



Housing for the Aged Action Group (HAAG) Submission to the Retirement Villages Act Review Options Paper May 2021

Via <https://engage.vic.gov.au/retirementvillagesact>

Introduction

Housing for the Aged Action Group welcomes the opportunity to comment on the Retirement Villages Act Review Options Paper. This submission is informed by consultation with our Retirement Accommodation Action Group, a group of members who live in retirement housing, and our case work experience in delivering the Retirement Housing Advocacy Service.

As a general remark, HAAG's view is that the options set out in this paper show a serious lack of understanding of the issues raised by residents and other stakeholder about retirement village residencies.

Retirement villages are too often unfair and exploitative. The Options Paper proceeds as if the problems were only that residents mistakenly perceived villages to be unfair and exploitative, or as if more information would resolve resident concerns. This is not the case. Again and again, the options paper proposes more information rather than increased protections for residents. This is a persistent failure of the options paper, and if the government proceeds on this basis the reform process will fail current and future retirement village residents.

Retirement Villages have also tended to remain exclusive and costly, partly because the Act allows and effectively encourages providers to seek profits primarily in the form of exit fees that are exorbitant, as well as unfair. Protections against unfair fees could incentivise villages to develop other business models - not just newly exploitative ones, which to date has been the industry's preferred mode of 'innovation'. This is an area where consumer protections have a meaningful role to play in ensuring that retirement villages can be a real option for Victoria's growing numbers of older people to age in place in secure, suitable, desirable accommodation.

Overall, the options paper reflects a perception by government that the retirement village sector is working well, and that some small changes will allow it to continue to do so. From the perspective of current, former, and prospective residents, this is just not the case. The options paper sets the

government up to comprehensively fail to address widespread, legitimate public concern about the exploitation and abuse of older Victorians.

Option 1(a): Amend the RV Act to explicitly clarify types of housing that fall outside its scope.

This option misses the specific point on which the definition of ‘retirement village’ given in the Act tends to become ambiguous for our clients. The definition already unambiguously excludes housing types like caravan parks and so on, and making that exclusion explicit would not improve understanding. Ambiguity tends to arise specifically where it is unclear whether at least one person paid an ongoing contribution: specific individuals who did not pay an ongoing may not know whether anyone else in the community did. Sometimes this information is easily accessible, but sometimes it is not.

The definition also creates confusion in some rare situations that arise largely for not-for-profit villages and other villages at the lower end of the market: what is the legal status of a community which otherwise meets the definition, but where the last surviving resident who had paid an ongoing contribution vacates? Do the remaining residents become renters under the Residential Tenancies Act? What about the case of the HAAG client who was the last remaining resident to have paid an ongoing, and who found the operator had refunded her ongoing while she remained a resident in an attempt to ensure the RVA would not protect her?

HAAG favours greater clarity in the sense of a definition which clarifies for individual residents what legislation applies to their housing, and prevents operators from using ongoing payments and information about ongoing payments to obfuscate their legal status. The options here do not address these issues.

Option 1(b): Amend the RV Act to more clearly explain what is meant by particular types of tenure.

The distinction between residency agreements that create licenses and those that create periodic tenancies is probably unclear enough often enough that this option would meaningfully improve clarity. In many cases, the rights conferred under agreements characterised as licenses are not significantly different from those conferred under agreements characterised as leases. To illustrate the confusion that can arise, HAAG supported a resident when a village applied to VCAT for orders terminating her residency on the basis of section 16(4). The application was dismissed in part because the village conceded she had a license rather than a periodic agreement, meaning section 16(4) did not apply. The village subsequently appealed the decision to the Supreme Court, claiming inter alia that this was incorrect and she did have a periodic agreement.

Option 2: Amend the RV Act to provide an expanded set of purposes or objectives.

HAAG does not believe the stated purposes of the Act require change, although it's possible that substantive changes throughout the Act could require an amended set of purposes and objectives.

In the options paper, the Department writes that "Operators and providers noted that the purpose of the RV Act does not include encouraging innovation or providing incentives for operators to provide a better product or service." We would not support this change. Our experience has been that 'innovation' is the industry's preferred term for the cultivation of new and diverse ways to exploit current and prospective residents; new and better products and services have continued to be expensive, exclusive, and completely unsuitable to vulnerable and disadvantaged retirees. The profit motive has been sufficient to protect these 'interests'. We would consider it a serious mistake for the Act to counterpose these goals to the existing purpose of protecting and clarifying the rights of current and prospective residents.

