

Retirement Villages Act Review
Consumer Affairs Victoria
Level 17, 121 Exhibition Street
MELBOURNE VIC 3000
By email only: rvreview@justice.vic.gov.au

Dear Sir/Madam,

Review of the Retirement Villages Act 1986

The Law Institute of Victoria ('LIV') thanks Consumer Affairs Victoria ('CAV') for the opportunity to provide feedback to the Review of the *Retirement Villages Act 1986* (Vic) ('the Act').

The LIV makes the following observations in relation to the questions outlined in the Issues Paper:

Part 2: The regulatory and policy framework

Application and scope of the Act

1. *Should the payment of an ingoing contribution be the defining factor in determining whether the Act applies to a retirement village? If not, what other considerations would be appropriate?*

The LIV believes that the payment of an ingoing contribution is an appropriate defining factor in determining whether the Act applies to a retirement village.

2. *Is the definition of 'retirement village' under the Act otherwise appropriate? If not, what changes would you recommend?*

The LIV believes that the current definition of 'retirement village' under the Act is appropriate.

Moreover, the LIV is supportive of CAV considering the issue of whether presently governed lifestyle communities under the *Residential Tenancies Act 1997* (Vic) should also be regulated by the Act. In recent years, there has been a convergence in the services provided and fees charged between retirement villages and lifestyle communities, to the point there is often little differences between them, save for the legislative regime under which they operate.

This can cause confusion for the public and/or consumers. The time would seem appropriate for further discussion about how independent seniors living in shared communities should be regulated in a consistent manner.

The purpose of the Act

3. *Is the current purpose of the Act still appropriate? If not, what do you think the legislative purpose of the Act should be?*

The LIV recommends that the current purpose of the Act be expanded to include reference to the regulation of Victoria's retirement village sector. The LIV cautions against overly prescriptive amendments which may limit the scope of the Act.

The purpose and use of the current register of retirement villages

4. *What improvements could be made to the register of retirement villages?*

The LIV does not believe any change is required to the register of retirement villages.

5. *What other information should operators be required to include in the register?*

The LIV does not believe operators should be required to provide additional information for inclusion in the register of retirement villages.

Part 3: Entering a retirement village

Consideration and cooling-off periods

6. *Are the current 21 day 'consideration' period and the 3 day 'cooling-off period' under the Act effective in achieving their aims? If not, what other or additional measures would be effective and fair?*

The LIV believes that the current consideration and cooling-off period are effective in achieving their aims, especially those of evaluating costs, services provided, any extra charges which may apply and financial obligations associated with retirement village living. Consequently, the LIV recommends that no amendments be made to these provisions.

Disclosure obligations

7. *When advertising the 'price' of a retirement village unit, should there be a requirement to include a reference to any deferred management fees and other departure fees and charges?*

The LIV believes that the Information Factsheet (in the approved form) and the pre-contract Disclosure Statement provided to prospective residents 21 days before signing the contract provide detailed and sufficient information regarding deferred management fees. The LIV does not believe it is necessary that retirement village operators be required to refer to deferred management fees when advertising the price of a retirement village unit.

8. *Has the provision of a Factsheet and Disclosure Statement to prospective residents led to an improved understanding of the financial and contractual arrangements relevant to living in a retirement village enabling prospective residents to make an informed decision?*

The LIV strongly believes that the provision of Information Factsheets and the pre-contract Disclosure Statement have enabled prospective residents to make more informed decisions when considering the move to a retirement village, and consequently the financial impact the deferred management fee has on their departure from the unit.

9. *What, if any, further improvements could be made to improve prospective residents' understanding of the potential financial and contractual arrangements relevant to living in a retirement village?*

The LIV is cautious of overwhelming prospective residents with unnecessary and excessive information in the Information Factsheet and the pre-contract Disclosure Statement.

Notwithstanding this, the LIV believes a number of improvements could be made to enhance prospective residents' understanding of the potential financial and contractual arrangements relevant to living in a retirement village.

Possible improvements may include:

- (a). information regarding the number & turnover of residents and/or units in the village;
- (b). how many units are currently, or on average, vacant in the village;
- (c). the previous 3 years of service fees; and
- (d). the average time it takes to sell a unit in the village.

The LIV also recommends that consideration be given to the possibility of introducing a requirement that a Certificate of Independent Legal Advice be provided by prospective residents before entering into a contract of sale.

