



Submission to Review of the *Retirement Villages Act 1986*

Options paper

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Part A Context and Strategic Issues

1. Introduction

The Office of the Public Advocate (OPA) is a Victorian statutory office, established under the *Guardianship and Administration Act 1986 (Vic)*¹ that is independent of government and government services and that works to safeguard the rights and interests of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to Parliament. OPA provides a number of services including the provision of guardianship, advocacy, and investigation services to people with cognitive impairment or mental illness. In 2019-20, OPA was involved in 1,792 guardianship matters (950 of which were new), 430 investigations and 284 cases requiring advocacy. More than half of OPA's guardianship clients are over 65 years of age. This has been the case for many years.

OPA is also required to arrange, coordinate and promote informed public awareness and understanding about substitute decision making laws and any other legislation dealing with or affecting persons with disability. OPA does this by providing an Advice and Education Service that offers information and advice on a diverse range of topics affecting people with disability. Last financial year, the telephone advice service answered 12,624 calls, of which 28 per cent related to powers of attorney and 22 per cent related to guardianship and administration.

OPA's work is supported by almost 700 volunteers across four volunteer programs, primarily through the Community Visitors Program. Community Visitors are empowered by law to visit Victorian accommodation facilities for people with disability or mental illness at any time, unannounced. They monitor and report on the adequacy of services provided, in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that residents are not subject to abuse, neglect or exploitation. Community Visitors conducted 4,142 statutory visits across all three streams in 2019-20.

2. OPA and Retirement Villages

Retirement villages are defined by the *Retirement Villages Act 1986 (Vic)* (the Act) to exclude residential facilities that provide residential care services within the meaning of the Commonwealth's *Aged Care Act 1997 (Cth)*.² Most of OPA's older clients are cared for at home or in a residential facility that provides nursing and/or personal care services. Nevertheless, OPA has some clients who reside in a retirement village, generally because they have developed an incapacity since they commenced living at a retirement village or because they are a partner of another resident.

Beyond its specific guardianship responsibilities, OPA assists a wide range of people with disability and those who are caring for people with disability. OPA is given statutory responsibility to:³

- a) promote the human rights of persons with a disability and the development of the ability of such persons to act independently;
- b) protect persons with a disability from abuse, neglect and exploitation; and
- c) undertake advocacy for persons with a disability on a systemic or individual basis.

¹ And continued under the *Guardianship and Administration Act 2019 (Vic)* s 10.

² *Retirement Villages Act 1986 (Vic)* s 3 (definition of 'retirement village').

³ *Guardianship and Administration Act 2019 (Vic)* s 15.

3. Disability, Ageing in Place and Retirement Villages

The range of disability within the community is broad, and particularly prevalent amongst older people. The experience of disability may fluctuate over time and occurs in the community over a spectrum of impairment. The dividing line between an older person needing to live in a residential care facility because of increasing incapacity and being able to live independently with some support is often not clear. Many people enter retirement villages with reasonable health and capacity but may deteriorate as they age.

Although it is not possible to quantify the number of people living in retirement villages with some form of disability or incapacity, OPA submits, from its experience, that there is a significant cohort of people in retirement villages whose age, health and capacity render them vulnerable and in need of some form of assistance, often from family members.

Public policy at the Commonwealth and state levels is increasingly supportive of people ageing in place, usually in their own home. The Commonwealth offers a range of care options to help people remain in their home (e.g. the Home Support Program and Home Care Packages). Services might be provided at fairly low levels, e.g. mobility aids or domestic assistance with basic chores, or they may be more comprehensive and intensive for people with significant needs, e.g. nursing and allied health services such as physiotherapy.

