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Access to Justice review
Department of Justice and regulation

This submission is a response by Housing for the Aged Action Group (**HAAG**) to the Access to Justice review, which includes six background papers and related terms of reference.

About Housing for the Aged Action Group

HAAG is a member-based, Not-For-Profit (**NFP**) organisation. Our members are mostly older residents and tenants from a variety of housing types across Victoria.

HAAG also operates an older persons housing information and support service, named Home At Last (**HAL**). A part of the HAL service is funded by Consumer Affairs Victoria (**CAV**) to provide tenancy and retirement housing information and support services to vulnerable and disadvantaged older Victorians.

The funding provided by CAV enables HAAG to assist tenants and residents living in private rental, caravan and residential parks and villages, retirement villages (mainly not-for-profit), Independent Living Units (ILUs) and rental villages throughout Victoria.

HAAG also facilitates and supports working groups made up of older residents living in caravan and residential parks and villages and ILUs. The working groups, along with HAAG's general membership, were consulted for response to the access to justice review and their feedback is reflected throughout this submission.

Scope of the submission

This submission will address access to justice as it applies to older residents and tenants living across a variety of housing types in Victoria.

HAAG understands that disputes arising under the *Residential Tenancies Act 1997 (RTA)* and in the Residential Tenancies Division of the Victorian Civil and Administrative Tribunal (**VCAT**) are not being considered by this review, as they will be addressed as part of the RTA review.

That being said this submission focuses on retirement housing specifically. Although some of the housing types addressed in this paper are covered by the RTA the concerns and issues experienced by older residents within each type are virtually the same.

Due to the age specific nature of this housing the recommendations provided throughout the submission address these concerns and issues and apply to all retirement housing types, no matter the legislative and regulatory framework.

Only the term 'residents' will be used in this submission, for ease of purpose, to mean older people living in all retirement housing types and should be taken to include tenants of retirement housing as well.

Retirement Housing

In Victoria the term retirement housing covers a myriad of housing types, far beyond the traditional retirement village model most people are familiar with. The following forms of housing will be considered in HAAG's submission response:

- **Residential parks / Residential villages**

'Residential parks' emerged in Victoria around the 1980s and onwards, developing from caravan parks and the holiday lifestyle options most prevalent on the New South Wales and Queensland coasts.

The term 'residential parks' arose when people, mostly retirees, began living permanently in caravan parks where they owned a moveable dwelling but rented the site on which it stood.

The evolution towards permanent living created the development of 'residential villages' which began in Victoria in the late 1990s early 2000s. Residential villages are purpose built villages for permanent living where people own their moveable dwelling and lease the site on which it stands. Villages are marketed mostly at people over 55 years of age, often offering a more affordable retirement lifestyle than retirement villages. Although the level of affordability has changed, these villages have experienced significant growth in recent years.

- **Independent Living Units / Not-For-Profit retirement villages**

During the 1950's the Australian Government passed the *Aged Persons Homes Act 1954 (APHA)* which funded churches, charities, and not-for-profit organisations to provide housing for older people. As a result 34,700 ILUs were built over a 30 year period

providing affordable housing for low income older people. In Victoria approximately 9,000 units were built during this period.

During the 1980's funding provided under the APHA ceased. As a result two models of ILUs have developed over time: those covered by the *Retirement Villages Act 1986 (RVA)*, now known as NFP retirement villages, and those covered by the RTA, usually known as ILUs. Both models have similar characteristics, usually bedsitter or one-bedroom units in small clusters, with very limited (if any) communal facilities and spaces. The main differences lie in the financial model.

- **Rental Villages**

Rental villages, operated by private companies, are targeted to aged pensioners who want a supported housing option with independent living conditions.

Historically rental villages in Victoria have been covered by the RTA and tenants pay 85% of income as rent, including 100% of Commonwealth Rent Assistance (**CRA**).

Units are semi self-contained, usually in clusters of 40-100, without a stove, large fridge, or laundry facilities due to a portion of rent paying for the provision of meals and a linen service. Utility and phone charges are paid for separately by the tenants.

It is often unclear whether particular villages should be considered rooming houses, due to the combination of independent units with communal facilities, or residential tenancies, as the units are substantially self-contained. This creates significant confusion as to the rights and obligations of the parties under their agreements. It is also unclear how the additional services provided are regulated, such as the quality of food, which causes many difficulties for residents.