10. *Are the current timeframes for provision of a Factsheet and Disclosure Statement to prospective residents appropriate?*

The LIV considers the current timeframes for the provision of the Information Factsheet and the pre-contract Disclosure Statement are appropriate.

Contracts – form and complexity

11. *Have the form and content requirements for retirement village contracts introduced in 2014 improved residents' understanding of the contractual arrangements they have entered into?*

The LIV believes that form and content requirements have greatly improved residents' understanding of retirement village contracts and their obligations.

The form and content requirements of retirement village contracts create uniformity across the retirement village industry, enabling prospective residents to compare villages before entering into any contractual arrangement. The LIV maintains that the information required to be included in retirement village contracts is not particularly onerous or complex, and assists prospective residents to make better informed decisions.

However, the LIV notes that the 2017 Victorian Parliamentary Inquiry into the Retirement Housing Sector (**'Parliamentary Inquiry'**) identified a lack of necessary knowledge across the legal sector

about retirement housing contracts. The LIV believes greater educational opportunities should be available to lawyers working in the retirement village sector. The LIV is currently considering the development of specialised training for lawyers, as well as the creation of a specialist accreditation program for lawyers working in the retirement village sector, as recommended in the Parliamentary Inquiry Final Report.¹

12. *To what extent do retirement village contracts remain unnecessarily complex?*

As noted above, the LIV does not consider retirement village contracts to be overly or unnecessarily complex. However, the LIV recommends CAV consider re-ordering the mandatory headings in a way which is more practical and intuitive.

For example, the LIV recommends 'resident's exit entitlement' follow 'costs payable on departure'; and 'consultation on changes to services' follow 'use of maintenance charges'. These changes would ensure that financial obligations are grouped together, particularly where the owner and the manager are different entities and have different financial and legal obligations.

13. *What further improvements could be made to contractual requirements under the Act?*

The LIV notes that the current contractual requirements under the Act and subordinate regulations are extensive. The LIV again cautions against introducing contractual requirements under the Act which are overly prescriptive in nature.

Financial models and the deferred management fee

14. *Should retirement village operators be required to disclose ingoing prices for entering a retirement village both with and without deferred management fees? If so, what form should this take? If not, why not?*

The LIV considers that the table of Estimated Departure Entitlements at the end of the pre-contract Disclosure Statement provides sufficient disclosure of future Deferred Management Fees imposed when exiting the village and/or terminating the contract.

15. *Should deferred management fees be calculated on a pro rata basis? If so, why? If not, why not?*

The LIV supports deferred management fees being calculated on a pro rata basis, which would represent a reasonable and equitable calculation of the resident's occupation of their retirement village unit.

16. *When should retirement village operators be required to provide a resident with an estimate of their departure fees and what are your reasons?*

The LIV believes that retirement village operators should only be required to provide a resident with an estimate of their departure fees when the resident indicates an intention to sell, by providing notice to the operator.

¹ Legislative Council Legal and Social Issues Committee, *Inquiry into the Retirement Housing Sector* (Final Report, March 2017) 41.

The LIV notes that compulsory and regular reporting of departure fees would be an onerous and costly requirement which will likely disadvantage smaller retirement village operators.

Living in a retirement village (Part 4)

Accreditation of retirement villages

17. *What do you consider to be the benefits and costs of introducing a form of mandatory accreditation for retirement villages?*

The LIV considers it does not have the necessary expertise to comment on this question.

Nonetheless, some LIV members have observed that a mandatory accreditation program may be too burdensome for smaller retirement village operators. It is recommended that CAV consider excluding small retirement village operators from any requirements under a mandatory accreditation system.

Qualifications and training of retirement village managers

21. *Should there be any additional limitations or requirements on persons who can be involved in promoting or operating retirement villages?*

The LIV notes that the recent *Inquiry into the NSW Retirement Villages Sector* identified a strong need for greater education and training across the industry, especially for retirement village operators.²

In particular, it was highlighted that the marketing and representations of persons involved in promoting retirement villages is often a first and influential point of reference for prospective residents.³

It follows that many would consider additional limitations or requirements a necessity for promoting or operating retirement villages. However, the LIV cautions that the introduction of such requirements may result in a loss of unqualified managers who are unable to access or afford the training necessary to maintain their position. The LIV consequently recommends that any such requirements allow for an exemption for smaller and regional retirement village operators.

