

*Mary Porter AM MLA
Retirement Villages in the ACT: A Discussion Paper*

2008

**The Legislative Assembly
for the Australian Capital Territory**

**A Review of Retirement Villages in the ACT:
A Discussion Paper**

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1. Introduction

The 2006 Census indicates there are almost 66,000 people aged 55 years and over living in the ACT. It is expected that by 2047 the proportion of people living in the ACT aged 65 years and over will represent 21.5% of the total population. This is a double in the current elderly portion of our population.

As our population ages, it is expected that many people will seek to downsize their current living arrangements. For many in our community, this may mean moving into a retirement village.

The ACT Government continues to support positive ageing and the protection and promote of the well being of the elderly in our community. The ACT Government also seeks to ensure individuals are able to make choices that maximise their independence as they grow older.

Currently, retirement villages operating in the ACT are subject to the *Fair Trading Act (ACT) 1992*. Under the Act, the *Retirement Villages Industry Code of Practice (1999)* (referred to from here on as the Code) governs the occupation and operation of retirement villages in the ACT.

The ACT is the only Australian jurisdiction which has not implemented legislation which specifically governs retirement villages. All other States and the Northern Territory have introduced legislation which governs retirement village living and management.

In July 2008 Mary Porter AM MLA hosted forums around Canberra to explore people's experiences of retirement village living and management in the ACT. Retirement village operators, residents and other stakeholders were invited to the forums to express their thoughts and experiences relating to the ACT's current Code.

Many people attending the forums expressed a strong preference for increased protection for retirement village residents and operators which extends beyond the

current Code. Therefore, the implementation of a legal framework, based on legislation from other jurisdictions, which sets out the rights and obligations of retirement village residents and operators and reflects the needs of all parties, should be considered.

The purpose of this discussion paper is to identify areas which are not adequately addressed under the current Code. This paper demonstrates how other jurisdictions govern retirement villages and suggests how protection currently offered to the residents and operators may be improved by implementing similar legislation in the ACT. This discussion will explore 3 main areas of interest –

- information provision and disclosure
- financial management
- dispute resolution.

Submissions in response to the suggestions detailed in this paper are sought from the community and industry stakeholders.

Submissions can be forwarded to –

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CANBERRA ACT 2601
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2. List of Recommendations

Recommendation 3.1.1

The ACT should adopt *Section 74* of the *Retirement Villages Act (Qld) 1999* to ensure prospective residents are provided with clear and adequate information and to have an approved format for the presentation of information.

Recommendation 3.1.2

The ACT should adopt *Section 84* of the *Retirement Villages Act (Qld) 1999* to ensure a *Public Information Document* is disclosed to prospective residents, within a reasonable time, before entering into a contract and on request.

Recommendation 3.1.3

The ACT should adopt *Section 37* of the *Retirement Villages Act (Qld) 1999* which will mandate that a *Public Information Document* will form part of a resident's contract.

Recommendation 3.1.4

The ACT should ensure information relating to the level of care provided by a retirement village is clearly outlined in a resident's contract and forms part of a *Public Information Document*.

Recommendation 3.1.5

The ACT should ensure terminology used in the resident contract and *Public Information Document* is simple and consistent.

Recommendation 3.2.1

The ACT should adopt *Part 3, Division 1, Subsection 7* of the *Retirement Villages Act (SA) 1987* and implement a 90 day 'settling-in' period.

Recommendation 3.3.1

The ACT should adopt *Section 21* of the *Retirement Villages Act (NSW) 1999* to ensure prospective residents are not charged an unreasonable amount if a waiting list fee applies to the retirement village.

Recommendation 3.4.1

The ACT should adopt *Section 180* of *Retirement Villages Act (NSW) 1999* to ensure payments owed to former residents are paid within a reasonable time frame.

Recommendation 3.4.2

The ACT should adopt *Section 70B* of *Retirement Villages Act (Qld) 1999* to protect relatives of residents who reside within a village, but who are not party to a contract.

Recommendation 3.5.1

The ACT should adopt *Section 168* of the *Retirement Villages Act (NSW) 1999* to ensure residents have the right to set the price for the sale of their premises.