More currently many villages have begun to change their financial model so some are now covered by the RVA but still allow for tenancy arrangements as units are sold to investors.

- **For profit retirement villages**

For profit retirement villages, also known as resident funded retirement villages, are managed by private companies and make up approximately 40% of the retirement village sector, containing approximately 70% of the total number of units.

Generally these villages comprise large clusters of units – 1, 2 and 3 bedroom – in a gated environment with a number of communal facilities and spaces. Ingoing contributions generally start from \$200,000 and will depend on the location, services provided and units developed.

Approximately 80% of retirement villages are loan/lease/license arrangements, with the remaining villages either rental or strata title agreements. Retirement villages are covered by the RVA but for strata title residents the *Owners Corporation Act 2006 (OCA)* is also applicable.

Some retirement villages may also contain **serviced apartments** which are a semi-supported style of housing that includes accommodation and services that contain a certain level of care, such as meals, cleaning, laundry and some medication monitoring, but not at the level covered by Commonwealth aged care legislation.

Introduction

Older residents in Victoria need strong legal protections to live with security, stability and to enjoy a good quality of life in their housing of choice.

“The importance of stable and secure accommodation for older people can make them exceptionally vulnerable to accommodation-related legal problems. Legal issues which may threaten the stability of accommodation arrangements may present a greater level of stress and anxiety to older people than other age groups.”¹

Strong legal protections include access to justice which is an important component of the justice system and the rule of law.

“Federal Attorney General Robert McClelland said that the “critical test” for our justice system is whether it is “fair, simple, affordable and accessible.”²

Justice must also be available to all. No matter a person’s financial or social status all elements of the justice system should be accessible to every person as required.

According to the World Justice Project’s (WJP) *Rule of Law Index 2015 Report* Australia ranks among the top ten globally in six of the eight dimensions measured by the Index. However the report shows that in Australia’s overall Index profile the lowest ranking scores are found in the dimension of ‘civil justice’. These relate to accessibility and affordability, no discrimination and no unnecessary delay.

Access to justice can be defined simply as access to lawyers, courts and legislation. In discussing this with HAAG members we found that there are other elements that are important to older people.

“Access to justice may mean ensuring physical accessibility to the courthouse, simplifying procedural rules, using plain language in a statute, explaining what the law means on the internet, provision of translation, dispute resolution other than through the courts, legal aid and similar steps to removing barriers of various kinds. A more comprehensive understanding of access to justice goes beyond the legal system to encompass efforts to assess and respond to ways in which law impedes or promotes economic or social justice.”³

The review addresses many of the elements outlined in the description above.

¹ Ellison et al, 2004, p 149

² Community law Australia, 2012, p 3

³ <http://www.lco-cdo.org/en/family-law-reform-final-report-part1-section>

Background paper - Accessible legal information

Question 1: How would you normally try to solve a legal problem? Who would you go to for help, information or advice? If you are from an organisation, where do you refer people for legal help?

HAAG members have often commented about their frustrations not knowing where to turn for legal information or how to solve a legal problem. According to a report undertaken in New South Wales (**NSW**) around the legal needs of older people “there is a heavy reliance on informal sources of information”,⁴ such as family, friends and doctors and this decision is heavily based on relationships they trust.

When older residents first present at HAAG they may not even realise, or understand, they have a legal issue. The first step is to empower them with the knowledge and understanding of what their rights are. Then the avenues to justice are explained as relevant to their individual needs. Often older residents are only seeking information and it is very few that will continue on through to the justice system.

HAAG’s most utilised referrals for legal help are the Consumer Action Law Centre (**CALC**), Justice Connect and the Tenant’s Union of Victoria (**TUV**). When the matter is complex and requires strong legal support a referral will be made, if the chosen service has capacity and the matter fits their criteria. At other times HAAG utilises these services for information and advice in order to better support residents internally.

HAAG members have tried many avenues to solve legal problems over the years. These include agencies and services such as: Community Legal Centre’s (**CLC**’s), CAV, Member’s of Parliament (**MP**’s), local council authorities and councillors, as well as tenant advocates. This knowledge of available resources is something that is often learned only after people have been involved with HAAG for a period of time.

Unfortunately even with a seemingly extensive list of resources members express their frustrations about not feeling heard and the difficulty in finding someone who understands their issues. Members feel there is regulatory failure to address their issues, with a lack of enforceability, which impacts negatively on their housing situation.

