SUBMISSION TO THE SOCIAL SERVICES AND COMMUNITY SELECT COMMITTEE

FEBRUARY 2022

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RVResidents ASSOCIATION OF NEW ZEALAND

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The Petition asked…

1. *That the government initiates an urgent review of the Retirement Villages Act of 2003 and 2008 Code of Practice to address the imbalances between operator and resident.*
2. *That where a resident with an Occupation Rights Agreement has no share in the capital gain nor any involvement in the sales process of their unit, the operator guarantees to return the capital (less the deferred management fee) to the departing resident on resale/relicensing of the unit or within 28 days of exit, whichever comes first.*

Why did the RVR file this Petition?

The RVR understands a Petition asks the House to do something, or to help put right a substantive concern. RVR respectfully submits it is now time for governance action, for the following reasons:

1. **Commencing a full review of the RV framework this electoral term supports this government's housing and health agendas**

   The RVA (Operators) claims *(RVA response to CFFC whitepaper 26 March 2021 page 12)* around 5000 new residents transitioned into villages in 2019. Using the median house price ($675,000) in NZ for 2019, and allowing for around 60% of those 5000 people to be couples, this equates to approximately $ 2,025,000,000 of property value that can be used to refresh housing supply under the government's Housing supply enabling law reforms.

   The Retirement village sector contributed $1.1 bn or 0.4% of national GDP in 2017 *(PWC sector review 2018)* and at that time employed approximately 19,000 people. Q1 2021 there were 417 villages housing approximately 46,000 older New Zealanders *(Jones Lang Lasalle NZRVD data 2021)*. 62% of the 36,000 units are owned by corporate operators, 10% by not-for-profit operators and 28% by independent operators. 95% of units are occupied through licensing agreements and the remaining 5% through unit title ownership.

   Almost 70% of retirement villages now also have a care facility on site. Approximately 14.5% of all 75+ year olds are choosing to move into retirement villages, and many are attracted by the potential for a continuum of care on the same site. With so many older home owners participating in this market proposition *(the average age of entering retirement villages is over 75)*, the government must ensure the older consumer's contribution to refreshed property supply to market, and understanding of the separate legislative regime governing residential care, is underpinned by a system that provides both security of investment by consumers and is fair to consumers.

2. **A full policy review of the legislative framework may take 3-5 years to complete, contributing to prolonged unfairness for a wide range of vulnerable consumers**

   When a review period is coupled with the period in which RVR has been alerting the Retirement Commissioner, Ministers and agencies to issues, it means some current elderly residents will have waited a decade or more for government to address a range of imbalances, including but not limited to;

   - Residents (who do not own the property in the village, nor share in any capital gain, nor have any say in the marketing) not being refunded their capital within a set period, in contrast to rental units.
   - Operators charging ongoing weekly fees after exit until relicensing.
   - Operators being able to continue to accrue deferred management fees until the unit is re-licensed.
   - Operators prioritising new unit sales over existing units contrary to the Code of Practice, but residents are not able to obtain quick remedies due to the complex complaints process.
   - Restricting freedom of choice for residents should they want to move but do not have the finance to wait for their unit to be re-licenced.
   - Lack of access to affordable bridging finance with quantifiable costs should an immediate move be required because of health changes etc.
   - A lack of incentive for operators to action refurbishment and re-market units faster.

   As the NZLS has said, in its submission to the Retirement Commissioner's 2020 white paper:

   "NZLS… recognises that the existing regime has become weighted in favour of retirement village operators' business models and considers how it could be evened up to take better account of residents' needs and interests."

   "The Law Society would welcome information on timelines for next steps, and considers the review should be undertaken with a degree of urgency."

3. **Interim actions such as Code Variations could alleviate burdens on some residents but have, previously, proven time-consuming and were therefore not favoured by the Retirement Commissioner**

   The issues listed in 2. above could be resolved through a **single variation** to the Code of Practice that might only take a year or so to complete. We acknowledge that the Retirement Commissioner *(2020 white paper and review of submissions)* stated it would be a more optimal use of resources to conduct a full review, however this single change stated in Point 2 of the Petition, requiring operators to refund the capital amount less agreed fees within a set period is that **single variation** example that, we believe, would bring some immediate relief to residents and is supported by multiple Australian state examples.