Recommendation 3.5.2

The ACT should adopt *Section 32E* of the *Retirement Villages Act (Vic) 1986* to protect the interests of operators following the sale of property within a village.

Recommendation 3.5.3

The ACT should adopt *Section 163* of the *Retirement Villages Act (NSW) 1999* to clearly outline the responsibilities of operators and residents surrounding the costs of reinstatement.

Recommendation 3.6.1

The ACT should adopt *Section 70* of the *Retirement Villages Act (NSW) 1999* to ensure residents have the right to establish a Residents' Committee and determine their own procedures.

Recommendation 3.6.2

The ACT should adopt *Section 72* of the *Retirement Villages Act (NSW) 1999* to ensure there is a means for residents to communicate with the operator of a retirement village if requested.

Recommendation 3.6.3

The ACT should adopt *Section 73* of the *Retirement Villages Act (NSW) 1999* to ensure that if a Residents' Committee is not established, residents still have an avenue for communication with management.

Recommendation 4.1.1

The ACT should adopt *Section 102A* of the *Retirement Villages Act 1999 (Qld)* to ensure an operator adopts a recurrent charges budget and that budget surpluses or deficits cannot be transferred to other areas of operation.

Recommendation 4.1.2

Operators should provide a copy of the budget to the residents for consideration at least 30 days prior to the end of the financial year.

Recommendation 4.2.1

The ACT should adopt *Section 106* of the *Retirement Villages Act (Qld) 1999* to ensure increases in recurrent charges are in line with the cost of living.

Recommendation 4.2.2

The ACT should adopt *Section 38, Subsection 4* of the *Retirement Villages Act (Vic) 1986* to ensure residents can approve by special resolution at a meeting of the residents any increase above the increase in cost of living.

Recommendation 4.2.3

The ACT should adopt *Section 107* of the *Retirement Villages Act (Qld) 1999* to ensure residents are not liable for charges which increase above the cost of living.

Recommendation 4.2.4

The ACT should adopt *Section 107A* of the *Retirement Villages Act (Qld) 1999* to ensure operators seek cost effective alternatives to increases in recurrent charges.

Recommendation 4.2.5

The ACT should adopt *Section 108* of the *Retirement Villages Act (Qld) 1999* to protect residents from the implementation of services which they do not utilise.

Recommendation 4.3.1

The ACT should adopt *Section 91 of the Retirement Villages Act (Qld) 1999* to require operators to establish and manage a capital replacement budget. This Section also states funds held in this account cannot be transferred to other areas of operation.

Recommendation 4.3.2

The ACT should adopt *Section 92 of the Retirement Villages Act (Qld) 1999* to require an operator to consult a quantity surveyor in the preparation of a capital replacement budget.

Recommendation 4.4.1

The ACT should adopt *Section 151 of the Retirement Villages Act (NSW) 1999* to ensure residents are not liable for services which they do not utilise.

Recommendation 5.1.1

The ACT should implement *Section 154 of the Retirement Villages Act (Qld) 1999* to establish a preliminary negotiation process for dispute resolution between residents. This forms the first tier of the dispute resolution process.

Recommendation 5.1.2

The Dispute Resolution Fund should be abolished and residents should not be required to pay a fee.

Recommendation 5.2.1

The ACT should adopt *Part 2 and 3 of Division 9 of the Retirement Villages Act (Qld) 1999* to establish the role of a mediator to oversee disputes which cannot be resolved

through preliminary negotiation. This will form the second tier of the dispute resolution process.

Recommendation 5.3.1

The ACT should adopt *Sections 191 and 197* of the *Retirement Villages Act (Qld) 1999* to establish the third tier of the dispute resolution process. This involves a tribunal, which has a significant cost, invested with the power to make orders.

Recommendation 5.3.2

The ACT should adopt *Section 174* of the *Retirement Villages Act (Qld) 1999* to allow a fellow resident or a relative to appear before the tribunal on behalf of a resident in the event that they are unable to appear.