MP’s and local council’s are often the first point of call for older residents. These avenues are fairly easy to access and engage with which makes it appealing to older people as these are elements they favour. Sometimes however they may not seek any advice preferring to keep quiet and ‘not rock the boat’.

The difficulties that arise about accessing these various avenues of legal advice, even for HAAG, is the lack of expertise and knowledge in relation to retirement housing. Some services are also not funded to provide legal help in certain housing areas which creates gaps in the justice system for older residents.

“Older people and service providers agreed that there was a gap in service provision to older people. Older people...do have some special needs that differentiate them from others. This is the case in terms of specialised areas of the law, such as retirement village

⁴ Ellison et al, 204, p 47

*contracts, and in terms of catering to their particular communication needs. The lack of a singular, specialised service for older people, or one-stop shop, sends them on a referral path”.*⁵

Older residents feel convinced there is no-one that can assist them and they will find no justice. Finally having stumbled upon HAAG they often share they have been in contact with a number of other services but to no avail. “Having tried several different legal and non-legal mechanisms for redress, they were left feeling as though no method could help alleviate or solve their problems”.⁶

Question 2: What format is most helpful when you are looking for information (e.g. online, printed material, telephone information or face-to-face information)? If you are from an organisation, what forms of material do you find get used by the community you work with? Does this vary between different parts of the community?

“Even though older people exhibit high use of telephones for communication... they prefer to speak to someone rather than be faced with messages and directives to press a number to clarify their needs”.⁷ When calling HAAG for the first time many people express how refreshing it is to have a real person to talk to, rather than listening to an automated telephone response. This is especially important when they are stressed or confused about their situation.

Overall older people prefer to have someone to talk to as opposed to just utilising printed or online material to understand their legal issue. It is also difficult to know what to look for to find relevant information and therefore talking to someone who has some understanding about the issue can result in information that is right for their individual needs.

Telephone information and advice “can make legal services more accessible, particularly when there are mobility issues for people with disabilities or for people living in rural, regional and remote areas”.⁸

Internet is increasingly used to provide information by government departments and service providers and although many older people are embracing this technology there are still a high number that feel it excludes them. It also requires knowledge about what to look for and half the trouble is that people do not understand what their legal problem is and what the relevant legislative and regulatory framework is.

Even for those that know what laws govern their housing, and where to find it, they have stated that legislation is difficult to read and understand. “If it is impossible or unduly difficult or expensive for the citizen to have access to legislation... the rule of law is imperilled”.⁹ In order for someone to understand what their rights are laws must be made accessible and simple. Legal documents should also be clear and easy to understand as well, such as contracts and agreements provided by operators of retirement housing.

⁵ Ellison et al, 2004, p 53

⁶ Ibid, p 75

⁷ Ibid, p 40

⁸ Ibid, p 41

⁹ Lindgren, 2013, p 35

HAAG has created its own plain English fact sheets for residential park and village residents which explain in simple terms some rights under the RTA. These fact sheets are usually provided after telephone or face-to-face advice has been provided.

HAAG also provides people with CAV guides and booklets where relevant as this provides a plain English summary of rights under law, again only after the issues have been discussed. Unfortunately there are information gaps even in these materials.

Most people say the written material is good but they express how much better they feel speaking to someone directly for an explanation about how the information applies to them. Written or online material could never take into account each person's individual situation and how to apply it practically.

Difficulties especially arise where someone does not speak English, or has English as a second language, and they require translated materials. For instance CAV no longer provides guides in other languages and their online translated material is only a brief summary without any robust detail.

HAAG's general practice, especially where matters are complex, is to provide an outreach service where workers visit older residents. This type of information delivery is the most appreciated by this age group. Unfortunately due to a lack of resources many services are unable to provide an outreach component to older people which may make them inaccessible to older residents, and therefore make access to justice more difficult.

Question Three: What are some of the legal problems that you have experienced? If you are from an organisation, what are some of the common legal problems experienced by community members you work with?

"There are some areas of the law that bear special relevance to older people. One report has indicated that substitute decision-making, care arrangements and accommodation decisions are of particular significance to older people".¹⁰ Housing has been found to be one of the most common legal enquiries for people over 65.