4. **The appropriate process for assessing the broad range of issues, impacts and solutions is through a fully consulted policy review of the legislative framework**

   The attached Appendix includes extracts that demonstrate:

   - Examples of different perspectives from key stakeholders,
   - Clear recommendation for policy review by the Retirement Commissioner; and
   - The disparate view of operators towards any change in the regulatory environment.

What the RVR has done over the past six years to advocate for the changes outlined above

The RVR has:

- Spent the recent 6 years advocating and working with the Retirement Commissioner's office and MBIE/MHUD to highlight issues and concerns with the Retirement Villages legislative framework, including bringing agency attention to a wide range of complaint insights from vulnerable residents that do not often show up in reported complaint data.
- Repeatedly expressed concern at the limited opportunity for resident input into the 2003 legislative framework and in particular, the lack of review that was to be conducted, as indicated by the Government of the day.
- Participated in a number of annual stakeholder forums hosted by the Retirement Commissioner's office to highlight concerns and seek review actions.
- Contributed resident evidence to most annual monitoring reports, including participation on advisory groups reviewing monitoring reports prior to their release to Ministers.
- Responded to the 2020 industry white paper conducted by the Retirement Commissioner's office, supplying data and insights from over 1900 resident submitters (almost two thirds of the total submissions received) highlighting a broad range of necessary framework improvements.
- Endorsed the 2020 White Paper from the Retirement Commissioner that supports full policy framework review of the legislative framework be carried out "as a matter of urgency".
- Endorsed the 2021 Consumer NZ review into unfair terms in occupational right agreements, also backing recommendations by the Retirement Commissioner to review the Retirement Villages Act and ensure better protection for residents. Consumer NZ's review found contract terms favour village operators and risk leaving residents unfairly out of pocket.
- Endorsed the New Zealand Law Society's response to the White Paper, which expressed the view that a total review of the legislative framework is overdue.
- Liaised extensively with similar resident associations in Australia to stay informed with how the Australian Government is actively mandating policy changes ensuring some consumer rights are now clearly in the statute and not leaving certain rights to be determined through industry-led codes. The majority of states are or have already introduced guaranteed buybacks since legislation was enacted, and operators have not gone bust because of it.
- Four meetings with Ministers distinct from Ministry policy officials between 2015 - 2022. Received recent advice from Minister Poto Williams office that she has asked MHUD to start discussions. MHUD's recent advice to RVR is that they are unable to initiate such a review until late 2023. This official's indication is contrary to our understanding with the Minister.

The RVR wishes to speak to this submission.

Dated: 3rd March 2022.

Appendix: Examples of different stakeholder perspectives

1. **The Retirement Commissioner**
   (source: summary of submissions received in response to the 2020 White Paper)

   Most of the concerns raised in the individual and resident submissions related to issues that are encountered in the moving on stage of the life cycle. Concerns related to resale and buyback timeframes, sharing capital gains, and the continuation of financial charges after exit were among the most widely discussed issues in the individual and resident submissions.

   Many operators highlighted that financial terms and consequences of resale and buyback process should not be legislated as these are commercial terms that allow operators to differentiate their models.

   However, a distinction needs to be made between dictating commercial terms and legislation that protects consumer rights and eliminates unfair terms. It is the moving on stage where residents and their families are often at their most vulnerable. Issues relating to resale and buyback timeframes, sharing capital gains, and financial charges post-exit, highlight strongly differing views around the minimum rights and responsibilities of both operators and residents. Once again it needs to be highlighted that ORAs are generally not negotiable.

   Transferring to care is another area where more needs to be done to ensure there is a clear understanding of resident rights when contemplating moving into care within a village, as well as the financial consequences of such a move; and the implications of moving (or being moved) outside the village to receive higher levels of care.

   <u>A full legislative review [although initially promised] has not taken place since the legislation was enacted almost two decades ago</u>, and the Act does not currently provide for an implementation review. The initial intention of the legislation was to provide a framework for retirement living options in a then-nascent industry. The industry has grown in scope and complexity since then and projections are for further significant growth. Other than some revisions to the code, no review has been conducted to assess whether the balance of power between operator and consumer is appropriate. <u>We therefore recommend that a full review of the legislative framework is carried out as a matter of urgency and that such a review will result in future legislation nominating a further review period.</u>

2. **ANZ Bank**
   (source: ANZ October 2019 Annual RV Report cited in Part 7 - Emerging Consumer issues)

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

   However ANZ suggests the real reason is twofold: investors, bankers, lawyers and residents understand how the current model works, and the model fits with the way operators fund village development. The sale of licence to occupy agreements repays debt from one stage and helps fund the next one until the village is completed and the debt is usually repaid in full.