Recommendation 6.1.1

The ACT should adopt *Section 27* of the *Retirement Villages Act (Qld) 1999* to ensure minimum standards are being adhered to in all retirement villages in the ACT.

Recommendation 6.1.2

The ACT should adopt *Section 35* of the *Retirement Villages Act (Qld) 1999* to ensure the public has access to information on the register.

3. Information Disclosure

3.1 Disclosure of Information to Prospective Residents and Those Entering into a Contract

Forum discussion and research has revealed:

- information provided to prospective residents can be excessive and difficult to understand
- some residents are required to pay the operator's legal expenses in addition to their own when settling a contract
- to comprehend the information included in their contracts, prospective residents often need to obtain extensive and costly legal advice.
- some resident's expectations regarding the level of care provided by a retirement village can change over time
- some residents have an expectation of care which is over and above what is offered
- the terminology used in a residents contract is not consistent across the ACT.

Discussion

Part 3 of the *Code of Practice* outlines information which must be disclosed to prospective residents. Unlike legislation in other jurisdictions, the *Code* does not include a standard form of information disclosure.

The ACT should consider *Section 74* of the *Retirement Villages Act (Qld)1999*, which includes a standard form for the provision of information to prospective residents.

This Section requires information to be outlined and disclosed in an approved format, known as a *Public Information Document* which must include, amongst other things, information relating to the following –

- accommodation
- resident's contribution
- payments the scheme operator must make to residents
- funds
- resale
- dispute resolution.

This document must be provided to prospective residents before entering into a contract, as detailed in *Section 84* of the Act. Additionally the ACT should consider, *Section 37, Clause 1* of the Act which states a *Public Information Document* must form part of a resident's contract.

A copy of the village's rules and meeting procedures should also form part of a *Public Information Document* to provide prospective residents with additional information about their rights and responsibilities as well as management's expectations.

Details outlining the level of care provided at a retirement village should also be included in the *Public Information Document*. This includes information relating to the availability of professional care, such as a nurse, on the village site.

Both the contract and the *Public Information Document* need to be in simple language and terminology consistent across all retirement villages in the ACT. It has been found that some owners have villages in other jurisdictions, for example, NSW and apply the terminology contained in the NSW legislation in the ACT; this can be confusing for some residents, as terminology can differ from that used in other ACT villages. Additionally, there appears to be no common terminology across the ACT.

Recommendations

Recommendation 3.1.1

The ACT should adopt *Section 74* of the *Retirement Villages Act (Qld) 1999* to ensure prospective residents are provided with clear and adequate information and to have an approved format for the presentation of information.

Recommendation 3.1.2

The ACT should adopt *Section 84* of the *Retirement Villages Act (Qld) 1999* to ensure a *Public Information Document* is disclosed to prospective residents, within a reasonable time, before entering into a contract and on request.

Recommendation 3.1.3

The ACT should adopt *Section 37* of the *Retirement Villages Act (Qld) 1999* which will mandate that a *Public Information Document* will form part of a resident's contract.

Recommendation 3.1.4

The ACT should ensure information relating to the level of care provided by a retirement village is clearly outlined in a resident's contract and forms part of a *Public Information Document*.

Recommendation 3.1.5

The ACT should ensure that terminology used in the resident contract and *Public Information Document* is simple and consistent.

3. Information Disclosure

3.2 Cooling Off Periods

Forum discussion and research has revealed:

- residents believe the current cooling off period in the Code does not allow sufficient time to consider the conditions of their contract
- residents are not able to experience retirement village living prior to entering into a contract and may have unrealistic expectations.

Discussion

Under the current Code, a resident is entitled to a 5 day cooling off period. Unlike legislation in other jurisdictions, the Code does not allow an adequate period of time for a prospective resident to consider the conditions of their contract or obtain legal and financial advice.

The ACT should consider *Part 3, Division 1, Subsection 7* of the *Retirement Villages Act (SA) 1987*, which states a resident or prospective resident is entitled to rescind the residence contract within 15 business days of signing a contract. This section also states a resident can settle the contract prior to the 15 business days if all documentation is given.