Some of the common legal problems experienced by older residents that contact HAAG in retirement housing are:

- Complex and inadequate contracts,
- Unfair and excessive fees and charges,
- Inadequate service provision, such as repairs and maintenance and meals,
- Bullying and intimidation by management,
- Exemptions in law,
- Lack of understanding of rights and responsibilities (in law and in contractual arrangements) both by residents and management, and;
- Eviction and breaches of law and contract.

¹⁰ Ellison et al, 2004, p 51

Question Four: Is the Commission’s proposal to establish a well-recognised entry point to the civil justice system appropriate for Victoria? Would a single entry point to the civil justice system be useful in helping you better understand your legal rights and address the legal problems you have experienced? If established, what should a well-recognised entry point do and how should it be governed?

Many older people utilise HAAG as an entry point to the justice system. HAAG, in essence, acts as a specialised, one stop shop. HAAG has specialised knowledge about retirement housing, and understands the sector, which makes it an appropriate starting point for related legal issues.

Once someone presents to HAAG with a retirement housing issue the matter is assessed and advice is provided. If HAAG can assist directly then the older resident will remain with our service. If the matter is more legalistic then we will contact the service we believe may be most relevant and speak to them informally about the issue. It is important to gauge whether their support is appropriate and possible, prior to making a referral. HAAG has strong networks and referral protocols with a number of agencies, which ensures we can usually place the right resident with the right service.

This background paper discusses the recommendation made by the Productivity Commission to establish a single entry point to the justice system that would “be better equipped to determine to which provider(s) a person should be referred”.¹¹ HAAG’s concern is whether a single entry point would function in reality as it would require thorough understanding of the sector and the legal issues of older residents in retirement housing.

There is already evidence to show that resources currently available, which are highlighted in the background paper, are lacking in updated and relevant information for older residents. Older residents are mostly unaware of these resources anyway.

Everyday Law has a section about renting but it is not updated to reflect changes in the RTA that occurred in 2011 with the introduction of a specific part for residential parks and villages. Nor does it provide a comprehensive list of support services. There is also a section about retirement villages which is completely lacking in sufficient and relevant information and only provides CAV as a source of information and advice.

The Law handbook has nothing on caravan parks, residential parks and retirement villages and therefore does not provide older people with sufficient information and advice in relation to retirement housing.

Another issue is that both resources are online and older people may not access the internet or know how to find these particular resources. The law handbook can be bought in hard copy for \$99.50 but for a pensioner this would most likely be unaffordable.

If current resources cannot provide relevant information and support HAAG is concerned that any proposed new general service might also be lacking. Thought should be given to the practicality of starting up a new service when the system already contains a number of well skilled agencies that could be resourced to expand their service provision.

¹¹ Accessible Legal Information background paper, p 8

HAAG is an older person specific housing information and support service and already provides a key point of entry for older residents to access the justice system.

Question Five: What other strategies would be useful to ensure that Victorians know where to go for help to solve their legal problems and understand the available dispute resolution mechanisms and legal assistance services?

HAAG believes that community education is beneficial to inform older residents about the justice system. Older people will not look for information unless they, or someone close to them, have an issue that needs to be resolved so it can be difficult to target information. Therefore this needs to be a strategy that is available once older residents are ready.

HAAG provides information and education sessions to retirement housing residents upon request. It has been successful in not only increasing knowledge but also linking residents into HAAG, via membership opportunities, for any future questions or concerns.

HAAG is also proposing that the government introduce a retirement housing ombudsman which may address, at least for older residents, the idea of a single entry point into the justice system and access to information. This proposal will be discussed in more detail under the heading of dispute resolution.

Background paper – Division and triage

Question One: How do organisations currently employ triage and diversionary strategies, and what referral mechanisms are the most effective?

HAAG's tenancy and retirement housing services provide information and advice to older residents prior to accessing civil litigation. First the issue is discussed and assessed to see whether there is something that can be challenged.

HAAG's practice is in line with what most residents want which is to negotiate first. Taking formal legal action and accessing VCAT is the last resort failing all negotiation and attempts at communication. In essence HAAG's practice supports the diversion and triage model.

HAAG finds the most appropriate referral mechanisms for older people are 'warm referrals'. Warm referrals can only be done between agencies and services that have strong, established relationships. This is something that needs to be encouraged more in the justice system but is already well utilised.

In general older residents prefer to have the referral done on their behalf. This way their matter has already been explained to the new service and they can basically pick up where they left off with HAAG. Often this also means HAAG will remain a support throughout a matter, if the older person chooses this option, and HAAG's established relationship with other services makes this an easy and simple transition for people.