22. *What do you consider to be the benefits and costs of mandating training and professional development requirements for retirement village managers and employees?*

Please refer directly above.

Residential committees

25. *Is the current role of the residents committee appropriate and are its powers adequate?*

² NSW Fair Trading, *Inquiry into the NSW Retirement Villages Sector* (Final Report, December 2018) 33.

³ *Ibid.*

The LIV believes that further clarity is required regarding the overlap of owners corporation committees and residents committees.

LIV members note that confusion often arises where a retirement village has a mixed tenure.

26. *Should residents committees have a role in dispute resolution involving resident-to-resident disputes?*

The LIV cautions against residents committees being heavily involved in the resolution of disputes between residents. This may cause ongoing disputes between residents which may involve a conflict of interest.

27. *Should residents committees have the power to approve above-CPI increases in maintenance charges? If not, why not?*

The LIV has no reason to believe that any amendments are necessary to the current powers residents committees have to approve above-CPI increases in maintenance charges.

28. *Should retirement village owners and managers involvement in meetings of the residents committee be prohibited unless invited by the committee?*

The LIV believes prohibiting managers from being involved in meetings is overly prescriptive and unnecessary.

Often managers will play a crucial role in resolving issues of concern for residents committees. For this reason, the LIV believes that prohibiting managers will inhibit the timely and efficient resolution of issues arising from residents committee meetings.

Annual meeting and reporting

29. *Is the level of detail about the financial activity involving the retirement village required to be included in the financial statements adequate for residents? If not, why not?*

The LIV believes that current disclosure requirements provide sufficient opportunity for the disclosure of financial obligations for residents.

30. *Should residents be provided with copies of the financial statements before the annual meeting? If so, what period is reasonable?*

The LIV believes that it would be appropriate for financial statements to be provided to residents concurrently with the notice of the AGM seven days prior to the AGM.

Retirement villages with an owners corporation

32. *In mixed tenure retirement villages (i.e. retirement villages comprising both owner residents and non-owner residents), should there be separate meetings for the village, according to the provisions of the Act, and for the owners corporation, according to the provisions of the Owners Corporation Act 2006 ('OC Act')? If not, how should issues identified for mixed tenure retirement villages be addressed?*

The LIV notes that residents and owners corporation meetings must be held separately to ensure the efficient operation of retirement villages with mixed tenures.

The LIV emphasises that CAV should be cautious about causing any unnecessary confusion or ambiguity with managers' legislative obligations, which may lead to non-compliance with the Acts.

The LIV suggests there be only one AGM for a mixed tenure village, noting there would likely be some issues on the agenda which would relate to owners corporation issues, and only owners corporation residents would be entitled to vote on those issues.

Maintenance and maintenance charges

33. *To what extent should the Act further address issues of 'responsibility' and 'timeliness' for repairs and maintenance in retirement villages?*

The LIV notes that maintenance and repair requirements are often a confusing and problematic area for retirement village operators.

Many residents are unclear about the expectations surrounding repair works and the requirements to reinstate the unit to its original condition. There are various approaches by retirement village operators, and differing interpretations in the application of refurbishment and reinstatement clauses contained in retirement village contracts.

'Fair wear and tear' is not clearly defined across the sector, therefore refurbishment and reinstatement clauses are not consistently applied in every circumstance.

Both Queensland and New South Wales have attempted to resolve these issues through the adoption of two different approaches:

New South Wales

In New South Wales, if the unit owner is a registered interest holder,⁴ the owner is entitled to keep 100% of the capital gain made on the unit. The owner also has total control over the sale of the village unit, including setting the sale price and liability for the total selling costs. If, under the retirement village contract, the retirement village operator is entitled to some of the capital gain made on the sale of the unit, the operator is also 50% liable for the selling costs.

Registered interest holders do not have to make any repairs or renovations to the unit prior to sale.

If the owner is selling a unit as a non-registered interest holder,⁵ then the retirement village operator controls the sale of the unit. In this instance, if the unit is not re-sold/re-occupied, the operator must pay the owner, or refund the owner after six months from the date the owner vacated the village unit (unless the contract states otherwise).

⁴ Either as an owner of a unit/strata or community scheme; an owner of shares giving residence rights; or a holder of a registered long-term lease (where the owner is entitled to a 50% of the capital gain that *may* have been made at the time of vacating the village).

⁵ Such as a loan or licence tenure in a village, or a registered long term lease under 50 years.