South Australia currently enforces what is known as a ‘settling-in period’ for residents following the settlement of their contract. A ‘settling-in period’ ends 90 days after the date on which the resident is admitted to occupation of their residence. The ACT should consider a ‘settling-in period’ for all resident’s contracts as specified under the South Australian legislation.

Recommendations

Recommendation 3.2.1

The ACT should adopt *Part 3, Division 1, Subsection 7* of the *Retirement Villages Act (SA) 1987* and implement a 90 day 'settling-in' period.

3. Information Disclosure

3.3 Waiting List Fee

Forum discussion and research has revealed:

- some residents believe they are charged unreasonable amounts in order to be placed on a waiting list
- some prospective residents apply to numerous retirement villages and face significant costs.

Discussion

The Code does not make any provisions for waiting lists. This can result in the inefficient handling of waiting lists, prospective residents being charged an unreasonably high waiting list fee and being placed on a waiting list for extensive periods of time.

The ACT should adopt *Section 21* of the *Retirement Villages Act (NSW) 1999* which states that an operator of a retirement village is prohibited from requiring or accepting a waiting list fee which exceeds \$200.

Section 21 of the Act also states an operator must provide a person paying a waiting list fee a written copy of the village's waiting list policy as well as a receipt for payment.

Recommendations

Recommendation 3.3.1

The ACT should adopt *Section 21* of the *Retirement Villages Act (NSW) 1999* to ensure prospective residents are not charged an unreasonable amount if a waiting list fee applies to the retirement village.

3. Information Disclosure

3.4 Contract Termination

Forum discussion and research has revealed:

- some retirement village residents are forced to terminate their contract due to unforeseeable circumstances (for example, when health rapidly deteriorates and the resident needs to move to a nursing home)
- some residents are unsure about their financial responsibilities or entitlements when leaving a retirement village
- retirement village premises are predominantly occupied by couples; however, in most cases only one occupant is listed as a party to a contract which means only that resident holds a right to reside in the village. Cases have emerged in which a resident listed on the contract dies, leaving their partner without a right to reside in the village
- some residents believe exit fees are unreasonably high and unjustified.

Discussion

Part 4 of the Code states resident's entitlements upon termination of their contract. In comparison to legislation in other jurisdictions, the Code is limited in its scope and does not offer adequate protection to residents.

Operators should be required to outline their financial responsibilities as well as those of residents relating to contract termination and exiting a village. This information should form part of a *Public Information Document* as detailed on page 7 of this discussion paper.

The ACT should adopt *Section 180* of *Retirement Villages Act (NSW) 1999* which states operators must give former residents a statement outlining how amounts owing are determined. Amongst other things, this Section requires the following calculations be disclosed to residents:

- the departure fee
- outstanding or accrued recurrent charges
- any amount payable by the former occupant in relation to the sale of the premises.

Section 180 of the Queensland Act also requires that payments due to residents are made within a reasonable time frame. For example, the Section details that the operator of a retirement village must make any payments owed to a former occupant within 14 days of the date on which the operator receives full payment under a contract with an incoming resident of a premises.

The ACT should consider *Section 70B* of *Retirement Villages Act (Qld) 1999* which states the rights of residents of a retirement village who are not party to a contract. This Section of the Act relates that relatives of village residents, who are not party to a contract but have been residing in the premise for at least 6 months, are entitled to the right to continue to reside within the residence for 3 months in the event that their relative, who is a party to a contract, dies.

Recommendations

Recommendation 3.4.1

The ACT should adopt *Section 180* of *Retirement Villages Act (NSW) 1999* to ensure payments owed to former residents are paid within a reasonable time frame.

Recommendation 3.4.2

The ACT should adopt *Section 70B* of *Retirement Villages (Qld) 1999* to protect relatives of residents who reside within a village, but who are not party to a contract.

3. Information Disclosure

3.5 Sale of Premises

Forum discussion and research has revealed:

- some residents are confused about their rights and responsibilities surrounding the sale of their premise
- some residents believe they should be entitled to seek an independent valuation of their premise
- responsibilities regarding the costs of reinstatement of premises are not clearly outlined
- some residents in a leasehold contract believe they are entitled to an annual independent evaluation of their premise.

