified.

There are gaps identified by SACAT or others in terms of what disputes SACAT are empowered to adjudicate. Some operator representatives would like to see SACAT adjudicate disputes between residents. The Review does not consider this is appropriate. The Review agrees that applications should be able to be brought to the Tribunal for the following matters:

- A mechanism for dealing with retirement village disputes which may not necessarily otherwise fall within the scope of s 46(3)(c), such as a dispute arising from a village's rules.
- Making it clear that the Tribunal can deal with a dispute between a resident and an operator considering the principles of contract law. SACAT cites the example of a false or misleading disclosure statement and that it appears the Tribunal has no powers to make orders under s 46.
- Enabling the Tribunal to issue a restraining order as it can under s 112 of the *Residential Tenancies Act*, but only if it is incidental to some other application before the Tribunal and not as an originating application (in order to avoid SACAT becoming involved in disputes between residents).

Recommendation 37 – Dispute Resolution Policy

The Act should provide that an operator must follow its dispute resolution policy, and only where agreed between the operator and resident, can some other dispute resolution approach (e.g. mediation) be followed.

Recommendation 38 – Disputes jurisdiction

The Act should permit SACAT to determine a wider range of disputes.

Lease of Land (Topic 2.17)

Provisions introduced to the Act about the lease of land have proven to not deliver the desired clarity. Specifically, there is no mention of a commercial lease, only the ability of the operator to lease (or grant a lease to occupy) land in the village for a purpose other than as defined in the scheme, to an 'eligible person'. An eligible person is defined in the Act as a person who has attained the age of 55 years and retired from full-time employment. For such leases, the Act includes a maximum length of lease of five years and stipulates that the person is then not a 'resident' as per the definition of the Act.

When asked "should the Act be amended to include separate provisions relating to the lease of land within a retirement village for commercial purposes and the lease of residences within the retirement village to rental tenants", 33% of respondents said yes and 18% said no (51% did not respond). There were not substantial written responses, but there was overall support for separating out the treatment of commercial and residential leases.

When asked "should there be a limit on the length of residential leases in a retirement village", 33% said no and 16% said yes (51% did not respond). There were very few written responses to this question, but they should be considered in conjunction with the matter of 'rental tenants' in a retirement village. SARVRA put the position that the Act should include a section on the rights of rental tenants.

The Review considers there are two issues at play here, one is about the flexibility afforded to an operator in terms of the usage of the retirement village through commercial leases and/or residential leases in addition to more traditional retirement village products, to maximise how the village operates. The other is about how different types of people residing in retirement villages are classified, 'residents' as defined in the Act and rental tenants, who are not afforded the same rights. The latter point is explored further in the section below.

In considering amendments to the Act, the Review would encourage that the current maximum lease term on residential leases be considered in the context of the growth of this population within retirement villages; noting the impact an uncapped term may have on the structure and thus financial operation of villages.

Recommendation 39 - Commercial and Residential Leases

The Act should provide separately for commercial and residential leases in retirement villages.

Recommendation 40 - Residential Lease Term

The five-year maximum lease term on residential leases should be removed from the Act.

Rental Tenants (Topic 2.18)

Under section 57 of the Act, a tenant in a retirement village is not classified as a resident and thus not afforded the rights of residents outlined in Part 3 of the Act. This means, for example, that a rental tenant does not have the same voting rights as a resident.

When asked if the Act should be amended to enable rental participants to have a greater participation in village life, 23% of online survey respondents said yes and 21% said no (51% did not respond).

In the written submissions, resident respondents generally supported rental residents having equal rights when it came to participation in village life, stating that if they are treated differently, it potentially creates a divide between the two groups. The only exception was in relation to financial related matters, given they have not made an incoming contribution (investment) to the retirement village. Operator and other respondents agreed with this position. A small number of comments noted that rental tenants are more likely to be older, single women and that this cohort should be supported.

The Review understands that rental tenants in retirement villages are a growing population, particularly in the for-profit sector. The perception that rental tenants are not as invested in the retirement village is noted in the written submissions; however, as they pay market rent, depending on the length of tenure in the retirement village, it is possible that with longer tenures, they may be paying a similar amount for the duration they live there as lower entry cost models. In the absence of good data, this assumption is speculative. However, the nature and purpose of a retirement village is about the provision of community living for a particular cohort- and a resident investment in such a community goes beyond just the financial.

Recommendation 41 - Rental Tenants

The rights of rental tenants within retirement villages should be updated to give them the same non-financial voting rights afforded to residents of retirement villages; and to avoid

duplication, otherwise they should have the same rights and obligations as rental tenants under the *Residential Tenancies Act*.

Health and Safety (Topic 2.19)

The Discussion Paper raised two sets of questions in relation to health and safety, one relating to minimum training requirements of village staff on the code of conduct and the second, in relation to emergency situations given the recent bushfires and pandemic. The former issue has been dealt with in Part 2 of this Report.

When asked "should the Act be amended to include requirements for villages around emergency/evacuation plans", 60% of respondents said yes and 6% said no (33% did not respond).

In written submissions, resident respondents supported a requirement for operators to have an emergency plan. There were limited non-resident responses, however it was flagged that retirement villages are independent living and thus there is not always an operator employee on site.

The Review notes that in January 2020 New South Wales introduced compulsory emergency plans and associated requirements for retirement villages.[41]

The Review considers that there should be obligations on operators in relation to emergency/evacuation plans and other health and safety requirements. However, it might be that these matters are already covered by the obligations under the *Work Health and Safety Act (SA 2012).* Advice could be sought by the OFAW from Safework SA to clarify this. If that is the case, then that legislation is the more appropriate vehicle to regulate and educate in relation this matter. If it is not the case, then a provision such as that in NSW could be considered.