A large majority of people would prefer to age in place. Research by the Australian Housing and Urban Research Institute⁴ found that between 78 and 81 per cent of older Australians aged over 55 years wanted to live in their own home as they age. Ageing in place not only allows older people to remain in their familiar home environment, it also allows them to maintain their local and community networks more easily. Older Victorians who are able to live in their preferred situation as long as possible have the best chance of maximising the eight key attributes identified by the Victorian Commissioner for Senior Victorians as being necessary for ageing well.⁵ These include being able to manage health issues, safety and security, and staying connected to family, friends and society.

While many Victorians might want to spend their senior years in their own house or apartment, others will continue to choose to live in a retirement village home as the best option for them to age in place. The increasing number of people who want to age in place rather than enter an aged residential care facility is likely to manifest in an increasing number of older people in retirement villages who need low to medium levels of assistance. As the Public Advocate said in evidence to the Parliamentary inquiry into the retirement housing sector in 2017:

“It goes without saying that people are living longer, as we live longer we have larger amounts of disability as we age and we are in fact more vulnerable.”⁶

OPA notes that Standard 7 of the Australian Retirement Village Accreditation Scheme (ARVAS), recognises that:

Increasing levels of frailty and the increasing need for care services in the retirement living setting has, and will continue to, result in increased numbers of residents with early to moderate cognitive decline.⁷

⁴ James, A., Rowley, S., Stone, W., Parkinson, S. Spinney, A. and Reynolds, M. (2019) *Older Australians and the housing aspirations gap*, AHURI Final Report 317, Australian Housing and Urban Research Institute Limited, Melbourne, <http://www.ahuri.edu.au/research/finalreports/317>, doi: 10.18408/ahuri-8117301.

⁵ Commissioner for Senior Victorians (2020) *Ageing Well in a Changing World*.

⁶ Quoted at p.85, Legal and Social Issues Committee, Legislative Council of the Victorian Parliament *Inquiry into the Retirement Housing Sector*, 2017.

⁷ Australian Retirement Village Accreditation Scheme at p.90, accessed at https://www.qip.com.au/wp-content/uploads/2019/03/ARVAS-Standards-V1_0-Designed.pdf.

The policy and legislation for retirement villages needs to align with the prioritisation of ageing in place policies and the consequent changes to the health profile of those who want to remain in their home as long as possible, including a home in a retirement village.

The government should be particularly concerned to ensure that adequate safeguards are in place to allow residents to have access not just to clear information, but also to assistance and effective dispute resolution processes.

The government also needs to consider whether new measures are required to prevent any unscrupulous operators from ‘churning’ residents who might have low to medium, but manageable, needs for assistance. The fee structures of some operators might create incentives for them to move residents into aged care homes by generating higher margins for short to medium term residents.

Section 3.3 of the Options Paper (recommendations 8 – 12) examines the financial and related issues for residents who are exiting a retirement village and acknowledges that “the complexity and significance of the decisions at the stage of exiting a village require consumer protections that go beyond those provided for general transactions.”⁸

OPA would welcome a specific discussion of the needs of people with disability and other residents experiencing vulnerability who live in retirement villages and the transition pathways for those who might need to eventually move into a residential aged care facility. The range of disabilities varies considerably, but particular attention should be paid to the needs of those who might be living with the early stages of dementia or physical deterioration.

4. Dispute Resolution

Apart from the vulnerabilities of age and disability, many stakeholders have pointed out the basic structural imbalance between village operators and residents and the consequences of the imbalance for fair and effective dispute resolution. Once a person has become a retirement village resident, the financial and logistical difficulties of moving to a different retirement village if they are unhappy with their situation make such a course almost prohibitive. Effectively, they must remain in the village unless their care needs dictate a shift to an aged care facility or until they die.

The unequal relationship is reinforced by a resident’s dependency on the operator for the services that they rely on in the village, as well as the general expectations that a resident will fit in with the village’s requirements and not be disruptive. Most residents wish to avoid the risk of acquiring a reputation of being ‘difficult’ or ‘disruptive’ within their retirement community.