Non-registered interest holders are only required to pay for the cost of repairs if a condition report was completed when the owner initially moved into the unit. If there is a condition report, then the owner must return the unit in the condition it was in when the owner originally moved in (as originally noted in the condition report). The owner is also responsible for any negligence, irresponsible or intentional actions that damage the unit. The owner is not responsible for 'general wear and tear'. Examples of fair wear and tear versus damage for which the tenant is liable to pay is provided by Fair Trading NSW.⁶

Queensland

In Queensland, a resident must leave a unit in the same condition it was in when the resident first moved in, apart from fair wear and tear and renovation.

If the resident does not return the unit in the same condition, the retirement village operator may carry out reinstatement work and claim the cost of the work from the resident. This work may include replacement and/or repairs that are reasonably necessary to reinstate a unit to the condition it was in when the former resident moved in (apart from fair wear and tear and renovations carried out with the agreement of the resident and the retirement village operator).

Fair wear and tear include a reasonable amount of wear and tear associated with the use of items commonly used in a retirement village, while renovation work refers to replacement or repairs other than reinstatement work.

If the retirement village contract provides that the resident and the retirement village operator share any capital gain on the sale of the unit, the cost of renovation must be shared in the same proportion the capital gain is to be shared. Otherwise, the former resident must pay for the renovation work. Both parties should then refer to the entry condition report to agree on any work required in the unit when completing the exit condition report.

The renovation work must be agreed upon between the former owner and the operator, and completed by an agreed date.⁷

In the LIV's view, out of the above jurisdictional approaches, Queensland's operation and definition of refurbishment and repair costs appear to be just and equitable in these circumstances.

34. *What are the problems in more prescriptive requirements applying to all types of retirement villages and in all types of circumstances?*

The LIV cautions the adoption of overly prescriptive requirements for all types of retirement villages. Such requirements have the potential to be excessive and onerous for individual operators, including those in regional areas.

35. *To what extent can or should the Act regulate what constitutes maintenance and capital items and to what extent should these issues be left to voluntary codes or guidelines?*

⁶ NSW Fair Trading, 'Leaving a Retirement Village', NSW Government (Web Page) <<https://www.fairtrading.nsw.gov.au/housing-and-property/retirement-villages/leaving-a-retirement-village>>.

⁷ Business Queensland, 'Residents Leaving Retirement Villages', Queensland Government (Web Page) <<https://www.business.qld.gov.au/industries-professionals/housing-accommodation/operating-retirement-village/residents-leaving>>.

As noted above, CAV should avoid the introduction of provisions under the Act which prescribe unnecessarily burdensome requirements for all retirement villages. The LIV believes that where such requirements appear to be onerous, consideration should be given to the possible utility of voluntary codes and guidelines to be agreed upon and implemented by retirement village operators.

Maintenance and capital replacement funds and plans

36. *Should all retirement villages be required to have maintenance and/or capital replacement plans and/or funds?*

The LIV believes that maintenance and/or capital replacement plans/funds should only be required of operators above a certain size, similar to prescribed owners corporations under the *Owners Corporation Act 2006* (Vic) ('**OC Act**') and reg 6 the Owners Corporation Regulations 2018 (Vic).

37. *If so, what, if any, minimum requirements should apply to the establishment and operation of such plans and funds (for example, reporting obligations and restrictions on how monies are held)?*

The LIV recommends that any requirements for the establishment and operation of maintenance and capital replacement funds be consistent with the regime that applies under the OC Act.

Regulation of care services in retirement villages

38. *Do you think retirement villages should provide privately funded care services?*

The LIV believes the provision of privately funded care services is a commercial matter to be decided by individual operators.

40. *Is the current regulatory framework for the delivery of privately funded care services sufficient to ensure that potentially vulnerable and frail residents receive safe and high quality standards of care?*

As noted above, retirement villages should not be responsible for the provision of privately funded care services to individual unit owners.

The LIV contends that retirement village operators should make decisions regarding privately funded care services based on their own commercial needs. The LIV further recommends that retirement village operators play a supportive role in the provision of its residents' individual care arrangements and should not be individually accountable, nor personally responsible, for resident's privately funded care services.

41. *What role, if any, should retirement village operators have in ensuring the safety and welfare of their residents, taking into account a resident's right to autonomy and privacy?*

Please refer to the answer directly above.