Recommendation 42 - Health and Safety

Advice should be sought by the OFAW to determine the extent to which retirement village operators are bound by the *Work Health and Safety Act 2012*. If there are gaps or doubts in the regulatory framework then amendments should be considered.

[41] See s 58A and 58B of Retirement Villages Act 1999 (NSW)

Leaving a village

Termination (Topic 2.20)

The Act provides clear grounds for which an operator can terminate a resident's right of occupation in a retirement village.

Few residents responded on this topic but stated that termination should only be a last resort. SARVRA recommended that a letter of termination notice should be accompanied by an invitation to meet with the operator. This might not always be appropriate but could be dealt with in Better Practice Guidelines.

Few operators responded on this topic, stating that whilst a termination is rare, consideration could be given to the Victorian model[42] where an operator can terminate for a serious breach without the Tribunal, following serving a notice that has not been complied with. In the absence of more detailed responses regarding the operator having the power of termination, the Review does not have sufficient evidence of the problem to recommend this be progressed.

A further comment was that currently the Act requires an operator to lodge an application for a termination to the tribunal and then give the resident notice (s44(12)). It is proposed 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.

A theme amongst operators was how to proceed when the capacity of resident declines – stating this may become more frequent given the shift in the aged care sector to support older people in their homes for longer. The Review notes that the Act already provides for termination if *the residence becomes an unsuitable place of residence for the resident because of the resident's mental or physical incapacity* (s 44 (1(d)) and considers the existing processes for dealing with capacity preferable to establishing a specific model under the *Retirement Villages Act*.

Recommendation 43 - Termination Notice

The Act should require that the operator give the resident a notice of intention to terminate before lodging a termination application with the tribunal.

[42] Retirement Villages Act (VIC) 1986 s3(16)

Notice to Vacate (Topic 2.21)

The Act introduced provision for a resident to continue living in the premises for up to 18 months once they have provided the operator with a notice to vacate, whilst the premises is remarketed. The intention is to protect the outgoing resident from having a gap (no home) between residences.

It is difficult for the Review to draw conclusions on this issue as there were very few responses to the questions in relation to notice to vacate in the submissions or online survey. The few resident respondents supported residents being able to live in the premise during marketing. Operators tended to the opposite view, stating it is difficult to remarket a residence when someone is still living in it.

The Act already protects the operator, in that for the 18-month payment of the exit entitlement to be paid, the resident must have vacated the premise three months before the payment must be made. In practice, this means that for the resident to receive the exit entitlement at 18 months, they must vacate the premise by month 15 after the notice to vacate has been lodged. However, should they not vacate the premise until 18 months after lodging the notice to vacate, the operator would have another three months to pay the exit entitlement.

One submission pointed out that Section 27(3)(a)(ii) contains an internal inconsistency as expresses an ability for a resident to intend living in the residence *until* the exit entitlement is payable, which the resident cannot do as section 27(2)(b)(ii) provides the exit entitlement will not become payable until three months after the resident has provided vacant possession.

The Review considers that the Act could better articulate the intent.

Recommendation 44 - Notice to Vacate: Remaining in Residence

The Act should be amended to clarify that the resident can continue to live in the residence after giving the notice of intention to vacate, but that the operator does not have to pay the exit entitlement until the residence has been vacant for a period of three months (or when the specified conditions of a contract are fulfilled).

Remarketing of a residence (Topic 2.22)

The Act requires that an operator have a remarketing policy. The Regulations clearly set out the process of remarketing and information that must be provided to a resident on entering a retirement village (e.g. remarketing costs for which they are responsible) and on exiting a retirement village.

In 2016, the Act introduced the provision which enables a resident to participate in remarketing if at nine months since they have ceased to reside (or are still residing but have lodged the notice to vacate) the residence has not been re-leased.

In the written submissions, resident respondents generally supported the right of a resident to engage their own agent, a small number advocating that this provision should take effect earlier than at nine months. The PCA and LASA suggest the 18-month exit entitlement payment period should not apply where a resident assumes responsibility for the process.

There was almost no comment about the remarketing policy itself, but comment from SARVRA that it is unreasonable that outgoing residents are required to pay a proportion of the remarketing costs, given they do not own the property. The Review notes that a resident participating in re-marketing may not assist with clarity about Type 1 or Type 2 scheme arrangements.

One submission stated that due to the different financial arrangements and models via which a resident enters a retirement village, there may be operators that require more than one remarketing policy and that the Regulations should be amended to allow for this. As these are largely matters of drafting, the Review recommends these issues are considered as part of the recommendation relating to Topic 2.30 of the Discussion Paper.

Refurbishment or reinstatement of a residence (Topic 2.23)

The Act provides that certain information be provided to a resident on entering a retirement village, including how refurbishment or reinstatement of a residence when they exit, are funded. This information is found in the residence contract, the premises condition report and in the disclosure statement. The Act is however silent on how alterations to the residence, made by the resident (that generally are required to gain approval of the operator) are managed at the point of exit.

When asked if the Act should be amended to include guidance around refurbishment and renovation of a residence, including alterations, 61% of online survey respondents said yes and only 8 % said no (31% did not respond).

In the written submissions, resident respondents generally supported the Act being more explicit on these matters. The submissions tended to focus on the absence of guidance in relation to alterations made to the residence during the resident's tenure.