Question Two: Are there appropriate services for people who come into contact with the justice system to be referred to? What connections between organisations are needed to support useful referrals?

Justice does not always satisfy the resolution needs of older people and often it is considered disempowering. "Some older people fail to see the law as empowering, for others it can be actively disempowering. This kind of experience, where the law is used as a weapon, may in turn affect the way that the legal system in its entirety is viewed".¹²

Often older residents feel fearful of exercising their rights. Even negotiations are stressful let alone having to consider taking formal legal action. HAAG members expressed being fearful of repercussions such as eviction or retaliation, feeling a lack of power, respect, unequal treatment and feeling like justice is one-sided.

"Increased physical and emotional vulnerability, as people age and experience higher levels of dependency, can also have an impact on how they deal with perceived threats. Fear of what might happen to them can exacerbate the problem by isolating the older person from support networks and assistance".¹³

Trust, time, involvement in decision making enables older people to feel more confident about taking action. The willingness to be referred into legal services can then be successful as older people feel they have the support they need in case something were

¹² Ellison et al, 2004, p 40

¹³ Ibid, p 31

to go wrong. The most important element for older people is support, to feel as though someone will stand by them and assist them through their issue. Older people also want services that are easy to access and engage with.

Few organisations are able to take the time that older people need to work through a legal issue. This can deter people from wanting to be referred, and in some instances older residents have specifically asked that HAAG act as their primary support. Although there are some organisations that are appropriate often resources, eligibility criteria and inability to provide outreach services can hinder access for older people.

When there are strong, established relationships between organisations, and legal services are willing to work together, then the support can often be shared between the two agencies.

Case Study:

CALC was representing a number of residents from one village. On the day of the VCAT hearing they needed to come to the city and CALC asked HAAG if they were able to pick up a few residents and bring them in. HAAG has resources to be able to do this and CALC does not. Upon following up the outcomes of the hearing CALC shared that the residents had been feeling very stressed about VCAT but the drive in with the HAAG worker, who discussed the VCAT process with them, made them feel more relaxed and confident about the day.

Question Three: What possibilities exist to improve the way in which people are diverted from civil litigation prior to commencing proceedings, to alternative services, at the earliest opportunity?

Question Four: What could be done to help members of the community make informed choices about diversion from civil litigation?

To successfully assist older people towards alternative services there is a requirement to have relevant, expert services to turn to which does not exist at present.

HAAG found that members are aware of a few alternative dispute resolution choices but the majority feel the services lack no power to enforce the laws and therefore feel these services are a waste of time. This will be discussed in more detail under the alternative dispute resolution section.

“While a number of older people....did not have faith in the legal system, some had strategically identified alternative methods of addressing problems”,¹⁴ such as taking the political approach and contacting their MP, which HAAG members often do.

Early intervention strategies are a good idea but they would require a far reaching arm. For instance in retirement housing, information should be given to prospective residents and it should be monitored. If managers and operators fail to provide information, or it is false or misleading, there should be an easy, quick and effective process to compel them to comply.

¹⁴ Ellison et al, 2004, p 38

Clear information about rights and responsibilities need to be provided to residents, which also requires accountability from managers and operators. They should be trained, accredited and held accountable for their practices. The government has an obligation to monitor this and act accordingly when not complied with.

There is an inherent power imbalance between residents and operators. Issues arise often of mistreatment, bullying, taking advantage of people psychologically and financially. This will always exist but government needs to recall these issues when they make decisions about what they will and will not respond to. Management issues are one of the top concerns brought to HAAG by residents in every form of retirement housing.

HAAG members voiced they felt often that decision makers are the source of the problem. "There is a lack of understanding about the role of specific Government Agencies"¹⁵ which often deters older people from contacting them. This will be discussed in more detail under alternative dispute resolution.

¹⁵ Ellison et al, 2004, p 44

Background paper - Alternative dispute resolution

According to the background paper the productivity commission said the use of Alternative Dispute Resolution (**ADR**) may not be appropriate where there is an imbalance of power between parties, or an unwillingness of parties to be constructive through and beyond the ADR process. These points in particular highlighted the potential inappropriateness of some forms of ADR for older people experiencing retirement housing issues.