While many older Victorians might have the resources, time and energy to pursue their rights, it is unfair and unrealistic to expect all older Victorians living in retirement villages to have as their only right of recourse the civil remedies that they could pursue through the courts or the Victorian Civil and Administrative Tribunal (VCAT) under their contractual arrangements or under the Act. Those who might have waning capacity and might be most in need of accessing remedies are the least able to use the current civil dispute framework.

While OPA recognises the improvements that have been made to the transparency of contractual documentation and the information materials associated with retirement living in recent years, there continues to be a severe lack of accessible dispute resolution resources and pathways for residents seeking to enforce their rights. Improvements in dispute

⁸ Consumer Affairs Victoria, *Options for reforming the Retirement Villages Act 1986: Review of the Retirement Villages Act 1986* (2020) 44.

resolution processes would be of particular benefit to those who might be losing capacity and those who might be assisting them.

The Parliamentary Committee⁹ received over 700 submissions to its 2016-17 inquiry, which is a very high number for such an inquiry. Very few were template submissions and most were from individuals living in retirement housing who were expressing dissatisfaction with their housing arrangements. The strength of the views provides a counterpoint to the assurances from providers that most residents are happy with their living arrangements.

Similarly, the low number of complaints received by Consumer Affairs Victoria (CAV) each year (less than 100) is more indicative of CAV's limited jurisdiction and powers, the complicated processes for dispute resolution, and the lack of awareness of how to pursue a complaint rather than indicating a low level of dissatisfaction. Even a satisfaction rating of 80% amongst all of Victoria's 36,000 retirement village residents¹⁰ would generate a significant number of complaints if there were accessible processes available to resolve them.

OPA acknowledges that sometimes a person's deteriorating condition might cause them to engage in challenging behaviours that are difficult for the operator and other residents to respond to. The availability of an accessible dispute resolution pathway could provide a means to de-escalate or otherwise resolve disputes in this type of situation.

OPA strongly supports the calls from different stakeholders, as well as the Victorian Parliamentary inquiry, for the establishment of an ombudsman to resolve complaints from residents and operators of retirement villages. OPA is aware of the challenges of creating a new ombudsman service but believes that such an option would be the best way to fill the significant gap that currently exists between retirement villages' internal dispute resolution processes, which are ineffective, and VCAT, which is too expensive and complex for most residents. One option could be to expand the role of the Residential Tenancies Commissioner to cover retirement villages, and to include dispute resolution services in its scope.

The perceived independence of an ombudsman from operators and the industry regulator would also be a significant advantage for promoting confidence in new dispute resolution processes. Such a scheme would need to be mandatory for operators if it was to be effective, and an ombudsman would need to be able to make binding orders, subject to review at VCAT.

In addition, an ombudsman whose role is focused on the needs of retirement village residents and operators could perform a leadership role and provide a point of discussion for systemic issues that might arise in the sector. For example, the Energy and Water Ombudsman of Victoria, as well as providing a dispute resolution service, engages in information, education and dispute prevention activities, monitors and analyses trends, and contributes to the policy-making process.

Funding would be an issue that would require further discussion and might require contributions from operators, residents (through their fees) and/or the government.

Alternatively, a version of the current dispute resolution scheme used by Domestic Building Dispute Resolution Victoria (DBDRV) could also be a means of resolving low level disputes, provided that residents were supported in the process through adequate access to information and advice. The advantages of a DBDRV-style service include that it has already been established so that a knowledge of the efficacy and challenges of the processes has been developed, binding decisions may be made through Dispute

⁹ Above n 6.

¹⁰ Consumer Affairs Victoria, *Review of the Retirement Villages Act 1986 Issues Paper* (2019) 13.

Resolution Orders, and an independent assessment service is able to provide technical expertise about matters in dispute. The service is also able to inform relevant regulators of emerging trends and issues.