Part 5: Leaving a retirement village

Selling/re-leasing a retirement village unit

42. *Does the Act strike the right balance between the interests of residents and operators in the sale or re-leasing of a retirement village unit, including the appropriateness of the process whereby the prescribed terms are inserted into non-owner residence contracts?*

The LIV's opinion is that Schedule 1 of the Act is sufficient to address the sale or re-leasing of a retirement village unit. The LIV does not believe it is appropriate to introduce a mandatory buy-back provision in the Act.

Reinstatement and refurbishment of retirement village units

43. *Does the Act strike the right balance between the interests of departing residents and operators? If not, what improvements could be made to ensure the right balance?*

Please refer to our above responses to questions 33-37.

Ongoing charges after a resident leaves a retirement village and capital gains

45. *Should the Act regulate the way in which any capital gains (and losses) are treated when a retirement village unit is sold or re-leased? If so, how should it be regulated?*

The LIV strongly recommends that the Act should not regulate the way in which capital gains (and losses) are treated when a retirement village unit is sold or re-released.

The LIV believes it should remain a matter of negotiation between the retirement village operator and the resident, whilst also noting the existence of a diverse range of financial models being offered to potential residents when entering into village contracts.

The LIV also believes this matter is adequately dealt with under the current disclosure requirements prescribed by the Act.

Part 6: Dispute resolution

Internal dispute resolution

46. *What are your views on the reform proposals identified by the review of internal dispute resolution procedures in retirement villages outlined in this Paper?*

The LIV supports the proposed reforms for internal dispute resolution.

External dispute resolution

47. *Should a party to a retirement village dispute seeking access to the Victorian Civil and Administrative Tribunal ('VCAT') or the courts be first required to have followed/exhausted the internal dispute resolution procedure?*

The LIV agrees that an internal dispute resolution process should be required before a matter is commenced in VCAT.

The LIV believes that many retirement village disputes are capable of resolution internally. Requiring parties to fully exhaust internal dispute resolution options will alleviate unnecessary pressure on VCAT lists and finite resources. A compulsory internal dispute resolution process also provides parties with an affordable means of resolving their matters while avoiding the stress and pressure of legal action.

48. *Should mediation of a dispute through Dispute Resolution Centre of Victoria ('DSCV') be a pre-condition of access to VCAT or the courts?*

For the reasons outlined above, the LIV believes that mediation should be a pre-condition to access to VCAT and the courts. Mediation services could be provided by LIV Accredited Specialist Mediators, mediators listed in the LIV's Mediators Directory, or by the DSCV.

49. *What do you think is the best means to achieve low-cost, timely and binding resolution of disputes in the retirement village sector?*

The LIV notes that pursuing action through VCAT or the courts is often expensive, lengthy and emotionally exhausting for parties in a dispute involving their retirement village.

There are several options available to CAV which may provide low-cost, timely and binding resolutions for such disputes. As noted in the Issues Paper, CAV has engaged an independent consultant to consider possible options for the establishment of an external dispute resolution body for the retirement villages sector.⁸

The LIV reserves further comment on this question until the independent consultant provides further information about the proposal to establish an external dispute resolution body in its final report on this matter.

Part 7: Enforcement

50. *Are the enforcement provisions incorporated into the Act sufficient?*

The LIV believes that the current enforcement provisions under the Act are sufficient.

51. *Should the Director of Consumer Affairs Victoria be given additional powers and enforcement options available under the Australian Consumer Law and Fair Trading Act 2012 ('ACLFTA')? If so, why? If not, why not?*

The LIV does not believe that the Director of CAV should be given additional powers and enforcement options under the ACLFTA.

⁸ Consumer Affairs Victoria, *Review of the Retirement Villages Act 1986* (Issues Paper, 2019) 50.

The LIV cautions against the introduction of excessively harsh or punitive provisions, and believes that the current provisions are adequate to address misconduct or breaches within the retirement village sector.

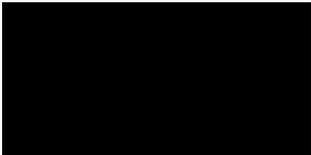
Concluding Remarks

Once again, the LIV thanks CAV for the opportunity to provide feedback to the Review of the Act.

We would welcome the opportunity to meet with you to discuss the above issues.

In the interim, please do not hesitate to contact me, [REDACTED] if you wish to discuss this further.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Stuart Webb
President
Law Institute of Victoria