The Review noted a strong level of frustration at what respondents reported, as a blanket rule to remove all alterations (at the cost of the outgoing resident) to ensure the premise is returned to the state as detailed in the premises condition report. The Review identified two themes in this regard:

i. concern that this led to a waste of resources – where an incoming resident may reinstall the same item for example and should at least have the option of deciding if they wish it to be retained; and
ii. a feeling by outgoing residents that their alterations improved the residence and thus may attract a higher sale price.

The Review also noted that it is not uncommon for SACAT to express the view in decisions that fees such as these imposed by operators are at the higher end of what might reasonably be expected.

Operator and other respondents were of the view that these are contractual and not legislative matters.

The Review considers that greater clarity on entry in terms of costs and responsibilities in relation to matters relating to refurbishments, renovations and maintenance - may help alleviate concerns stated by residents in relation to this section.

Recommendation 45 - Alterations

The Act should require the operator to include a clause in the residence contract, which outlines: a) the approval process for a resident seeking to make an alteration to their residence; and b) the process for dealing with operator approved alterations when the resident vacates the residence.

Leaving to enter an aged care facility (Topic 2.24)

When certain conditions are met section 30 of the Act requires the operator to pay the Daily Accommodation Payment ('DAP') to the Aged Care Facility for a resident that is exiting the retirement village, but has not yet received their exit entitlement.

A resident can apply for a refund of their entry price if they have been approved to move into an aged care facility, if they are required to pay a refundable accommodation deposit, and they do not have "ready access to funds" or their personal finances would be "seriously affected by" a requirement to make the payment. The early payment is paid within 30 days of the operator receiving the resident's application and is limited to the amount needed to secure entry into the aged care facility (up to an amount that is a reasonable assessment of the unpaid refundable entry price, considering any capital gain entitlement, capital loss liability and departure fees).

Tasmania has similar arrangements to South Australia, and Victoria has a different model again. Prior to 2021, no residents in ACT, NSW, NT, WA, and QLD were offered this arrangement. In New South Wales new provisions started in 2021. This includes providing

an option for residents to fund their move into aged care by accessing part of their estimated exit entitlement money. If a village resident in NSW needs to move to an aged care facility, they can request the village operator to pay.

When asked if the Act should be reviewed to provide further clarity for operators and residents around early access to an exit entitlement when entering an aged care facility, 56% of online survey respondents said yes and only 9 % said no (35% did not respond).

In the written submissions, resident respondents reiterated that this is a stressful time for a resident or their family, as they transition from a retirement village into aged care. Time delays were understandably identified as particular pain points. Operators and other respondents were of the view that the current provisions are sufficient.

The Discussion Paper identified a time delay on which the Act is silent, namely that an outgoing resident must within 60 days of being approved to enter the aged care facility or ceasing to reside in the village (whichever is the later), apply to the operator to cover the DAP. The operator must then make the first payment within 30 days of receiving the application. The Act is silent on who pays the DAP for this time, of which the upper limit is 90 days.

One condition of the DAP being paid by the operator is that the resident has chosen (under the *Aged Care Act 1997*) to pay a Refundable Accommodation Deposit (RAD).

The Review notes that the Aged Care Royal Commission Final Report[43] published on 1 March 2021 recommends that from 1 July 2025, the Australian Government: a) begin to phase out Refundable Accommodation Deposits for new residents; and b) assist providers with the transition away from Refundable Accommodation Deposits as a source of capital by establishing an aged care accommodation capital facility, with the terms and conditions of assistance designed to create incentives for providers to develop small household models of accommodation.

The Federal Government in its May 2021 response to the Commission's Final Report[44] states this recommendation is subject to further consideration with the aged care sector and relevant stakeholders to develop a reformed Residential Aged Care Accommodation framework.

In the interim, the OFAW could publish an information sheet which clarifies current funding arrangements between retirement village operators and an aged care facility.

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[43] https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-recommendations.pdf - Recommendation 142

[44] https://www.health.gov.au/sites/default/files/documents/2021/05/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety.pdf - May 2021

Recommendation 46 - Refundable Accommodation Deposits

When it is clear what the Federal Government's response is to the Aged Care Royal Commission recommendation to phase out Refundable Accommodation Deposits, section 30 of the Act could be amended.

Payment of recurrent charges after vacating a village (Topic 2.25)

Another issue which is contentious for resident respondents is the length of time residents must pay service and maintenance fees (recurrent charges) after exiting a retirement village**.** In SA and Victoria, a resident can be charged up to six months in fees. This compares to only 42 - 90 days for ACT, NSW, and WA. Tasmania and NT are silent in the legislation and QLD has a shared payment arrangement.

The Act is clear about the continued payment of recurrent charges to the operator for six months on vacating the premises. The point of contention raised in the Discussion Paper relates to the type of costs that are (or are not) included in the recurrent charge by an operator and thus payable for the six-month period on exit.

The Review notes the term recurrent charge is defined in the Act as '*a fee, charge or other amount (as specified in the residence contract) payable by a resident to the operator of a retirement village on a recurrent basis'.*[45]

The OFAW, as stated in the Discussion Paper, is aware of situations whereby residents enter into separate agreements with operators for services such as water and council rates. As these are then not considered part of the recurrent charge, the timeframe for which exiting residents pay for these services is not capped at the six-month period but could (dependent on the agreement) continue until the premise is re-leased, which could be up to 18 months.