As mentioned previously there is an inherent power imbalance between older residents and managers. Often there is also a lack of willingness from parties to utilise ADR constructively. Considering the current ADR processes available to older people it appears they may be mostly inappropriate to deal with the matters being raised in relation to retirement housing.

The main reason why management is of most concern to older residents is the lack of communication. ADR processes rely heavily on good communication. Older residents often also experience bullying and intimidation at the hands of managers and ADR processes require level headedness and a willingness to treat the other party with respect and consideration.

The majority of HAAG members who have used ADR processes feel they do not provide appropriate resolution due to the lack of enforceability of agreements. Generally HAAG members had poor experiences with processes such as negotiation, mediation and conciliation.

Negotiation is seen to be difficult by older residents, especially to undertake on their own, because the person they are usually trying to negotiate with is the one they have the problem with. Having someone negotiate on their behalf, such as an advocate, is beneficial for older people but some people have noted that advocates do not always understand the issue and therefore cannot negotiate successfully. Alternatively some advocates do not communicate or consult with the resident and therefore may accept an inappropriate outcome or resolution on their behalf.

Mediation is often viewed as a waste of time due to the need for both parties to be willing to resolve the issue. If the matter could not be resolved by negotiation it is unlikely that it will be resolved by mediation. There is also a lack of enforcement with any agreement made during mediation. HAAG members have stated that even where it appears an agreement is reached there is no-one to contact if the other party does not honour that agreement. It can be time consuming without meaningful outcomes.

Conciliation, usually provided by CAV for retirement housing issues, is seen by many HAAG members as trivial and unhelpful due to CAV's lack of willingness to enforce if there is a lack of compliance. It is felt that CAV are not using their powers properly. Older people feel it can be time consuming without meaningful outcomes and members feel there could be a role for fines and offences to assist in dispute resolution.

Question One: Are there circumstances where it would be appropriate to expand the use of ADR in Victoria? If so, how should that be done?

Perhaps if the matters raised above were addressed there may be scope to encourage an expansion of ADR processes in Victoria.

This would need to involve a review of the associated pieces of legislation that relate to retirement housing. Some are currently undergoing review but the RVA has yet to be revised and is long overdue.

The retirement village sector is HAAG’s focus in this section, specifically NFP retirement villages, because it is acknowledged that dispute resolution procedures for caravan and residential park residents, ILU residents and rental village residents are being considered under the RTA review. HAAG will respond to those housing types more specifically in that review, but it must be said there are similar experiences from residents in all forms of retirement housing.

The RVA review would consider the accountability of managers and operators, as well as the enforceability of ADR, both internally and externally, because currently what is available tends not to work.

Question Two: What could be done to improve ADR, including mechanisms to address the power imbalance that may exist in some situations?

*“Legal issues for older people relating to accommodation and housing reflect the distinct nature of accommodation and housing options that are prevalent amongst older people”.*¹⁶

Examples are:

- complaints arising when a solicitor has failed to adequately explain the terms of the occupation under the contract,
- lack of access to legal advice on retirement village contracts,
- lack of information about terms of occupation made available to potential residents,
- lack of specialist skills, experience and knowledge of this area amongst legal professionals.¹⁷

HAAG members overall feel they have lack of access to, and availability of, expert legal advice in all retirement housing types. They also express the complexities involved in exercising their rights and the difficulties in finding the correct service and support for their particular issues. Many HAAG members feel that services ‘pass the buck’ and no one is willing to take responsibility which means residents often decide not to access justice.

HAAG members wholeheartedly believe there is a need for a retirement housing ombudsman that would provide free, fair and effective dispute resolution services to older residents of all retirement housing types. HAAG has been working collaboratively with CALC, Council On The Ageing (**COTA**) and Residents of Retirement Villages Victoria (**RRVV**) to encourage government to adopt this approach.

¹⁶ Ellison et al, 2004, p 85

¹⁷ Ibid, p 101

Older residents have voiced they feel most comfortable accessing an ombudsman because it is non-confrontational, free, independent and expert. It allows for more timely resolution of disputes and assists to address the imbalance of power between the parties.

“A retirement housing ombudsman could be government-run or an industry funded scheme comparable to existing operations like the Energy & Water Ombudsman Victoria or the Public Transport Ombudsman Victoria”.¹⁸

The availability of this type of ADR process would encourage older people to access justice. It would assist residents to overcome fears and may empower them to better understand their rights. It would provide a service that is easy to engage with.