Option 3: Amend the RV Act to improve disclosure obligations to provide more support to residents by:

- a) requiring all fees to be disclosed in advertising materials and/or**
- b) introducing material fact provisions and/or**
- c) requiring factsheets and disclosure statements to be available online**

"Our owner keeps asking us to sign off on new rules – and there is always a catch – a blackmail clause. If we don't sign our fees will go up or we will lose some amenity." Retirement housing resident, HAAG consultation

Per the Options Paper, "Many residents suggested that the deferred management should be listed in advertising materials for a residence as it amounts to a significant reduction of a resident's exit entitlement." This is a category error; the solution to an unfair practice or unjustified impost is not to provide information, but to prohibit or restrict the practice. What you are hearing from residents is that exit fees are exorbitant and unfair. The law can limit or prohibit exorbitant and unfair fees, and obviate the need to warn residents about practices that should not exist.

Disclosure has not resolved concerns that retirement village fee structures and business practices are often exploitative, nor will it. Information about fees can itself tend to mislead consumers, because - for example - information about the percentages involved in a DMF can distract from other very substantial costs, like the value of foregone interest had the ingoing been invested elsewhere, or from the other uses to which the part of the ingoing that was not used for fees could have been put. Disclosure is not useful if the consequence of the fee structure is that the village will deliberately churn residents out to maximise their profits. Disclosure also tends to favour residents who are best able to understand and use the information disclosed; the value of disclosure diminishes as individual residents' vulnerability increases, and is least useful to the most

disadvantaged. HAAG would like to see serious protections against exploitative and unfair exit fees, and only in the context of such protections could we usefully consider possible disclosure models.

Option 4: Improve understanding of retirement village payment models by:

- **defining ‘deferred management fee’ and/or**
- **expanding education materials on the deferred management fee to include alternative payment models and/or**
- **introducing yearly contract check-ups on request**

Consultation questions

Are there any additional safeguards required in relation to payment models and the deferred management fee so that residents don’t feel unable to leave a village due to their financial situation?

“Retirement owners need to be more transparent regarding fees/outgoing resident expenses and not take advantage of vague wording in their contracts” Retirement resident, HAAG consultation

The use of the word ‘feel’ in this question is misleading, and suggests residents are mistaken. In our experience, a resident’s conclusion that they are unable to leave a village due to the impact of exit fees will most often be a statement of fact, not a feeling. The appropriate remedy is to change this situation.

This is because:

- Retirement village residents we assist have typically paid all or the vast majority of their savings as an ingoing contribution.
- No more than 60% of their ingoing contribution, less refurbishment costs, will be paid to them on departure.
- This means they cannot access a village of a comparable level, and would have to seek accommodation at a cost of less than 60% of the ingoing price of their previous accommodation.
- In many cases, this would simply exclude residents from the retirement village market, leaving them with few or no options beyond private rental - often an unsuitable choice.
- In other cases, the difference in quality and amenity between villages with a 40% difference in ingoing contributions is likely to be very significant; their options should they leave will be radically worse.

The Options Paper, in our view correctly, defines the DMF as ‘deferred rent’. This raises questions about whether it’s fair or reasonable to charge rent in this way, especially where other forms of rent are typically regulated to ensure increases are not excessive or arbitrary; and where other kinds of renters can typically opt out (by moving or otherwise terminating an agreement) if the increases become unaffordable. The DMF, by contrast, makes it harder or impossible to opt out by moving when fees become unaffordable (or for any other reason).

The specific financial model which has been most open to exploitation is one where the value of a DMF accrues annually but is capped after 5-10 years of residency. When a resident reaches this cap, the amount they will have paid is at its highest relative to the period of the residency. As they stay beyond this point, the price per day of their residency will continually decline, while the village will have to continue providing services, including services covered by the DMF. This creates an incentive to ‘churn’ residents, as widely described in reports about Aveo and other retirement village operators. Perversely, it also produces the conditions in which it’s hardest for residents to move elsewhere - a brutal double-bind for residents.