Discussion

The current Code does not include any provisions for residents to manage the resale of their premise.

The ACT should consider legislation to guarantee residents have the right to manage the resale of the premise. An example of such legislation is included under *Section 168 of Retirement Villages Act (NSW) 1999*, which states residents of a retirement village can appoint a selling agent. It should be noted that *Section 168 of Retirement Villages Act (NSW) 1999* does not prohibit residents from electing an operator to oversee the sale of a property.

If a resident elects to sell their property through a party other than the operator, the interests of the operator must also be protected. The ACT should consider legislation similar to *Section 32E of the Retirement Villages Act (Vic) 1986* under which residents are obliged to provide certain information regarding the sale of their premise to the operator of their village. This Section also states that the settlement of any

contract for the sale of a property is conditional upon the purchaser entering into a contract with the operator of a village.

The ACT should consider *Section 163* of the *Retirement Villages Act (NSW) 1999* to address concerns surrounding the costs of reinstatement. This Section states that upon exiting a retirement village, residents must ensure the premises are left in a condition comparable to its original condition. According to this section, an operator is liable for the costs associated with repairing general wear and tear and residents are liable for any damage which exceeds this.

Recommendations

Recommendation 3.5.1

The ACT should adopt *Section 168* of the *Retirement Villages Act (NSW) 1999* to ensure residents have the right to set the price for the sale of their premises.

Recommendation 3.5.2

The ACT should adopt *Section 32E* of the *Retirement Villages Act (Vic) 1986* to protect the interests of operators following the sale of property within a village.

Recommendation 3.5.3

The ACT should adopt *Section 163* of the *Retirement Villages Act (NSW) 1999* to clearly outline the responsibilities of operators and residents surrounding the costs of reinstatement.

3. Information Disclosure

3.6 Residents' Committees

Forum discussion and research has revealed:

- some residents are unsure about the meeting procedures and rules of committees
- some residents are concerned they do not have sufficient input in the way their village operates
- some residents are reluctant to partake in a committee as they fear victimisation
- some residents believe that management does represent their views or interests.

Discussion

Unlike other jurisdictions, the Code is limited in its scope when addressing the procedure for the establishment and operation of a Residents' Committee.

The ACT should consider *Section 70* of the *Retirement Villages Act (NSW) 1999* which states there should be no limitations on the formation or operation of a Residents' Committee. This Section states a Residents' Committee has the right to decide its own procedures and form subcommittees. The Section also allows a Committee to call meetings of all residents of a village.

Section 70 of the Act also states the operator must provide reasonable administrative assistance to the Residents' Committee on request, but only if an estimated cost of providing the assistance has been included in the statement of approved expenditure for the financial year.

Section 72 of the *Retirement Villages Act (NSW) 1999* states an operator must, upon the reasonable request of a Residents' Committee, meet with the Committee. This

ensures residents are able to communicate with the operator of their retirement village.

The ACT should also consider *Section 73* of the *Retirement Villages Act (NSW) 1999*, which states procedures if residents of a retirement village choose not to establish a Residents' Committee. This section outlines that the operator of the village must call a meeting of the residents (in addition to the annual meeting of the residents to be held for the purpose of considering the budget) if a minimum of 5 residents, or 10% of the residents (whichever is greater) of the village request the operator to do so.

Recommendations

Recommendation 3.6.1

The ACT should adopt *Section 70* of the *Retirement Villages Act (NSW) 1999* to ensure residents have the right to establish a Residents' Committee and determine their own procedures.

Recommendation 3.6.2

The ACT should adopt *Section 72* of the *Retirement Villages Act (NSW) 1999* to ensure there is a means for residents to communicate with the operator of a retirement village if requested.

Recommendation 3.6.3

The ACT should adopt *Section 73* of the *Retirement Villages Act (NSW) 1999* to ensure if a Residents' Committee is not established that residents still have an avenue for communication with management.