In the written submissions, resident respondents supported greater clarity about what can be charged for the six-month period. For example, it was stated in some written submissions that it is not clear whether water and council rates are included as a recurrent charge, and it was questioned whether it is appropriate these should be charged post exit.[46]

Operators were of the view that these details are already covered in the Disclosure Statement and residence contract.

The Review considers 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.

[45] s4 Retirement Villages Act (SA) 2016

[46] Submissions 4, 11 and 12

However, as there is not sufficient evidence of the frequency and length of time exiting residents are charged non-recurrent charge costs, including this in legislation could have a perverse impact. The Review therefore considers an educative approach appropriate.

Recommendation 47 - Exiting and Recurrent Charges

The Better Practice Guidelines should clarify what costs should be classified as recurrent charges and that the Act's six-month cap on recurrent charges is the benchmark period for the payment of like costs after exit.

Payment of exit entitlement (Topic 2.26)

The Act introduced the right of an outgoing resident to take action to recover the payment of an exit entitlement as a debt in the event a residence is not re-licensed in 18 months after the resident has vacated their residence (or provided an operator with notice of their intention to vacate 18 months earlier and vacated at the 15-month mark). Whilst it is an offence for an operator to fail to pay the exit entitlement within 10 days of it being due, a resident still needs to initiate action to secure payment (separate to any prosecution).

In written submissions, residents' respondents tended to voice their concern that an 18-month period was too long and should be reduced. Operators and non-resident respondents tended to be of the view that the 18-month period should not be reduced.

When compared to other jurisdictions, a Queensland resident is entitled to receive their exit/departure entitlement at 18 months after the termination date, unless the unit is sold earlier. This is more favourable for operators than in VIC, TAS, and ACT where it is a six-month limit – unless sold earlier. However, in WA and NT there is no mandatory limit. In NSW a person can generally make an application for payment after 6 months (Greater Sydney) or 12 months (rest of NSW) of having vacated the premises.

Operator representatives consider that the provisions in the South Australian Act are a 'blunt instrument' compared with provisions in other jurisdictions which allow for more flexibility depending upon market forces. They submit that this has impacted on the ability for operators to obtain finance and has impacted on investment decisions for new resident villages in South Australia.

It is in both an outgoing resident and operator's interests for a unit to be occupied. The Review was advised that operators' finances are not structured in a way that means that they hold a resident's exit entitlement to hand in cash – they are relying on a new resident to come in to fund the exit payment of the outgoing resident, and it has implications for an operator to secure finance to pay out an entitlement without an incoming resident. However, residents or their representatives have expressed that an operator might prefer

to have newer residences in a village occupied, or might not have sufficient incentive to ensure that the transaction proceeds promptly.

The Review is hampered in making an assessment on whether it is reasonable to recommend a change to the time period due to a lack of data. In the absence of reliable data on turn over times in retirement villages, it is difficult to ascertain the impact on operators of any reduction of the 18-month period, noting operator representatives are strident in their opposition to it. The OFAW advise that contact made with operators pre the 2016 Act indicated that the average time to re-licence was 12 months.

The lack of data provided to OFAW also means that unless residents or their representatives are aware of the repayment requirements and complain, the OFAW has no way of knowing if the requirements of s 27 are being met. Future consideration of this issue, protection of residents, and the role of OFAW would all be enhanced by the Act requiring the provision of data on this topic to OFAW. Consultation with operators could determine how this can be done in a way that is least burdensome to them.

Recommendation 48 – Data: Vacancy and turnover

To enable future measurement of the the impact of the 18-month exit provision data on the vacant possession and re-licence period (turnover) of units in retirement villages should be required to be provided by operators to the Registrar.

Under the Act, an operator can apply to the Tribunal for an extension of the 18-month period. The Tribunal is required to have regard to the financial hardship likely to be suffered by the operator if the order were not made. When asked, should the criteria be amended for an operator to apply to SACAT for an extension of the period, 24% of respondents said no and 23% of respondents said yes (54% did not respond).

Operators and their representatives advocate for this criterion to be changed. Operators consider that a ground should be that it is "just and reasonable" for the extension to be granted. It was put to the Review that "this would allow a wider range of circumstances to be considered by the Tribunal and not require the operator to admit financial insolvency to obtain an extension of the buyback period"[47]. The PCA suggest the following potential implications from the existing provision:

- Applying for hardship is a signal to creditors that the business is not financially viable

[47] Submission 76

- The units in the village become less attractive if it is known that the operator is suffering financial hardship
- Community perception and concern quickly grows that the village may be in difficulty significantly impacting on sales and value
- Changing positive relationship between the resident and operator to an adversarial one.

The Review recommends that the basis on which the Tribunal should determine if an extension should be granted is amended to the operator being able to demonstrate "exceptional circumstances". This gives the Tribunal scope to take into account things like market and economic conditions, efforts made by the operator (which presently seems to be a gap), as well as the operator's financial position.

The Discussion Paper also set out that there can be issues in relation to paying an exit entitlement where a resident or their representative will not provide an operator with details of where to make payment. The Discussion Paper notes that this is rare but has occurred in cases where there is a dispute about the exit entitlement amount. There is support from operator representatives for an amendment to the Act to require a resident to provide details as to how an exit entitlement should be made.

Recommendation 49 – Exit Entitlement extension

The criteria to which the Tribunal should have regard in section 27(8) of the Act should be amended to "exceptional circumstances".

Recommendation 50 – Exit Entitlement payee details

The Act should require residents or their representatives to provide payee details to an operator.

Exit fees (Topic 2.27)

Financial matters have proven to be the most contentious for residents that responded to this Review – this includes exit fees.