It must also be noted though that an Ombudsman would not be effective until all legislation that governs retirement housing is reviewed to provide robust protections for residents. There needs to be rights to exercise for people to access justice.

Question Four: How could the resolution of disputes with government agencies be improved?

It appears there needs to be clearer guidelines about how government agencies can act and in what circumstances. This needs to be readily available to older residents and government agencies need to be willing to use their powers to ensure there is a more equitable approach to justice. There must be clearly communicated processes by which someone can seek proper resolution if the agency does not do what it is empowered to do.

For government agencies to be able to enforce the law, rights must be available to be enforced, highlighting once again the need for review of retirement housing legislation.

¹⁸ Consumer Action Law Centre, 2015, p 4

Background paper - VCAT small civil claims

Question One: What reforms could be made to VCAT's jurisdiction, practice and procedures to make the resolution of small civil claims as simple, affordable and efficient as possible?

Question Two: What mechanisms, processes or supports could be introduced to better assist vulnerable and disadvantaged people to resolve small civil claims?

VCAT is supposed to be simple, low cost and provide for self-representation to encourage equal treatment within the justice system. Unfortunately older residents feel it is complex, lengthy, costly and inequitable which deters them from accessing it.

HAAG acknowledges this background paper is not considering VCAT disputes under the RTA. Our submission for RTA issues will be provided under the RTA review but it must be stated that many of the issues are similar and both submissions compliment each other.

For HAAG the specific form of housing affected by some of the issues highlighted in this section, in relation to small civil claims within the civil division of VCAT, is NFP retirement villages. For this group of people VCAT is difficult, lengthy and inefficient due to the complexities in the legislative and regulatory framework. It is not addressing the needs of this more vulnerable group sufficiently.

Older residents often resist taking matters to VCAT viewing it as too complex. As VCAT fees increase older people feel it is beyond their financial reach and many are unaware of the fee waiver. Information is not easily accessible about VCAT procedures and people often feel intimidated undertaking the process.

"People need to be able to access the courts and legal processes or the law cannot enforce people's rights and responsibilities".¹⁹

HAAG believes that VCAT should have a retirement villages list, separate to the civil claims list, to ensure a more efficient avenue to take legal action. Of course in order to have rights to exercise the RVA needs to be reviewed to provide residents with robust protections.

There can be no access to justice without strong legislation to support it. The RVA is well overdue for a review and would go a long way to enable NFP retirement village residents to feel more confident exercising their rights.

Case Study:

A not-for-profit retirement village resident contacted HAAG for assistance due to an increase in maintenance charges. The organisation managing the units had doubled this resident's charges.

This particular woman was single and had undergone surgery which required her to need some care and assistance in her recuperation. Her son came over from India to look after her while she healed. She informed the organisation that he would be staying with her for

¹⁹ <http://www.ruleoflaw.org.au/education/case-studies/access-justice/>

an extended period of time. As a result they decided she would need to pay double the charges during his stay.

According to the Retirement Villages Act 1986 (RVA) maintenance charges are not to be increased above the Consumer Price Index (CPI) unless in relation to specific increases in rates and wages.

When HAAG first spoke to this resident it was unclear what legislation was appropriate for this housing. The resident paid a 'donation' upon entry but was not provided with a receipt. HAAG approached the organisation to ask them what legislation governed the units and they did not know.

HAAG assessed it was a retirement village based on the donation model and wrote to the organisation stating they were not allowed to increase charges by more than CPI. They were also not allowed to charge extra for someone requiring a carer to stay with them.

The organisation did not accept this and the resident decided she would like to challenge them further. As a result of her decision she was bullied by management and ostracised by other residents. A whole campaign was set against her due to her decision to challenge the organisation. While facing a complex justice system she also had to deal with a tense home environment which significantly impacted on her health over the 18 months this matter lasted.

In order to take the matter to VCAT it required an application under consumer law and within the civil claims list. As consumer law is not an area of HAAG's expertise we approached CALC for assistance. Unfortunately at the time CALC were not equipped to assist the resident although they did provide basic advice on the matter and support at a VCAT directions hearing to get the process moving.

HAAG then sought pro bono legal assistance for the resident through Justice Connect. After some advocacy by HAAG, due to delays in processing the application and the barrister not responding to correspondence, the resident was finally allocated a pro bono lawyer to assist with the matter. HAAG remained as a support even attending legal appointments with the resident.

