

Review of internal dispute resolution processes under the Retirement Villages Act 1986

Options paper

Consumer Affairs Victoria
June 2017

Executive summary

This options paper has been developed as part of Consumer Affairs Victoria's review of internal dispute resolution processes under the *Retirement Villages Act 1986*. It presents, for stakeholder feedback, a mix of possible regulatory and non-regulatory options for reforming these processes.

The options in this paper reflect stakeholder comments and suggested improvements provided during a stakeholder roundtable held in April 2017. The paper is based around the key issues and questions that were discussed at that roundtable.

Feedback is sought on the following options:

- Option 1A: Introduce a definition of 'complaint' into the Retirement Villages Act and clarify requirements around recording complaints
- Option 1B: Clarify what constitutes a 'complaint' through guidelines and/or protocols, but clarify in the legislation obligations around recording complaints
- Option 2: Review and improve the protocols, and raise their profile amongst owners and residents
- Option 3: Clarify in legislation avenues for directing complaints about village managers
- Option 4: Require approval for 'above CPI' increases to maintenance charges to be obtained through the annual meeting of residents, and facilitate voting by alternative means than attending that meeting in person
- Option 5: Remove the role of residents committees in resident dispute mediation, and promote alternative avenues available for resident-to-resident dispute resolution, such as the Dispute Settlement Centre of Victoria

We invite your comments on these options by Friday 28 July 2017.

1. Introduction

Background

Consumer Affairs Victoria ('CAV') is undertaking a review of internal dispute resolution processes under the *Retirement Villages Act 1986* ('RV Act').

A discussion paper issued to key stakeholders in March 2017 identified key themes and issues of concern that have been raised by stakeholders in recent times relating to the management of complaints/disputes within retirement villages.

The discussion paper framed a stakeholder roundtable held on 7 April 2017. The discussion and feedback during the roundtable has assisted the development of potential options for reform of internal dispute resolution processes under the RV Act, which are canvassed in this options paper.

Participants at the roundtable are being invited to comment on the potential options for reform outlined in this paper, prior to CAV reporting its findings of this review to the Minister for Consumer Affairs, Gaming and Liquor Regulation.

Options for reform of Internal Dispute Resolution (IDR) processes

This options paper presents potential options for reform arising from the key issues and themes identified in the discussion paper. In cases where only one approach is considered to be a feasible alternative to the status quo, a stand-alone option is presented.

Feedback is sought on these options. If the status quo is preferred on any issue, views are sought on the rationale for that position.

As noted in the discussion paper, potential reforms arising from a consideration of the issues that relate to recommendations made by the recent Parliamentary Inquiry into the retirement housing sector ('Inquiry') are out of scope of this review and will be the subject of a whole-of-government response later in 2017.

A summary of key points raised by stakeholders during the roundtable was distributed to participants shortly after the roundtable. This options paper includes that summary by way of introduction to potential options for reform.

We invite your views and comments on the options outlined in this paper by 28 July 2017.

2. What is a complaint

Background

What constitutes a 'complaint' is not defined in the RV Act or the Regulations.

CAV's 'Internal dispute resolution guidelines for retirement village owners and managers' ('IDR guidelines') generally describe a complaint (whether about management or another resident) as "the reporting by a resident of an issue, problem or grievance that is affecting the quality of life at the village. It may relate to behaviour (an action or a failure to act) and/or the physical environment".

Stakeholders have raised concerns about the lack of a definition or clarity around what constitutes a complaint or dispute, which can, amongst other things, lead to uncertainty around whether a complaint or dispute has been resolved. In response to these issues, the discussion paper posed the following questions that were considered by stakeholders at the roundtable:

- Should a distinction be made between what could be characterised as an informal complaint/dispute and a formal complaint/dispute? If so, where and how should that distinction be made?
- What would be the benefits and costs of adopting a definition of 'complaint'/'dispute' (such as that adopted by ASIC in its Regulatory Guide 165)?
- Should there be any adjustments to the requirements for capturing and recording the complaint or dispute depending on the nature of the complaint/dispute?

Stakeholder feedback

There was agreement at the stakeholder roundtable that what constitutes a 'complaint' for the purposes of the Act is currently vague, and greater clarity would be beneficial.