HAAG’s view is that financial models that make it difficult or impossible for residents to move are intrinsically unfair and tend to compromise consumer choice. Such models should be banned. In the event that they are not banned outright, residents should have options to have their DMFs reduced or waived based on severe hardship and/or serious and persistent breaches on the part of village operators.

What information should be included in education materials regarding alternative payment models?

Option 5 - Reform the contract process by:

- **requiring contracts to be in plain English and/or**
- **working with advocacy and legal assistance services to improve knowledge of contracts and/or**
- **introducing a requirement that residents must get legal advice before signing contracts.**

“We need legal help when confronted with these 4-6 page documents that are a nightmare to understand. Retirement housing residents do not have the money to finance legal representation.”

Retirement housing resident, HAAG consultation

It is not immediately clear to us whether contracts written in plain English would significantly improve the level of understanding among residents. We see the problems with comprehension arising largely from the complexity of the financial and other obligations that apply in retirement villages, not just from the language that expresses those obligations. Our experience has not been that residents don’t understand the words used in their contracts, but lack clarity as to the ways the terms combine and interact with the Act, with related legislation like the Owners Corporations Act,

and with each other. Simplifying the language use might help with this. We would appreciate the opportunity to see an example before commenting.

Similarly, it is not clear that there is a significant benefit for residents in obtaining legal advice, if the contractual arrangements in retirement villages remain unfair and exploitative. Advice is useful where some contracts are poorly drafted or uniquely bad, not if standard practices are unfair and residents lack meaningful protections. HAAG is also concerned about the impact of a requirement that residents obtain legal advice on low income tenants who cannot afford to engage a lawyer.

Option 7 – Amend the Act to:

- **extend the cooling-off period and/or**
- **introduce a settling-in period**

HAAG favours the introduction of a significant settling-in period.

Option 8 - Amend the timeframe in which ongoing fees (personal services and maintenance charges) can be charged to residents leaving a retirement village

HAAG supports this option.

A cap on maintenance fees would prevent or mitigate the common situation that a resident's family or estate remains liable for significant charges for many months or years after the resident has ceased to benefit from the services for which they are paying. It would also mitigate the problem that village operators are incentivised to sell units for which they are not receiving maintenance fees, leaving residents to watch as the village repeatedly sells unlet units while the resident continues to pay fees.

The options paper sets out an apparent concern that this change would require a change in operators' business models, perhaps by passing on the increased costs to residents. This is somewhat confusing as the costs described are already incurred by residents.

Option 12 - Introduce a requirement to repay a resident's exit entitlement for RV units not re-sold within a specified timeframe.

HAAG strongly supports the introduction of a mandatory buy-back scheme. The options paper canvasses many of the reasons we consider this desirable, but we would add that a buy-back scheme - or certainty about the payment of a resident's exit entitlement - would reduce a significant barrier many residents describe to the exercise of their rights.

HAAG has worked with a large number of clients who had claims against their villages, but who ultimately decided not to proceed with those claims because they were concerned it would negatively impact their ability to sell their units. They were worried if they got a manager 'off side' by asserting their rights, that manager would deprioritise the sale of their unit when they eventually vacated, causing real and significant financial loss. Many residents we spoke to claimed to have observed this behaviour with respect to other residents; they felt they had seen managers cause such losses to residents who asserted their rights.

A requirement to repay a resident's exit entitlement within a specified timeframe is not only a way to protect residents' financial interests at the end of their residency, but also a key aspect of improving retirement village dispute resolution.

Option 14 - Reform the external dispute resolution process by enhancing specialist services and introducing mandatory conciliation.

"Please give us an Ombudsman. Please give a thought to the difficulty and unfairness when it effects a frail or sick resident. The owners are taking advantage of the seniors and making millions on it. We need an Ombudsman" Retirement housing resident, HAAG consultation.

HAAG strongly supports the creation of a retirement housing Ombudsman. The structural power imbalance between residents and operators has made existing forms of dispute resolution inadequate. Those structural imbalances include:

- access to information and resources (including legal advice and representation);
- the capacity to influence the other party's financial interests;
- the disproportionate effects on the parties of unsuccessful dispute resolution or possible deterioration in the relationships between the parties, where this encompasses the home and often the main social network of the resident, but only one small part of a larger business for the operator; and
- the physical and social effects of ageing.