4. Financial Management

4.1 Recurrent (General Services) Charges Budgets

Forum discussion and research has revealed:

- residents do not have sufficient time or financial expertise necessary to consider the annual budget when it is presented
- instances have arisen in which operators have transferred funds between areas of operation to balance budgets.

Discussion

Part 2, Division 2 of the Code does not include a time frame for the disclosure of budget information. Rather, the Code states, information must be provided “...within a reasonable time prior to the beginning of the coming financial year.” (page 7 *Code of Practice*) Further, the Code does not prevent operators from transferring finances from recurrent charges budgets to other areas of operation.

The ACT should consider *Section 102A* of the *Retirement Villages Act 1999 (Qld)* which requires an operator to adopt a recurrent charges budget for each financial year.

This Section also states operators must provide copies of the budget to a residents’ committee at least 14 days prior to the beginning of the financial year. However, forum discussion has revealed residents’ concerns that they sometimes have difficulty understanding complex financial statements. To ensure residents have an appropriate time frame to consider the budget, the ACT should implement legislation to ensure information is made available to residents at least 30 days before the beginning of that financial year.

This Section of the Queensland Act also states that budget surpluses and deficits must be carried over into the following financial year and adopted in the next recurrent

charges budget. This ensures account surpluses cannot be transferred to other areas of operation.

Recommendations

Recommendation 4.1.1

The ACT should adopt Section 102A of the *Retirement Villages Act 1999 (Qld)* to ensure an operator adopts a recurrent charges budget and that recurrent charges budget surplus or deficit cannot be transferred to another area of operation

Recommendation 4.1.2

Operators should provide a copy of the budget to the residents for consideration at least 30 days prior to the end of the financial year.

4. Financial Management of Villages

4.2 Recurrent (General Services) Charges – Increases

Forum discussion and research has revealed:

- most residents live on a fixed income and sometimes find it difficult to accommodate unanticipated increases in recurrent charges
- some residents believe increases in recurrent charges are unjustified
- some operators believe a cap on the increase in recurrent charges can result in inefficiencies
- residents can be charged for services which they do not utilise.

Discussion

Part 3, Division 18 of the Code lists information which management must provide to every prospective resident. According to this Part of the Code, management must list all recurrent charges payable by the resident, including, “a clear outline of the method used to calculate those charges or fees and the method used to determine any variation”¹. Under the Code, this information is required to be disclosed, to prospective residents however, not to residents currently living in the village. Therefore, recurrent charges are subject to increases at any time and operators are not required, under the Code, to disclose such changes to current residents. Unlike legislation in other jurisdictions the Code does not require recurrent charges to be fixed to a formula.

The ACT should implement *Section 107A* of the *Retirement Villages Act (Qld) 1999* which requires an operator to consider cost effective alternatives to increases in recurrent charges. This ensures increases in charges are adopted as a last resort, thereby protecting the financial interests of residents.

¹ *Retirement Villages Industry Code of Practice (ACT) 1999*, page 9.

The ACT should consider *Section 38, Subsection 4* of the *Retirement Villages Act (Vic) 1986* which states residents are liable for increases in recurrent charges above the cost of living only if the increase has been passed by special resolution at a meeting of the residents.

Section 106 of the *Retirement Villages Act (Qld) 1999* states increases in recurrent charges cannot exceed increases in the cost of living. This Section ensures increases in fees reflect increases in the general prices of goods and services. Additionally, the *Section 107* of the *Retirement Villages Act (Qld) 1999* states residents are not liable for fees which increased beyond increases in the cost of living.

The Code does not include provisions relating to the introduction of new services in a retirement village. The ACT should adopt *Section 108* of the *Retirement Villages Act (Qld) 1999* which prevents an operator from introducing new services which entail a recurrent charge without approval from residents. This Section ensures residents are not liable for unwanted services.

Recommendations

Recommendation 4.2.1

The ACT should adopt *Section 107* of the *Retirement Villages Act (Qld) 1999* to ensure that residents are not liable for charges which increase above the cost of living.