There was also agreement that there is a difference between a request for action and expressing dissatisfaction about how this request has or has not been dealt with.

Use of a standard definition, such as the ISO definition of complaint adopted by the Australian Securities and Investments Commission in setting procedural requirements for all licensed financial services and credit providers, could work. However, if a standard definition is adopted, this should be easily understood by residents.

There were different views about whether or not all requests for action and/or complaints should be recorded by village managers.

Whilst it was acknowledged that it is good practice for managers to log and acknowledge all requests, requiring managers to log all requests could create an administrative burden,

especially for small villages. Some requests are relatively straightforward and can be responded to straight away.

One approach suggested was to require that only requests that cannot be resolved immediately and/or have not been resolved to the resident's satisfaction should be recorded. Logging and acknowledging every request could be a matter for good practice guidelines instead.

It was noted though, that in cases where complaints escalate and are considered by an external body, it may be a problem if there is no evidence that a request was made. Recording initial requests can be important in these circumstances.

Asking residents if they want their request to be logged, or for an issue to be dealt with as a 'formal' complaint, might be welcomed by some residents, but might worry others.

Options for reform

Two options for reform have been identified.

Under both options, the RV Act would be amended to clarify that, as a minimum, all 'complaints' must be recorded in accordance with section 38H(1) of the RV Act. Further, where a complaint has not been resolved to the residents' satisfaction within 72 hours (or some other specified timeframe), the manager is required to create and maintain a written record of the complaint in accordance with the regulations pursuant to section 38E(4) and 38F(4) of the RV Act.

Under both options, the recording of 'requests for action' would not be mandated in legislation. However, such recording is acknowledged as constituting good practice and would be considered for inclusion in any review of the protocols 'Retirement villages: good practice to address key issues', as described in Option 2 below.

Option 1A: Introduce a definition of 'complaint' into the RV Act and clarify requirements around recording complaints

Under this option the RV Act would be amended to introduce a definition of 'complaint'.

The following definition of complaint provided in AS ISO 10002-2006, which was discussed at the stakeholder roundtable, appears to provide an appropriate (and widely adopted) option:

An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.

This definition allows a clear distinction to be made between ‘requests for action’ and ‘complaints’ and, in turn, facilitates appropriate distinctions to be made in requirements for the managing and recording of ‘requests for action’ and ‘complaints’.

Stakeholder views are sought on the suitability of the AS ISO 10002 – 2006 definition for the RV Act.

Option 1B: Clarify what constitutes a ‘complaint’ through guidelines and/or protocols, but clarify in the legislation obligations around recording complaints

Under this option, clarification of what constitutes a ‘complaint’ and a ‘request for action’ would be provided through the IDR guidelines and/or the protocols, having regard to industry best practice. This would address stakeholder concerns about a lack of clarity around what constitutes a complaint, and the recording processes that follow.

3. Good practice for preventing, managing and resolving complaints and disputes

Introduction

6

A set of protocols were developed in 2012 through a series of roundtables of industry, consumer and residents groups. The protocols specify measures that retirement village operators and managers can take to prevent commonly-arising issues becoming complaints/disputes, and to promote good relations in villages to enhance the experience of residents.

For situations when complaints/disputes do occur, CAV has provided the IDR guidelines.

Stakeholder feedback indicated that the protocols do not appear to be widely used across the sector and therefore are not achieving their intended purpose. The discussion paper posed the following questions in relation to this issue that were considered by stakeholders at the roundtable:

- Assuming the protocols were broadly applied by retirement village operators, do the protocols, as currently drafted, remain a useful resource for preventing disputes arising and promoting good relations in retirement villages? What improvements could be made?
- What alternative non-regulatory approaches might improve the rate of adoption of the protocols as an example of best practice (for example, if compliance with the protocols were made a condition of obtaining Lifemark accreditation)?

Stakeholder feedback

At the stakeholder roundtable, there was broad agreement to the description and discussion of the issues relating to the good practice protocols provided in the discussion paper.

