Housing for the Aged Action Group welcomes the opportunity to comment on the Exposure Draft of proposed amendments to the Retirement Villages Act. This submission is informed by consultation with our Retirement Accommodation Action Group, a group of members who live in retirement housing, and our casework experience in delivering the Retirement Housing Advocacy Service.

As a preliminary remark, HAAG is disappointed by the brief consultation period allowed to respond to the draft bill. Our submissions here focus on areas of particular concern to our clients and members, but we have been unable due to time constraints to make detailed comments on numerous areas of concern. We are particularly disappointed in this because we have expressed repeatedly through the review process our concerns that the government's approach to consultation on these issues was inadequate and formalistic.

The draft bill fails to address many concerns raised by and on behalf of residents, in particular around management standards and fairer fees. The bill allows the most exploitative and predatory operators to continue to operate according to 'churn' business models where they are incentivised to maintain high turnover rates by systematically pressuring residents to leave once their exit fees reach their maximum value. The bill abandons the concept of a rights-based framework in favour of vague unenforceable 'principles'.

Overall, the bill simply fails to address serious public concerns about exploitative business practices in the retirement village industry, much less the concerns expressed by the many residents who have made submissions to this review.

Dispute resolution and the CDRO

The provisions regarding dispute resolution in the draft Bill include provisions regarding both internal and external dispute resolution.

For HAAG's members and clients, the improvements with regard to internal dispute resolution are largely irrelevant. In most villages, internal dispute resolution is simply a process whereby managers handle and dismiss complaints about their own conduct. Administrative requirements with respect to this process do not appreciably help residents.

While the provisions regarding internal dispute resolution are irrelevant, the provisions regarding external dispute resolution are misconceived, ineffective, wasteful and potentially even harmfulThe CDRO does not address any of the concerns about dispute resolution expressed by residents and their representatives through this review process. It will not improve outcomes for residents and risks creating worse outcomes for them; it is also likely to entrench and strengthen resident views that formal dispute resolution processes are inadequate and ineffective.

While the consultation guide indicates that the CDRO model is intended, in part, "to minimise the impact of power imbalances between operators and residents", it is totally unclear how it would do so. In itself, a model that emphasises conciliation and agreement does not tend to redress power

imbalances, and is likely to produce outcomes that favour the more powerful party, that is, the operator.

HAAG does not believe that our members or clients would be confident taking disputes to the CDRO, or that they would see it as a useful dispute resolution option. We anticipate that it could be seen as a viable dispute resolution mechanism by operators, and so are concerned it would take on the de facto role of hearing applications against residents by operators, similar to the current operation of VCAT with respect to residential tenancies. This concern is why HAAG has advocated strongly for a consumer-facing dispute resolution model – that is, an ombudsman.

Even if there were demand for or interest in a CDRO-type model on the part of residents (which, again, there is not), the approach taken in the draft bill would be unacceptable. It does not adequately protect procedural fairness. It fails to meet the Benchmarks for Industry-Based Dispute Resolution. The CDRO is not even bound to consider the principles – that is, the watered-down alternative to rights – that the bill introduces. The CDRO is not bound to protect the rights of residents.

In addition to all of these concerns, the CDRO has a specific role in health and safety terminations. Even setting aside all other concerns about both the CDRO and the process for health and safety terminations (discussed below), this would tend to fatally undermine any confidence residents could otherwise have in the CDRO. Loss of independence is a central and serious fear for many older people. It is difficult to think of any other context where a dispute resolution body for consumer disputes includes a unilateral power to determine the consumer is incapable of making their own decisions. Residents are likely to see the CDRO's power to approve health and safety terminations as fundamentally undermining its independence and neutrality.

Terminations

The definition of substantial breach

HAAG appreciates the value of introducing a definition of 'substantial breach' for the purposes of section 16. At present, the lack of clarity as to what constitutes a substantial breach has made it consistently difficult for us to give our clients clear advice around the risk of termination associated with particular breaches or alleged breaches. HAAG believes that it is important to define this key term both (a) to improve clarity for all parties and (b) to improve protections for residents by clarifying that certain breaches are not substantial and cannot be used as grounds for termination. That is, the definition should be specific and narrow.