Following this submissions were made by both parties, due to orders made at the directions hearing, but much of the statement made by the law firm assisting the resident signified they had a lack of understanding of the RVA, as well as the needs of the older resident. The law firm were often fairly negative about her chances at VCAT.

Following the submissions a compulsory conference was set. Prior to the conference taking place the managers of the retirement village agreed to reduce the residents charges and she would not have to pay for her son to stay.

This whole legal process took approximately 12 months, with 6 – 8 months being focused on the VCAT process.

Following this HAAG also contacted CAV about the status of the village. CAV eventually decided it was a retirement village. This occurred in 2011-2012 and to this day the village is seemingly still not complying with the RVA.

The case study above highlights all of the complexities in the justice system for retirement village residents. It is too lengthy and too difficult especially when the matter requires a quicker response.

Background paper - Pro bono legal services

Question One: What is your experience of *pro bono* work?

Question Five: Where could *pro bono* work be of the most help? What should the Government do to encourage lawyers to target *pro bono* work to communities and areas that need it most?

*“Many people over the age of 65 are not aware of the existence of free legal assistance”.*²⁰

HAAG has utilised the pro bono scheme provided by Justice Connect’s Senior Law which has been very useful especially for more complex matters where other free legal services are unable to assist.

Although legal aid is available older people can be excluded due to their asset levels and because legal aid won’t deal with many retirement housing issues.

*“Limits on eligibility due to means and assets tests can mean that older people who are marginally more financially secure fall through the cracks. Those that cannot afford private legal services, do not feel confident to represent themselves and are ineligible for Legal Aid funding”.*²¹

*“Furthermore, the issues for which older people seek assistance are often those which are excluded from legal aid assistance”.*²²

CLC’s are also an option but they don’t often have time to work on complex matters due to limited resources and cannot provide outreach which older people often need.

*“Another problem that flows from having very limited resources for community legal centres is the limits it places on the capacity to advocate more fully on a client’s behalf as well as represent them in court”.*²³ The aspect of advocacy, more so than just representation at VCAT, is what older people need the most.

Overall there is also a lack of knowledge and expertise in the area of retirement housing, both within paid and free legal services. Pro bono work could provide expert knowledge and be of most help where there are gaps in the legal system, where matters are more complex requiring more time and resources, and where matters of higher compensation or liability are required to be addressed.

²⁰ Ellison et al, 2004, p 76

²¹ Ibid, p 79

²² Ibid, p 78

²³ Ibid, p 82

Self-Represented Litigants

Question One: What are the difficulties facing self-represented litigants in Victoria?

*“Ineligibility for Legal Aid can and does force people who have no other choice to represent themselves, sometimes to their detriment”.*²⁴

The level of stress on an older resident is often so great when it comes to housing matters of a legal nature, and matters are often so complex, that self-representation will always be difficult.

Although some older residents may be capable the majority of HAAG members felt they would require support to undertake a legal process. It is also a result of the intimidation that is felt by having to ‘battle it out’ with the operator and most probably their solicitor too.

Therefore for older people HAAG feels that the focus of access to justice should be on support services, rather than self-representation. This emphasises why older residents prefer the idea of an ombudsman.

Conclusion

*“Unresolved legal problems cause significant social, health and financial costs to individuals and the community. If Australians can’t protect their legal rights, the law becomes meaningless”.*²⁵

On one level access to justice means being able to access law and courts, as well as being able to secure legal advice and representation but it is also about understanding the processes and procedures that surround the justice system, and being able to understand the information contained within it.

To be able to access justice the system must include a strong legislative and regulatory framework, especially addressing power imbalance. It must have effective alternative dispute resolution processes and services that can cater specifically to older residents by having specialised knowledge of retirement housing. It must have government agencies that can enforce law and regulation. It needs to be a fair, equitable, affordable, timely and efficient system to make it accessible.

For older residents the nature of retirement housing disputes can be especially stressful and the intimidation and fear often felt by this group can mean they will often not access justice to avoid repercussion and consequences. Older residents want services that are easy to access and engage with, where they can be provided with in-depth support.

A retirement housing ombudsman would be most appropriate to provide free, independent, expert advice and assistance in relation to retirement housing disputes. Followed on by specialised services that can provide support if the matter must be taken further these steps would no doubt improve access to justice for older residents.

²⁴ Ellison et al, 2004, p 79

²⁵ Community Law Australia, 2012, p 10

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