Stakeholders expressed the following views about the protocols:

- They are somewhat outdated and would benefit from a refresh, including in language and tone.
- There have been legislative changes since the protocols were developed (which need to be reflected in the protocols or potentially could mean that content could be removed).
- There are no references to the Australian Consumer Law in the protocols.
- Some of the protocols are unclear and operators have struggled to work out what they mean in practice.
- Even though the protocols were promoted initially, many operators have forgotten about them.
- The protocols are aimed primarily at village managers, although language used means that the audience is not always clear and the protocols could be complemented by a separate document for residents.
- The fact the protocols are not enforceable and do not have to be followed is an issue. Some managers/operators are reluctant to do things they are not legally required to do. Linking the protocols to external dispute resolution could be an incentive to using them, and to having good internal dispute resolution processes.

It was considered that a commitment to the protocols by village operators is crucial. The roundtable noted that many managers take their lead from head office, so the best way to get them to use the protocols is by getting the operators on board.

If the operators and managers are committed to the protocols, residents also need to be aware of them. There could be greater accountability if the protocols were required to be displayed publicly in villages and promoted in marketing material.

It was recognised that there could be challenges associated with making the protocols mandatory. An alternative approach could be to include the protocols (or something similar) as part of an accreditation scheme.

In relation to accreditation schemes, it was noted that this is an area that would benefit from:

- more transparency and maturity
- being more than a marketing tool
- resident/consumer involvement
- an accountability framework.

It was generally agreed that further discussions about the future role of the protocols, and the issues they cover, could occur in a wider context – as part of the response to the Parliamentary Inquiry, for example. Any future discussions should, where possible, involve representatives from smaller operators and the not-for-profit sector.

Options for reform

One option for reform has been identified.

Option 2: Review and improve the protocols, and raise their profile amongst owners and residents

Under this option, the protocols will be reviewed, with the collaboration and input of key stakeholders, including representatives of small and large operators, the not-for profit sector, residents and consumers. Not only will this provide an opportunity for the protocols to be updated as to issues, language and tone, it will provide opportunity for ‘buy in’ by all key stakeholders.

A complementary publication, directed at residents, would be developed to improve their level of awareness of what is considered best practice. Owners or managers could be required to prominently display in common areas within the village a copy of the resident edition of the protocols, which will in turn lift the profile of the protocols both amongst residents and owners/operators.

The protocols currently provide that if a dispute comes to CAV for conciliation, CAV will look to see if the protocols have been followed. Consideration could be given to adopting a similar approach to any reforms to external dispute resolution processes that the Government might consider as part of broader reforms to the RV Act.

4. Complaints about managers

Introduction

The discussion paper canvassed stakeholder concerns around the fact that while the RV Act requires that an IDR procedure must include the name of the person or persons to whom residents may give notice of management complaints, this is often the village manager. The IDR procedures within retirement villages often do not address the not uncommon scenario of when the complaint is about the manager. Obviously, this creates a conflict of interest and is a potential barrier to residents making a complaint.

The discussion paper posed the following questions for consideration at the roundtable:

- Is this issue largely limited to smaller or independent operators?
- What are the non-regulatory options that could better ensure that this issue is adequately addressed and managed through a retirement village's IDR procedures?

Stakeholder feedback

It was generally agreed that residents should try to resolve complaints through internal processes before following an external dispute resolution process. However, this can be difficult if the complaint involves the village manager in some way. In very small operations, the internal complaint process only involves one manager.

While operators and managers may be comfortable with residents taking complaints directly to higher levels (above village managers), many residents do not do this. This could be because the resident:

- is unaware of this option
- is worried about going above the manager's head and contacting head office
- thinks they will get the same response whoever they contact in the organisation.

It was noted that there are some distinctive features of retirement villages and their residents, which make them unlike other markets when it comes to complaints. For example:

- Many residents do not want to complain because of fear of repercussions from managers, operators and/or other residents. (Isolation by other residents can be a particular problem.)
- Older people can feel powerless and need support to make complaints.
- For many operators, the commercial incentive to provide good customer service is missing (although it was noted that this is less likely to be the case for operators that

rely on good word of mouth and high levels of customer satisfaction to keep their villages full).

- Residents are generally a ‘captured’ market, as they lack other housing options and cannot leave the village if they are unhappy.

There was also discussion around the likely changes in retirement village demographics (such as the increasing number of ‘baby boomers’ with high expectations and a greater willingness to complain), which mean it is important to have a sound complaint management framework in place.