In the written submissions, resident respondents were strongly in favour of a cap on capital infrastructure fund contributions, which it appears are often charged as part of the exit fee at a rate of one per cent per year of residence. For people living longer in retirement villages than they had expected, this can result in a much higher contribution toward capital than anticipated. The PCA reported that operators need flexibility in how fees are calculated and used due to the multitude of retirement village products. Some other respondents supported greater transparency for residents, others stated that further change to the exit fees would be difficult for the sector.

The Review noted from the submissions that there seemed to be a level of confusion in general about how exit fees are calculated. Increasing transparency in how the exit fee is calculated, and what a resident could expect it to be, is addressed in Part 2 of this Report.

Miscellaneous/Other issues

Certificate of Title (Topic 2.28)

Section 56 of the Act provides that a residence contract cannot be entered into unless the land that is, or is to be, used for a retirement village is endorsed for that purpose on the 'relevant' certificates of title.

The Discussion Paper states that the term 'relevant' creates some confusion, as it is not clear which certificates of title this refers to – particularly in the case of mixed used land, such as a retirement village and aged care on one site.

The PCA supported the proposal to clarify the intent of this section of the Act.

The intent of this section is presumably to offer some protection that parts of the village cannot be dealt with without there being an indication to an interest holder about the use of the land. The Review received too few responses to draw a conclusion on this matter. It is not clear that this provision achieves any consumer protection purpose. The Review considers that this issue should be further considered by the OFAW in conjunction with the Registrar-General. It would be unfortunate from a resident perspective if an operator could sell, for example, any communal parts of the village.

Recommendation 51- Certificate of Title

OFAW should consult with the Registrar-General and assess whether changes to section 56 of the Act are desirable.

Villages with multiple sites (Topic 2.29)

The Act is currently silent on retirement villages with multiple sites; however, the Discussion Paper highlights that this practice occurs - where multiple sites in close vicinity of one another with shared finances and facilities operate as one site.

This situation creates an administrative burden on an operator who then must register each site as a separate village, but also prevents residents who are from the same village, acting as one group of residents through for example, a Resident's Committee.

The Discussion Paper is not referring to operators which own or manage multiple villages.

When asked "should the Act be amended to expressly state that villages can span multiple sites", 24% of respondents said yes and 17% said no (59% did not respond). Respondents were then asked whether it should be up to an operator to determine whether a village will operate across multiple sites, to which 28% of respondents said no and 14% said yes (58% did not respond).

In terms of decision-making powers in relation to this, when respondents were asked whether the Minister be provided with powers to enable the amalgamation of multiple site retirement villages where each site has been registered as a separate village, 28% said no and 18% said yes (55% did not respond).

In the written responses, SARVRA support the ability of multiple site villages, where each village is no more than 10 units, to amalgamate and the Minister having the power to affect this. Other resident respondents were of the view that such a decision be put to a vote of the associated Residents' Committees. No operators responded to this question.

The Review considers that given the diversity in the sector, there is not one simple response to this issue. Further, the retirement village sector is evolving, and multiple site villages may become more common.

An administrative response is most appropriate for multiple sites owned by one operator that are managed with shared finances, have shared facilitates, whereby a change would not impact on the residents, but rather reduce administrative burden on the operator.

In a case where there are multiple sites that elect to amalgamate and this results in a change in the financial, facility or management structure of existing individual retirement villages, then it may be appropriate that the sections of the Act that protect a resident in the event of a retirement village being terminated (s59), are considered.

It is not clear that there is a significant problem that needs to be solved at the present time. The Review therefore believes it would be pre-emptive to make recommendations to amend the Act, and rather, given the diversity of how a multiple site village is or could be formed, these issues require further exploration before the concept of 'multiple sites' is added to the Act.

Definitions (Topic 2.30)

The Discussion Paper sought to determine if the definitions introduced in the 2016 Act had provided greater clarity.

When asked, have the changes to the definitions made it easier to understand terms used in the legislation, 25% of respondents said yes and 15% said no (60% did not respond).

There were very few written responses to this set of questions. Two written submissions from the legal sector suggested a range of drafting changes to improve the clarity of the

Act.[48] The Review suggests that the OFAW draw these matters to the attention of Parliamentary Counsel when any Amendment Bill is drafted.

Recommendation 52 - Definitions and drafting

OFAW refer points made in submissions regarding specific drafting to Parliamentary Counsel for consideration when any Amendment Bill is drafted.

Ingoing contributions (Topic 2.31)

The ingoing contribution of a resident or prospective resident is a threshold matter in the Act –as an ingoing contribution needs to be paid by a resident for classification as a retirement village scheme. In practice, this could mean that a retirement village could achieve its status with only one resident meeting these criteria, as the Act provides no guidance on the proportion of residents that must pay an ingoing contribution for it to be classified as a retirement village.

This creates a potential issue for an operator in that it would be difficult to achieve their responsibilities under the Act with only one resident (as defined in the Act), but further, for a resident (current or prospective) it could create a false impression to the type of village in which they are/will be living.

When asked if it should be a requirement that a certain number or percentage of residences must be occupied by retirement village residents under a retirement village scheme, 28% of online survey respondents said yes and 26 % said no (46% did not respond).

In the written submissions, so few residents responded to these questions that it is not possible to draw any evidence-based conclusion. Only one operator responded, stating that a retirement village scheme should not be restricted to ingoing contributions only, but broadened to accept other types of senior living communities.