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

3. **Consumer NZ**
   (source: https://www.consumer.org.nz/articles/media-release-review-of-the-retirement-villages-act-is-overdue)

   Consumer NZ is backing recommendations by the Retirement Commissioner to review the Retirement Villages Act and ensure better protection for often vulnerable residents. Consumer NZ's review found contract terms that the organisation considers privileged village operators and risk leaving residents unfairly out of pocket.

   Terms included those that:

   - make residents responsible for maintenance of, and repairs to, the village's chattels, including the appliances and all internal maintenance in their unit.
   - deny residents the opportunity to benefit from any capital gain when their occupation licence is sold, despite being required to contribute to the property's upkeep.
   - result in residents being charged penalty interest if they make any payments a few days late, while the village retains discretion to decide whether it will pay interest on money owed to residents.
   - attempt to exempt the village from liability for damage that the village may cause to the residents' possessions.
   - give the village wide-ranging discretion to decide what residents can and can't do, including whether they can have guests to stay, make improvements to their unit and raise reasonable objections to village developments.

   A Consumer NZ survey of 1680 village residents found 63 percent were unhappy their agreement didn't allow them to get any capital gains when their unit was sold. The survey also found low satisfaction among respondents with the fairness and readability of village contracts.

4. **The New Zealand Law Society**
   (source: White Paper Submission 25th March 2021)

   From the perspective of the legal profession, the Law Society hopes that the outcome of the review would enhance lawyers' ability to provide clear advice to clients who are retirement village residents (or potential residents) as to:

   a. the rights and obligations that arise when they acquire an interest in a retirement village; and
   b. how disputes in the retirement village context can be resolved quickly and effectively.

   The need for clear advice is heightened given that clients are elderly and may not be confident dealing with legal documents and processes.

5. **Law Journal Authority**
   (source: NZ Law Journal (2019) 9 NZFLJ 149 - Julia Marshall-Mead - "Freedom and fairness in retirement villages: an analysis of the regulatory framework")

   While the regulatory framework has improved the quality, and quality control, of retirement villages in New Zealand …concerns remain around its effectiveness at protecting consumers in several key respects.

   "It is unlikely that the best response to these issues will be purely legislative. Legislation sits alongside other options at the Government's disposal such as fiscal interventions (taxes, subsidies, price controls), performance-based or technology-specific standards, direct information provision and mandatory disclosure, and the use of licensing and certification to provide information in an indirect manner.

   The issues persist within the current regulatory framework include:

   - confusion around the role of the statutory supervisor;
   - concerns around the supervisor's independence;
   - insufficient financial disclosure by operators;
   - issues with residents' appreciation of the implications of ORAs;

- the substantive terms of ORAs;
- no mechanism to enforce wide ranging promises/undertakings included in disclosure statements;
- a lack of compliance with the regulatory framework; and
- unsatisfactory dispute resolution mechanisms.

Further policy interventions are necessary to improve the functioning of the regulatory framework. Both legislative and non-legislative options were suggested. Such options seek to protect residents' rights and interests, while balancing these with the legitimate business interests of operators. It is suggested that a combination of these options be employed by policymakers in order to comprehensively effect the aims of the regulatory framework.

6. Retirement Villages Association - RVA
(source: RVA Blueprint)

"There would be a catastrophic effect if the government interfered with the commercial model. It is unreasonable and impractical to mandate a maximum relicensing period as villages face the same ebbs and flows of the real estate market. To cherry pick issues and rigidly prescribe some commercial terms fails to appreciate the interdependent nature of the terms of a village offering."

And **in the RVA response to CFFC White Paper - 26 March 2021 p13**

"Increased regulation of the sector that would force operators to hold greater capital reserves such as mandatory buy-backs for a given period of time, will run the risk of slowing the supply pipeline of larger operators and cause liquidity / financial viability issues for smaller villages. The increased funding cost would also likely be passed to the resident in order for the operator to continue to achieve its required return on capital."

7. Retirement Village Residents Association - RVR
(source: White Paper Submission document)

On the issue of how and when a resident's money is repaid on termination:

Operators sometimes exploit residents over the resale and buyback of units when ORAs end.

Many of the cases cited by the RVR point to either:

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

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

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

We believe a single variation to the Code of Practice and an immediate review will address this and allow for a more fair and equitable framework for older New Zealanders.

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