Residents want to be able to communicate effectively with managers, and value the ability to converse about issues and receive a meaningful response (information and explanations). Clear, open channels of communication are likely to mean the resident is satisfied with the manager’s response, even if this is not what they wanted to hear.

Residents need to feel safe to make requests and complaints. Managers could receive training in how to create the right environment.

Options for reform

One option for reform has been identified.

Option 3: Clarify in legislation avenues for directing complaints about village managers

10

Under this option, section 38E(1)(a) of the RV Act would be amended to require the procedure for dealing with management complaints include:

- the name of one designated contact person (for example, the village manager) within the village to whom residents may give notice of management complaints; and
- the name of an alternative person whom residents may contact if their complaint concerns the designated contact person or where the designated person is not available or empowered to deal with their complaint.

For larger operators this could be someone other than the village manager, such as a regional manager or head office contact point. Where there is no such alternative within the organisation (for example, where it is a small operator), then the village would be required to identify an alternative person (or organisation) to whom residents could direct their complaint. The alternative person would need to be appropriate (for example, not the relative of the owner/manager to whom the complaint may relate) and someone who has a formal arrangement in place with the retirement village for communicating those complaints so that they can still be managed through the IDR process in the first instance.

5. Capability of managers

Introduction

The discussion paper canvassed the issue of manager capability, responding to stakeholder feedback that managers are often not adequately trained in effective communication and managing complaints/disputes. This view has been recently endorsed by the Inquiry, which found that: “Evidence received by the Committee strongly supports the view that managers in the sector must have professional training and/or accreditation in order to do their job well”.¹

The Inquiry recommended that the Victorian Government give consideration to developing a model for mandatory accreditation for all retirement housing providers, and ensure that an appropriate minimum Certificate level applies to retirement village management courses.²

Whilst out of scope of this review, the discussion paper posed the following questions for consideration at the roundtable:

- What is your view of the Inquiry’s recommendations relating to mandatory accreditation for village providers and certification levels for management courses?
- What do you see as the benefits, costs and challenges of implementing these recommendations?

11

Stakeholder feedback

Given this issue is the subject of an Inquiry recommendation, no reform options have been developed as part of this review. However, for completeness a summary of stakeholder feedback around this issue is provided below.

- Being a village manager is a difficult and complex role, which is likely to warrant at least Certificate 4 or Diploma level training. It could be reasonably straightforward to introduce this kind of training system, though.
- There are cost implications associated with paying a well-qualified manager, which may be incurred by residents in the form of higher salaries. There are also the direct costs of new training, plus time out of the village to do the training and any other placements. It was noted that many courses can be done online.
- People with background and training in the hospitality industry may be particularly suited for this kind of management role.

¹ Page 65, Inquiry Report.

² Recommendations 11 and 12 of the Inquiry Report, respectively.

- While operators often say their managers receive a lot of training, this training is not necessarily on the things that benefit or focus on residents – such as effective communication, complaint handling, dispute resolution, looking after residents, understanding the difficulties associated with ageing, and accommodating the specific needs of older people (in relation to modifying a property, for example).
- A potential issue with mandatory accreditation for village operators could be what happens if an operator fails the accreditation process. (Could this result in village closures, for example?) It was suggested that this could be linked to training requirements.

6. Resident participation in village decision making

Introduction

The discussion paper noted that the RV Act provides for resident participation in their retirement village, through:

- requiring the village manager to convene an annual meeting of residents, and to prepare and present certain information at that meeting
- enabling residents of a retirement village (where there is no owners corporation) to elect a residents committee to represent their interests
- enabling residents committees to call meetings, form sub-committees, determine procedures, and act as a mediator in disputes between residents.

The discussion paper noted that the ability of lessee-residents to participate in residents committees and decision making around common property where there exists an owners corporation has recently been considered as part of the Consumer Property Law Review. Options for reform, which were subject to a public consultation process, are currently being considered by the Government.

The Inquiry has recommended that the Victorian Government investigate measures to ensure that all retirement village units hold the same owners corporation voting rights.

Whilst outside the scope of this review, the discussion paper posed the following questions about the Inquiry's recommendations for consideration at the roundtable:

- What is your view of the Inquiry's recommendation relating to voting rights?
- What do you see as the potential benefits, costs and challenges associated with implementing this recommendation?