The Review considers that if a set proportion of the retirement village residences that must enter via an ingoing contribution is specified, this may lead to a reduction in the flexibility in the market and be a deterrent to operators wanting to expand or build retirement villages in South Australia. From the perspective of prospective residents, such a requirement in the Act may result in fewer options for those that are not able to afford the upfront ingoing contribution.

[48] Submissions 46 and 76

Recommendation 53 - Village Type Transparency

To help prospective residents be clear on the type of village they are entering, the Better Practice Guidelines should recommend that information about the proportion of existing residents within a village that have made an ingoing contribution is provided to prospective residents.

Abandoned goods (Topic 2.32)

The Act considers the property as vacant when the person 'ceases to reside', which includes delivering vacant possession of the property to the operator. In the situation where the resident leaves or passes away and there is no other party (e.g. family) to remove the items from the property, the operator has no process through the Act to manage this situation.

When asked, should the Act be amended to include provisions around abandoned property, 35% of respondents said yes and 9% said no (56% did not respond). There were very few written responses to these questions, but general support for a clearer process to manage goods abandoned in a retirement village property.

Recommendation 54 - Abandoned goods

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.

Exemptions (Topic 2.33)

The Act provides that the Minster can approve exemptions to the whole Act, a section of the Act or certain provisions. The Discussion Paper raises the issue that these exemptions are at times applied to an operator and they are then extended to further retirement villages (of the same operator), at times developed after the original exemption was made. When asked, should the Act be amended to clarify the application of exemptions, 27% of respondents said yes and 13% said no (60% did not respond).

If an exemption is provided to an operator on the grounds of a particular status and point in time, being then a blanket exemption for future retirement villages of the same operator has the potential to create an unfair advantage within the market.

The Review considers that in the case of any future exemptions, this matter could be dealt with by careful drafting of the exemption, including conditions (such as a time period or the location of the village). For any existing exemptions, this matter could be dealt with by

OFAW undertaking a review of exemptions that have been granted to ensure they are still appropriate. If there are exemptions in place that are no longer considered appropriate and there is advice that specific additional legislative power is actually necessary to deal with this, then this could be addressed.

Recommendation 55 - Exemptions

OFAW should assess if there are any exemptions no longer considered appropriate and obtain advice as to whether any additional legislative power is necessary.

Terminating a retirement village scheme (Topic 2.34)

The Act provides for the termination of a village, but the Discussion Paper highlights that this does not cover all scenarios through which this could occur. For example, where an operator wishes to terminate just one site of a multiple site village.

When asked, should the Act be amended to clarify provisions around terminating retirement village schemes, 30% of respondents said yes and 10% said no (60% did not respond). There were too few written responses to the questions relating to exemptions for the Review to draw any sound conclusion.

Under the Act, the rights of residents are protected in the event of a planned termination. It is noted however that the Act does not clearly state that the Minister can make a determination to terminate a scheme where there are no residents remaining.

Further, the situation could arise where an operator is actively encouraging residents to leave a village before a termination application has been made. In such a situation, the Minister or OFAW would have no oversight of the approach taken by the operator and thus assurance that the residents are being appropriately treated nor have access to legal advice.

Recommendation 56 – Terminations

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 57 – Terminations: Resident Legal Advice

The Act should state that an operator must, when commencing discussions with residents about terminating a village, ensure that residents are afforded a reasonable opportunity to seek legal advice.

Enforcement of legislation (Topic 2.35)

Representative bodies of both residents and operators have suggested that more enforcement action could be undertaken by the regulator.

Recommendations to address this are substantially dealt with in Part 2.

In addition, the Review notes that the Act does not explicitly ascribe responsibility for different actions to the operator, a manager, or senior manager. For example, section 34 purports to impose numerous obligations in relation to proceedings at meetings and for levies and charges, but the Act does not ascribe these obligations to an operator as opposed to a manager. The Review recommends that consideration be given to providing that a failure to comply with these provisions can be an offence by either the manager or the operator, or both. Again, the *Work Health and Safety Act* might provide a model that can be appropriately adapted.

Another change that the Review considers appropriate relates to the time within which a prosecution can be brought for a breach of the Act. The OFAW may only become aware of breaches of the Act at the time when a dispute arises. This can be many years after the contract is entered into, or the causative act giving rise to the issue. The Review considers that in this case there are good grounds to extend the time for which proceedings can be brought.

Recommendation 58 - Enforcement Clarity

The sections of the Act that impose obligations should be clear who can be held accountable for the failure to comply with those obligations (operator or manager or both).

Recommendation 59 – Enforcement: Time to Commence Proceedings

The Act should permit a prosecution to be brought within two years after an offence first comes to the attention of the regulator.

Home care services (Topic 2.36)

The Federal Government is responsible for aged care and has an increasing focus on people receiving care in their homes to enable them to live there longer. Coupled with a growing aged population in South Australia, this policy position is likely to lead to more retirement village residents receiving aged care in their homes.

In terms of how the Act should consider this matter, the few written responses received supported the position of people being able to stay in their homes, noting that retirement

villages are independent living and that the Commonwealth and not the retirement village operators are responsible for aged care.

The PCA propose an educational campaign that supports people's understanding of how to obtain home care services. As the Aged Care Royal Commission Final Report proposes sweeping changes to aged care, including ease of access and understanding of the aged care system, and the Federal Government's response (published in May 2021), which largely accepts the Commission's recommendations, the Review does not recommend any further changes at this stage.

The Review considers that the issue of regulation of personal services provided either as Supported Residential Facilities, aged care, or private services provided either by operators of retirement villages or other parties are not a matter for regulation under the Retirement Villages Act, save for the fact that residents should have the ability to access such services from a provider of their choosing. The New South Wales legislation provides explicitly for access by home care personnel, but the Review has not received any information that suggests this is necessary in South Australia at this point.