However, the DBDRV option would lack the benefits of an entity such as an ombudsman who would be devoted to addressing issues that arose in the sector and engaged in the types of systemic activities that characterise the activities of other industry ombudsmen. If the DBDRV model was preferred, OPA would strongly recommend that a separate entity be created to deal with the systemic regulatory and policy issues, possibly by adding those functions to an existing entity such as the Residential Tenancies Commissioner. As mentioned, the Commissioner's role could also be expanded to cover dispute resolution services.

The need for strong communication channels between any dispute resolution and systemic advocacy entities and the regulator would require particular care and attention to ensure that systemic problems that were identified through the dispute resolution process were being addressed by the regulator.

5. Role of the Regulator

Disappointingly, the Issues Paper does not canvass the role of CAV as the entity responsible for policy and regulation of the retirement villages sector. While OPA appreciates that the Issues Paper brings a detailed analysis and some welcome recommendations to some of the issues that are particularly concerning for residents in their dealings with village operators, it misses the opportunity to discuss CAV's regulatory role.

Questions that should be considered in any review of the Act include:

- the current profile of CAV's regulatory activity – what issues on the spectrum of regulatory activity does CAV focus on? Is it able to monitor systemic issues in the sector and take action accordingly?
- whether CAV is a responsive regulator, and how might it leverage the opportunities that might arise from the establishment of an ombudsman or strengthened dispute resolution service?
- whether CAV's powers under the *Australian Consumer Law and Fair Trading Act 2012* are sufficient for it to discharge its role and protect the interests of residents, especially vulnerable residents?
- whether powers and procedures are in place to deal with a crisis situation such as occurred in the case of Berkeley Living in 2017?

Part B Response to specific options

OPA supports options that promote clarity, simplicity and fair dealing. Such improvements will particularly benefit those who are frail or have difficulty in engaging with complex arrangements and processes. For many of the options raised in the Options Paper, especially those that address fees and charges, OPA is generally supportive, but is not in a position to provide a more detailed analysis.

6. Scope and Purpose

Option 1

Amend the RV Act to:

- explicitly clarify types of housing which fall outside its scope, and/or
- more clearly define particular types of tenure.

OPA does not offer a view on whether the Act should be widened to include other forms of retirement housing but supports clarification of its scope.

Option 2

Amend the Act to provide an expanded set of purposes or objectives.

OPA supports broadening of the objectives of the Act and the suggestion that the revised objectives could be aligned with those used in NSW and Queensland.

7. Financial Arrangements

Options 3 - 12

These options address the financial arrangements for retirement villages. OPA supports:

- options to improve disclosure options about fees and material fact provisions and the provision of factsheets and disclosure statements online. Effective and accessible disclosure statements are essential for preventing and resolving disputes (Option 3)
- a clearer definition of 'deferred management fees' and expanding education materials about such fees (Option 4)
- the use of plain English in contracts and improved knowledge of retirement village contracts by advocacy and legal assistance services. OPA acknowledges the importance of good quality legal advice and supports efforts to develop a cohort of lawyers who are knowledgeable and experienced in retirement village matters. It does not express a view about whether legal advice should be mandatory prior to entering into a retirement village contract (Option 5)
- clarification of maintenance and repair requirements, especially given the incidence of complaints about such matters (Option 6)
- extension of the cooling-off period to seven-days and establishment of a 'settling-in' period for new residents, such as occurs in NSW (Option 7)
- the fixing of time limits for the continued charging for personal and maintenance services once a resident has vacated their property (Option 8)
- clarification of reinstatement and renovation obligations and costs, including the use of condition reports upon entry and exit from a retirement village (Option 9)
- clarification of residents' rights in the sale or re-lease of retirement village units (Option 10)
- allocating capital losses so that they are no greater than the equivalent proportion of any capital gains (Option 11)
- the setting of a mandatory exit entitlement repayment period/s, noting that the need for funds by people who are entering an aged care facility are already recognised in the *Retirement Villages (Contractual Arrangements) Regulations 2017* (Option 12)

8. Dispute Resolution

Option 13

Clarify and enhance internal dispute resolution procedures, including removing the role of residents committees in resident disputes and/or mandating a code of conduct.