Stakeholder feedback

There was some discussion at the roundtable about the Inquiry recommendation on voting rights. It was assumed that this is about the overlap between owners corporation and retirement village legislation, which is being dealt with in the context of the owners corporation reforms. It was not clear, though, what the issue is around voting rights in leasehold villages.

It was noted that operators need to be willing to encourage and facilitate resident participation in village decision making. It was suggested that there is a lack of guidance on this.

There are often different views on what 'consultation' means and how to do this effectively. It was suggested that there should be greater clarity about what is required or expected.

It was also suggested that there should be a range of opportunities for resident involvement, not just by attending meetings or being a member of the residents committee. This relates back to an earlier point about the importance of managers having good communication and engagement skills, and the ability to create a climate that encourages residents to feel comfortable expressing their views.

Concern was expressed that resident committees have the power to make certain decisions without consulting all residents. This is problematic. It was suggested that approving 'above CPI' increases to maintenance charges, for example, should be a matter for the annual meeting of residents, rather than for the residents committee alone. More financial matters could also be dealt with at the annual meeting.

Options for reform

Noting that a number of the above issues will be addressed as part of either the Consumer Property Law Review or the Inquiry response, one option for reform has been identified.

Option 4: Require approval for 'above CPI' increases to maintenance charges to be obtained through the annual meeting of residents, and facilitate voting by alternative means than attending that meeting in person

Given that the ability of resident committees to approve the increase of a maintenance charge beyond the 'adjusted maintenance charge' (that is, effectively increases 'above CPI') has been identified as a source of tension and dispute amongst residents, under this option it would be removed. The alternative means by which the owner/operator could increase a maintenance charge beyond the 'adjusted maintenance charge' would be by majority resolution at the annual meeting of all residents.

Under this option, the RV Act would be amended to allow for residents to vote for a resolution or decision, for which reasonable prior notice must be provided by the owner, by alternative means that will not require the resident's presence at the meeting.

7. Disputes between residents

Introduction

Retirement villages' IDR procedures must include the procedure to be used by the manager in mediating resident disputes. Village managers can play a key role in seeking to resolve disputes between residents. A resident may choose to have a dispute with another resident mediated through the residents committee, if there is one, although there is no requirement under the Act for this option to be articulated in the IDR procedures. CAV cannot conciliate disputes between residents.

The discussion paper noted that submissions to the Inquiry indicated that some residents are reluctant to seek assistance from the residents committee because the committee has been 'captured' by village management.

The discussion paper also noted that CAV has little data on resident-to-resident disputes and the nature and extent of these disputes is unclear. It was on this basis that the discussion paper posed the following question for consideration by the roundtable:

- Are you aware of any specific issues relating to resident-to-resident disputes that could be addressed?

Stakeholder Feedback

14

There was general acknowledgement at the stakeholder roundtable that managing disputes between residents can be a big challenge for managers, especially in smaller villages.

Stakeholders suggested that the Dispute Settlement Centre of Victoria could potentially play more of a role in resident-to-resident disputes, and there could be greater awareness that this option is available (though it was also noted by some stakeholders that there will be some residents who do not want to take their dispute outside the village).

There was some support for removing the role of residents committees in handling resident-to-resident disputes, on the basis that such a role is inappropriate. There may be a conflict of interest for committee members, and it can be hard for the people involved to deal with things objectively.

Options for reform

One option for reform has been identified.

Option 5: Remove the role of residents committees in resident dispute mediation, and promote alternative avenues available for resident-to-resident dispute resolution, such as the Dispute Settlement Centre of Victoria

This option acknowledges the potential for conflicts of interests arising for resident committees playing a role in resolving resident-to-resident disputes, and the general sensitivities around this as conveyed by a number of stakeholders at the roundtable.

The RV Act currently requires the IDR procedure to note the fact that residents may seek advice on disputes with other residents from the Director of CAV or from CAV itself. Under this option, consideration could be given to requiring those IDR procedures to also identify potential alternative avenues for resident-to-resident dispute resolution, such as the Dispute Settlement Centre, which provides a free dispute resolution service to Victorians.