Recommendation 60- Aged Care Royal Commission

OFAW should monitor the implementation of recommendations resulting from the Aged Care Royal Commission that relate to home care services, to determine whether any legislative amendments or changes to education in relation to retirement villages are required.

Appendix 1 – Definitions and Abbreviations

These definitions were provided as part of the Discussion Paper which informed this Review and have been adopted in this Report.

Act

Retirement Villages Act 2016 (SA)

ACSA

Aged Care Services Australia

ARAS

Aged Rights Advocacy Service (SA)

COTA(SA)

Council on the Ageing (SA)

LASA

Leading Aged Care Services Australia

OFAW

Office for Ageing Well (OFAW) is a part of the Department for Health and Wellbeing. OFAW was formerly known as Office for the Ageing.

PCA

Property Council of Australia (South Australia)

Retirement Village

Under section 4 of the Act, 'a retirement village means a complex of residences or a number of separate complexes of residences (including appurtenant land) occupied or intended for occupation under a retirement village scheme'. It does not include a complex excluded by the Regulations such as residential parks, residential tenancies, or aged care accommodation.

Retirement Village Scheme

Section 4 of the Act further defines a Retirement Village Scheme (scheme) as:

> *'a scheme established for eligible persons and their spouses or domestic partners, or predominantly for eligible persons and their spouses or domestic partners, under which-*
>
> *(a) residences are occupied pursuant to a lease or licence; or*
>
> *(b) a right to occupation of residences is conferred by ownership of shares; or*
>
> *(c) residences are purchased from the operator subject to a right of option of repurchase; or*

(d) residences are purchased by prospective residents on conditions restricting their subsequent disposal,

but does not include a scheme under which no resident or prospective resident of a residence pays an ingoing contribution in consideration for, or in contemplation of, admission as a resident under the scheme.'

Registrar / regulator

The Act requires that there is a Public Service employee who acts as the Registrar. The Registrar's function is to gather and maintain information about retirement villages and retirement village schemes in South Australia, to advise the Minister on the administration and operation of the Act and to perform any other function assigned to the Registrar under the Act or by the Minister. The Registrar is the Director of OFAW and the regulator of retirement villages.

Register

The Registrar is required under the Act to maintain a register containing information about each retirement village. A retirement village operator is required to register a retirement village within 28 days of the first resident taking up occupation. An operator must also advise the Registrar of any changes to this information within 28 days of the change taking place. OFAW holds and maintains the Register which contains publicly available information. Penalties can be enforced against operators who fail to register a village or keep information on the Register up to date.

The requirement for registration provides the State Government with information about the makeup of retirement villages in South Australia. The Register provides OFAW with information, including village size, location, expansion, and ownership.

SACAT

The South Australian Civil and Administrative Tribunal determines disputes between operators and residents of a retirement village.

SARVRA

South Australian Retirement Villages Residents Association

Appendix 2 – Online survey responses – binary questions

	TOTAL Responses	93	YES	NO	Nil	YES	NO	Nil
		BEFORE MOVING IN TO A VILLAGE						
2.2	Disclosure Statement	Do you believe the disclosure statement is serving its intended purpose?	26	38	29	28%	41%	31%
2.3	Information to be provided before a contract is signed	Does the information provided before a person signs a residence contract allow a person to make an informed decision?	27	37	29	29%	40%	31%
2.4	Disclosure Periods	Do you believe the disclosure period provides people with sufficient time to seek advice on a residence contract?	31	31	31	33%	33%	33%
		Should a person be able to waive the requirement to wait 10 business days before signing a residence contract?	33	26	34	35%	28%	37%
2.5	Cooling off period	Should a person be able to waive both the period before signing the contract as well as the cooling-off period (effectively sign the contract and move into the village on the same day)?	19	36	38	20%	39%	41%
2.9	Settling-in period	Should the Act be amended to limit what an operator can charge a resident when they leave a village during the settling-in period?	46	9	38	49%	10%	41%
		MATTERS RELATING TO LIVING IN A VILLAGE						
2.11	Increasing recurrent charges	Should the Act be amended to require more information to be provided to residents about changes to recurrent charges before they occur?	51	7	35	55%	8%	38%
2.12	Consultation with a residents' committee	Should the Act be amended to clarify that the meetings held with the residents' committee to discuss the required information does not require the finalised statements?	31	22	40	33%	24%	43%
2.13	Surplus and deficit policy	Should the Act be amended to clarify the default surplus and deficit policy?	44	10	39	47%	11%	42%
		Should the Act be amended to include processes about what is to happen if residents do not approve a change to the surplus and deficit policy?	52	4	37	56%	4%	40%
2.15	Consultation with residents	Should the Regulations contain a simple default set of rules to apply in the event that a committee does not have rules in place?	52	6	35	56%	6%	38%
		Should residents of multiple sites be able to form a representative committee?	38	15	40	41%	16%	43%
		Has the clarification of what constitutes reasonable consultation improved consultation in retirement villages?	32	26	35	34%	28%	38%
2.16	Disputes	Should the Act be amended to require an operator to follow a village's dispute resolution policy?	61	3	29	66%	3%	31%
		Have the changes to the dispute resolution policy improved handling of retirement village disputes?	17	28	48	18%	30%	52%
		is SACAT the most appropriate place to hear retirement village disputes?	32	14	47	34%	15%	51%
2.17	Lease of land	Should the Act be amended to include separate provisions relating to the lease of land within a retirement village for commercial purposes and the lease of residences within the retirement village to rental tenants?	29	17	47	31%	18%	51%
		Should there be a limit on the length of residential leases in a retirement village?	15	31	47	16%	33%	51%
2.18	Rental tenants	Should the Act be amended to allow rental tenants to have greater participation in village life?	25	21	47	27%	23%	51%
2.19	Health and safety	Should there be a requirement for training of village staff?	59	5	29	63%	5%	31%
		Should the Act be amended to include requirements for villages around emergency/evacuation plans? Do you have any other feedback about health and safety requirements in retirement villages?	56	6	31	60%	6%	33%
2.22	Refurbishment or reinstatement of a residence	Should the Act be amended to include guidance around refurbishment and renovation of a residence, including alterations?	57	7	29	61%	8%	31%
2.24	Leaving to enter an aged care facility	Should the Act be reviewed to provide further clarity for operators and residents around early access to an exit entitlement when entering an aged care facility?	52	8	33	56%	9%	35%
2.26	Payment of exit entitlement	Should the criteria be amended for an operator to apply to SACAT for an extension of the period?	21	22	50	23%	24%	54%
		MISCELLANEOUS/OTHER ISSUES						
2.28	Certificates of title	Should the Act be amended to clarify provisions around the endorsement of retirement village land?	27	8	58	29%	9%	62%
2.29	Villages with multiple sites	Should the Act be amended to expressly state that villages can span multiple sites?	22	16	55	24%	17%	59%
		Should it be up to an operator to determine whether a village will operate across multiple sites?	13	26	54	14%	28%	58%
		Should the Minister be provided with powers to enable amalgamation of multiple site retirement villages where each site has been registered as a separate village?	17	25	51	18%	27%	55%
2.30	Definitions	Have the changes to definitions made it easier to understand terms used in the legislation?	23	14	56	25%	15%	60%
2.31	Ingoing contribution	Should there be a requirement that a certain number or percentage of residences must be occupied by retirement village residents under a retirement village scheme?	26	24	43	28%	26%	46%
2.32	Abandoned goods	Should the Act be amended to include provisions around abandoned property?	33	8	52	35%	9%	56%
2.33	Exemptions	Should the Act be amended to clarify the application of exemptions?	25	12	56	27%	13%	60%
2.34	Terminating a retirement village scheme	Should the Act be amended to clarify provisions around terminating retirement village schemes?	28	9	56	30%	10%	60%