OPA supports:

- a requirement for retirement village staff and/or managers to undergo accredited dispute resolution training
- clarification of what matters should fall within the definition of a 'complaint'
- consideration of the Good Practice Protocols in the dispute resolution process
- removal of the role of residents committees in the dispute resolution process, as previously recommended by CAV's review of internal dispute resolution processes, and
- introducing a mandatory code of conduct for resolving internal disputes.

Improvement of the first stage of dispute resolution to make it more effective, widely known and accessible would lessen the demand pressures on later stages and provide a more informal, less stressful experience for residents and operators.

Option 14

Reform the external dispute resolution process by enhancing specialist services and introducing mandatory conciliation.

OPA supports a strengthened external dispute resolution process that includes mandatory conciliation before any VCAT proceedings could be initiated, a power for an ombudsman or chief conciliator to make binding orders, and specialist services to inform and assist the conciliation process.

An ombudsman model could be an appropriate model for retirement village disputes, or otherwise a model similar to that used by the DBDRV, as discussed in the Dispute Resolution section of this submission.

9. Governance Framework

Option 15

Prescribed rights and responsibilities for retirement village operators and residents, supported by a mandatory Code of Conduct.

OPA strongly supports the articulation of rights and responsibilities for retirement village operators and residents. It also supports a Code of Conduct to provide guidance on how the rights and responsibilities should be observed, as well as for resolving disputes and informing regulatory action. The examples provided at Appendix 2 of the Options Paper provide a useful basis for discussion.

Specific expression of rights and responsibilities would provide much needed clarity about such matters. Without such a document, discussions and dispute resolution processes can too easily become diverted at the outset into whether or not particular rights and responsibilities exist in a particular situation.

Wider expressions of the rights of older persons, such as occur in the *United Nations Principles for Older Persons* (1991) and the Madrid International Plan of Action on Ageing (2002), could be used to include necessary references to the need for older persons to have

independence, the ability to participate in society, access to care, be entitled to self-fulfilment and the full dignity of life.

The legal consequences of breaches of identified rights and their relationship to contractual rights and responsibilities would need to be further investigated.

Option 16

Improve the operation of residents committees

OPA does not support a continued role for residents committees in dispute resolution, primarily because of the potential for bias and the lack of relevant dispute resolution training and resources. It supports clarification of the powers and functions of residents committees as outlined in Option 16.

Option 17

Staff accreditation

OPA supports professional development initiatives for retirement village staff, especially managers. Greater focus on issues associated with disability in retirement villages would lessen the vulnerability of residents with disability and should be included in any accreditation proposals.

Option 18

Village accreditation

As for Option 17, any village accreditation schemes should cover issues linked to people with disability living in retirement villages. Such schemes should be developed in consultation with older people with disability and organisations who advocate for people with disability.

OPA notes that Standard 7 of the Australian Retirement Village Accreditation Scheme (ARVAS), contains a comprehensive discussion on the care standards that should be met by providers, but that the standard only applies to operators who are providing care services themselves or through their contractors as part of a service agreement with a resident. OPA supports the key considerations outlined in the section on Dignity and Choice:¹¹

- choice and dignity policies and procedures
- model of care
- induction of new staff to the model of care/consumer-directed care
- assessment tools designed to facilitate choice
- care/service plan facilitates the recording of goals and choices
- dignity of risk and informed choice/consent
- management of substitute decision-maker information.

While Standard 7 is limited to provider-supplied care services, its underlying principles could be used to help develop a general standard for residents with disability.

Option 19

Industry ombudsman

OPA supports the establishment of an industry ombudsman for the reasons provided in the section of this submission on dispute resolution (pp 5-7).

¹¹ Australian Retirement Village Accreditation Scheme Standards (September 2019) 91.