HAAG is satisfied with the elements on the definition included as (a) and (b) (roughly, causing serious damage or danger within the village). However, we are concerned that part (c) of the definition is insufficiently precise, among other problems, and so open to abuse. This part defines a substantial breach as including "a breach of the contract, that is one of many breaches by the resident that are persistent and, in the circumstances justify the termination of the contract".

It is not clear in what circumstances multiple breaches would justify the service of a notice of breach (and therefore, potentially termination) under this definition. It is unclear how many times a breach must recur to count as 'one of many': two is presumably not enough, but would four be 'many'? Ten? The dictionary gives 'a large number' for many, but it is not clear what this means in the context of breaches of a retirement village contract.

It is also unclear in what circumstances a series of breaches is or is not persistent. Does the fact of a breach's recurrence 'many' times make it persistent, or is persistence an additional criteria? If the latter, what is the substance of this additional criteria?

Finally, it is tautological to define a substantial breach as a breach that "in the circumstances justify the termination of the contract". The purpose of the introduction of the definition *is* to clarify specifically what circumstances justify the termination of the contract, and this element of the definition fails to do so.

That is, while the first two elements of the definition (damage and danger) seem to constrain the definition and usefully protect residents against both termination and baseless threats of termination, this last part of the definition is almost indefinitely open. Almost anything that has happened, potentially, three or more times could arguably constitute one of "many breaches" that justify the termination of the contract.

Briefly, here are some examples of breaches HAAG clients have been accused of committing where it is unclear whether they would fall under part (c) of the definition. An 88-year-old woman smokes daily in her home contrary to a village rule which prohibits smoking. Another client in his 60s regularly walks his dog in a part of the village where pets are not permitted, although this does not seem to cause any inconvenience or disruption to other residents. Another client routinely parks his car other than in the space designated for his use. Another client is persistently unable to remove creeper vines from the external walls of her courtyard, which management claim is a contractual breach. For all these clients, it is relatively clear or arguable that any particular instance of the recurring breach is 'one of many', so that to determine whether the breach is substantial we need to decide whether the breach justifies the termination of the contract. But the definition fails to offer any guidance on this crucial point, if anything intensifying the ambiguity in the undefined term in the existing Act.

Persistent breaches which do not cause damage or danger within the village simply should not be used to justify termination. I note in this context that there are *no examples* under the existing Act of tribunal or court orders for termination of a retirement village residency based on breach of contract. What there are *numerous* examples of in HAAG's casework is threats by retirement village operators to terminate residencies based on specious, unsubstantiated and tendentious allegations. The broadness of this definition totally fails to protect residents against this actual issue.

Termination for breach – process issues

16B – Effect of termination

HAAG is concerned that the effect and intention of the proposed section 16B is insufficiently clear and could allow for termination processes other than those permitted by the Act. We submit that it would be better to say that any contract term permitting termination other than according to the provisions of the Act is invalid.

Minimum notice periods

The proposed section 16C sets out requirements for a breach notice under the Act, which may form a precondition for a termination for breach. The proposed s16C(3)(b)(i) requires that, if the notice is served with respect to a breach that is not capable of being remedied, the resident must cease committing the breach "no later than 28 days after the date of the service of the notice". Notwithstanding that this period can be subsequently extended, I suggest that it would be appropriate for 28 days to form a minimum period, rather than a mandatory one, for the resident to

stop committing a breach. There could be a range of circumstances where it is reasonable to allow a resident more than 28 days to remedy a breach. For example, HAAG had a client who received a breach notice in mid December purporting to require her to arrange a large amount of repair work (some 37 items) within 28 days. It would probably not have been possible to arrange the volume of repair work involved within 28 days at any time, but particularly not over the Christmas/New Year period.

Also, because the 28-day period applies only to breaches that are not capable of being remedied, the Act does not seem to prescribe *any* notice period for termination based on a breach which can be remedied. The contracting party can serve a notice under 16C setting out the breach and what the resident is required to do to remedy the breach, and then serve a termination notice under 16D weeks, days, or hours later. (The only apparent limitation here is that the contracting party must not serve a notice of termination unless the breach has not been remedied 'as far as practicable'. But to the extent there is a practicable extent to which the breach could have been remedied, the termination notice can be served immediately.)