Appendix 3 – Written Submissions

Submission No.	Respondent
1	John O'Connor
2	Roy Spraakman
3	Jeff Hobart
4	Gillian Kennard
5	Allan Matschoss
6	Beverley Couzner
7	June Godwin
8	Lyla Rhodes
9	Joan Stone
10	Tony Perin
11	Johanna Francis
12	Roger Adamson
13	Chris Golding
14	Brian Hanna
15	Aveo Fulham Residents Committee
16	David Rosewarne
17	Gillian Kennard
18	Geoffrey Lindell
19	Peter & Merrilyn Schwennesen
20	Graham Inns
21	Ken & Beryl Singleton
22	David Donaldson

Submission No.	Respondent
23	Vailima Gardens Residents Committee
24	Robert Bognor
25	Roy Spraakman
26	Peter Patterson
27	Margaret Price
28	The Gardens Residents Committee
29	Don Parkinson
30	The Elms Residents Committee
31	Leon Ernst
32	Forest Place Residents Committee
33	Elliot Gardens Residents Committee
34	Peter Darr
35	Elaine Rose
36	Beverley & Keith Lloyd
37	Elizabeth Weekley
38	Kay Mulvihill
39	Denys & Teresa Slee
40	John Ingham
41	Phillip McDonald
42	G&J Mann
43	Leon Stacey
44	Kalyra Woodside Residents Committee
45	Brian Brady

Submission No.	Respondent
46	Legal Services Commission (SA)
47	Pam Castle
48	Laura Ealey
49	Helping Hand Residents Committee
50	Nicholas Kerrison
51	Community Centres SA
52	Peter Graham
53	Robyn & Ken Jury
54	Confidential
55	No name provided
56	Jill Elford
57	Joanne & Henry Daley
58	No name provided
59	Townsend Park Residents Committee
60	Ken Whiting
61	Shirley & Barry Hoskin
62	June & Colin Chandler
63	Paul Booth
64	Confidential
65	Debra Sutton-Smith
66	Ian Bruce
67	Ray & Sue Wendelborn
68	John & Penney Hughes

Submission No.	Respondent
69	James (Fred) Edgington
70	Tony Perin (per Steve Murray MP)
71	Chris Golding (per Steve Murray MP)
72	Barry Robins
73	Brian Cheesman (per Steve Murray MP)
74	Confidential
75	Raelene Fuller
76	O'Loughlins Lawyers
77	Don Parkinson
78	South Australian Civil and Administrative Tribunal (SACAT)
79	Local Government Association (SA)
80	On Statenborough Residents Committee
81	David Donaldson
82	Leading Age Services Australia Ltd
83	AVEO
84	National Seniors Australia
85	Stephanie de Riva O'Phelan
86	Brighton Dunes Residents Committee
87	Confidential
88	Property Council of Australia
89	Aged Rights Advocacy Service (SA)
90	Frances Bedford MP
91	Aged and Community Services Australia - ACSA

Submission No.	Respondent
92	COTA SA
93	Anne Tepper
94	South Australian Retirement Villages Residents Association - SARVRA