It is not clear to us that the options outlined in the paper would address these issues. Indeed, the options set out seem to comprehensively ignore the issues raised by residents and resident advocates; and to try and conceal this by assigning the label 'ombudsman' to a role that has nothing to do with any previous submissions or discussions regarding a possible ombudsman.

Mandatory conciliation would not significantly address the identified power imbalances. Forcing residents into conciliation where the other party benefits from a significant power imbalance will not improve outcomes for residents; the conciliation will tend just to reproduce those imbalances at the level of outcomes. Discussions of dispute resolution in retirement villages should be fundamentally framed as discussions about *addressing these imbalances*, or they are just discussions of the mechanisms by which residents will consistently fail to assert their rights and access justice.

Moreover, conciliation should not form a further barrier for residents who wish to obtain binding orders.

Option 15 - Amend the Act to prescribe rights and responsibilities for RV operators and residents, supported by a mandatory Code of Conduct.

HAAG supports the introduction of a clear rights framework for residents under the RVA. Central to this option should be the right to security of tenure, including changes to section 16 to make it more

difficult for operators to terminate residency rights. The Act should include a strong presumption against termination to ensure residents are able to age in place. At present this is not the case, with potential for termination under section 16 on the second recurrence of any 'substantial' breach (I note the Act does not clarify what kinds of breaches are substantial), or with six months notice in any circumstances for residents with periodic tenancies.

The security of tenure residents experience in retirement villages (or feel they experience) is entirely a matter of convention and common practice, not an actual protection. Where relationships between parties break down, this can cause significant stress and uncertainty for residents. Village operators often appear to consider it part of their role to informally pressure some residents to leave and/or explicitly threaten to terminate their residency rights - especially where their DMF has reached its cap and the village will not profit further if their residency continues.

Residents who understand they have strong security of tenure will be more confident to assert their rights generally. Strong protections for security of tenure will also make it more difficult for operators to deliberately churn residents to maximise the value of DMFs and other exit fees. More generally, it tends to be outrageous and inappropriate for residents who have paid a substantial ingoing contribution (and/or bought their own homes within villages) to face possible termination.

The prescription of other rights - including rights to quiet enjoyment, access to common areas, and the maintenance of common areas in good repair - is also desirable. If exit fees that limit residents' capacity to move remain a common practice, persistent breaches of these rights should give rise to an option for residents to seek orders that their exit fees are not payable. This would mean that residents would not be stuck in villages where their rights were consistently or repeatedly infringed.

Option 16 - Improve the operation of residents committees by:

- **clarifying residents' committee powers and functions and/or**
- **providing additional guidance on village operators and managers attending residents' committee meetings**
- **clarifying arrangements for resident participation**

HAAG favours greater clarity and guidance as to the function of residents committees.

Option 17 - Improve staff qualifications by:

- **expanding disqualification criteria for RV staff and/or**
- **developing and mandating participation in a training and professional development regime**
- **developing and implementing a qualification for managers of retirement villages**

“I wish my retirement housing manager would speak to residents respectfully and not in a bullying manner. He needs training to work with retired citizens with housing issues. The older I get, the more I feel like I’m being treated like a child with minimal rights” Retirement housing resident, HAAG consultation

We reiterate HAAG’s support for the introduction of mandatory training standards for retirement village managers.

Option 18 - Improve industry practices and resident outcomes across retirement villages by:

- **strengthening existing voluntary accreditation or**
- **developing a mandatory accreditation scheme in consultation with stakeholders**

We reiterate HAAG’s support for a mandatory accreditation scheme, delivered by an independent third party.

Option 19 - Reform the external dispute resolution process by the creation of an Industry Ombudsman.

“A VCAT member is like a GP who has a limited amount of knowledge of a wide range of conditions. Our retirement housing residents need a specialist – an ombudsman who has a thorough knowledge and understanding of our particular type of living conditions” Retirement Housing resident, HAAG consultation

“A retirement housing ombudsman is so important It would be easier to settle problems without going to Consumer Affairs and VCAT which is very stressful and time consuming. ” Retirement Housing resident, HAAG consultation

HAAG strongly supports the creation of a retirement housing Ombudsman offering free, timely, binding dispute resolution. Please see the response to option 16 as well for general remarks about issues in external dispute resolution.

For more information, please contact:

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