Only required that one breach is substantial

The proposed section 16D(2)(b) specifies that a notice of termination may only be served if the breach specified in the original breach notice was substantial. However, it does not require that the breach *remain* substantial to the extent it has not been remedied. That is, in circumstances where the resident committed a substantial breach which they have remedied to the extent it is no longer substantial can have their residency terminated for that breach. A resident who committed a breach which was substantial, and then later commits a version of that same breach that is not substantial, can have their residency terminated for that breach. HAAG submits that this is inappropriate, and that termination should only be possible where the breach *remains* substantial, or where any incidence of a breach which could not be remedied is itself substantial.

Health and safety terminations

In this context that HAAG has limited experience dealing with terminations under 16(5), the current equivalent to the proposed provisions regarding health and safety terminations. Given that the stakeholder reference group has heard repeatedly from operators that this is a central and common concern for them, we suspect that this is because residents subject to such terminations face significant barriers to accessing information about and assistance to assert their rights. This makes it extremely important that the rights of residents are adequately protected by legislation.

The proposed mechanism for terminations on health and safety ground are critically inadequate to protect the rights of vulnerable residents. It weakens existing protections for residents, and places life-changing decisions about the rights of vulnerable residents with an office of conciliators and mediators with no particular medical knowledge or training. This is a deeply inappropriate and misconceived approach.

HAAG's submission is that there is already a mechanism by which a person no longer capable of living independently can be made to leave a village, which is for a guardian to be appointed to make decisions on that person's behalf. There is a substantial legal, medical and practical infrastructure in place to ensure that guardianships are available to those who need them, but that individuals who do not require guardianships are not subjected to them. The idea that the Retirement Villages Act must separately allow for the eviction of individuals who do not meet the requirements for a guardianship order – that is, individuals who remain capable of making decisions for themselves – is simply not justified. We know it is not justified because there are no published decisions terminating

a residency right on health and safety grounds or pursuant to s16(5). Operators routinely describe their ability to resolve these situations through discussion with individual residents and their families. Powers to terminate residencies on health and safety grounds are simply not required.

Beyond this overall objection to the inclusion of such powers, we note the following specific concerns about the provisions in the draft bill.

The only requirement for an application under the proposed s16G is that an operator thinks a resident meets the criteria in s16F (i.e., that the resident requires care which cannot be provided in the village and their remaining in the village poses a substantial risk to the health and safety of any person). There is no requirement that the operator obtain a medical report or opinion, and no expectation or requirement that individual managers will have any real training or expertise with regard to residents' capacity for individual living. There is no requirement that the operator consider the resident's views or those of any of the resident's doctors or support workers before making this determination.

In general, the possible protections for a resident are expressed throughout these sections in 'may' rather than 'must' language. A resident may obtain a medical report; the CDRO may arrange for a medical practitioner to provide an opinion, and so on. This is seriously inadequate in that it allows for the CDRO to approve the termination of a residency on health and safety grounds without considering any medical evidence obtained either by the resident or independently. Indeed, because there is no requirement that the operator provide or rely on medical evidence in making a s16G application, it allows for termination on health and safety grounds in the absence of any medical evidence.

Even where a resident does obtain medical evidence indicating their continued ability to live independently, the CDRO is not bound to accept that evidence but simply to consider it pursuant to s16J(1)(d). This is an extraordinarily weak protection in comparison to, for example, the requirement elsewhere in the draft bill that a condition report is "conclusive evidence" of the state of repair of a property.

Under these provisions, the CDRO can make orders terminating a residency on health and safety grounds even where there is no medical evidence the resident cannot live independently, and contrary to medical evidence that they can continue to do so. There is no requirement or apparent expectation that individual delegates of the CDRO will have the expertise necessary to evaluate such an application; our understanding is that CDRO delegates are expected to be trained primarily as mediators and conciliators, a totally irrelevant and inadequate basis for these decisions.

HAAG is seriously concerned that these provisions will be used by operators, both out of misplaced good-faith concerns and otherwise, to remove residents from villages when those residents have a reduced capacity but are still able to live independently. We believe that in many cases, village operators are strongly motivated to present an image of independent good health among their residents, including by seeking to remove residents with visible or noticeable impairments and disabilities. We are seriously concerned that the CDRO will lack the expertise to protect the rights of residents in those circumstances, and that the legislation also fails to protect their rights.

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