Recommendation 4.2.2

The ACT should adopt *Section 38, Subsection 4* of the *Retirement Villages Act (Vic) 1986* to ensure residents can approve by special resolution at a meeting of the residents any increase above the increase in cost of living.

Recommendation 4.2.3

The ACT should adopt *Section 106* of the *Retirement Villages Act (Qld) 1999* to ensure increases in recurrent charges are in line with the cost of living.

Recommendation 4.2.4

The ACT should adopt *Section 107A* of the *Retirement Villages Act (Qld) 1999* to ensure operators seek cost effective alternatives to increases in recurrent charges.

Recommendation 4.2.5

The ACT should adopt *Section 108* of the *Retirement Villages Act (Qld) 1999* to protect residents from the implementation of services which they do not utilise.

4. Financial Management of Villages

4.3 Capital Replacement

Forum discussion and research has revealed:

- some residents are confused about their rights and responsibilities surrounding the costs of capital replacement
- retirement village operators in the ACT are not required to establish and manage a capital replacement fund
- residents can find it difficult to accommodate unanticipated capital replacement charges whilst living on a fixed income.

Discussion

Unlike operators in other jurisdictions, ACT operators are not required to establish or maintain a capital replacement fund. As a result, retirement village residents in the ACT may be subject to unanticipated capital replacement charges.

The ACT should consider *Section 91* of the *Retirement Village Act (Qld) 1999*, which states an operator must establish and manage a capital replacement fund. Under this Section, the operator is solely responsible for contributing to the fund and finances from the fund cannot be transferred to other areas of operation.

The ACT should also consider *Section 92* of the *Retirement Villages Act (Qld) 1999* which requires an operator to obtain a quantity surveyor's report concerning the expected capital replacement costs of a village. In accordance to this Section of the Act, the operator must determine the amount to be held in the capital replacement fund with regard to the quantity surveyor's report

Recommendations

Recommendation 4.3.1

The ACT should adopt *Section 91 of the Retirement Villages Act (Qld) 1999* to require operators to establish and manage a capital replacement budget. This Section also states that funds held in this account cannot be transferred to other areas of operation.

Recommendation 4.3.2

The ACT should adopt *Section 92 of the Retirement Villages Act (Qld) 1999* to require an operator to consult a quantity surveyor in the preparation of a capital replacement budget.

4. Financial Management of Villages

4.4 Personal Services

Forum discussion and research has revealed:

- residents can be absent from their village for prolonged periods of time due to extenuating circumstances, such as hospitalisation and in these instances, residents continue to be liable for the costs of personal services during their absence
- some residents believe they should not be liable for services they do not utilise
- instances have arisen in which former residents continue to be liable for the costs of personal services following their death.

Discussion

The Code does not outline the rights or responsibilities of residents relating to charges for personal services.

The ACT should consider *Section 151* of the *Retirement Villages Act (NSW) 1999* which states a resident who is temporarily absent from a village for a period of 21 days or more is not liable to pay charges for personal services for the remainder of their absence, if they have given reasonable notice.

This Section also states that in cases in which a resident dies, the liability to pay for personal services extends to the date the operator is notified of the resident's death.

Recommendations

Recommendation 4.4.1

The ACT should adopt *Section 151* of the *Retirement Villages Act (NSW) 1999* to ensure residents are not liable for services which they do not utilise.

5. Dispute Resolution

5.1 Preliminary Negotiation

Forum discussion and research has revealed:

- residents and their relatives can be reluctant to make complaints about fellow residents or management as they fear victimisation
- some residents have a limited understanding of their rights relating to dispute resolution
- residents are concerned about the high costs associated with dispute resolution
- some residents and operators believe the dispute resolution process can be biased
- some residents believe that if they do not utilise dispute resolution mechanisms they should not be required to contribute to a dispute resolution fund
- the scope of the Disputes Resolution Committee is not adequately outlined in the Code
- some residents would like more support when dealing with a dispute.

Discussion

Part 5, Division 2 of the Code covers the resolution of disputes within a village. Under the Code, a Disputes Resolution Committee must be established to resolve disputes which arise within a village. The Code states residents and management must agree upon the processes of the Committee however, the Code does not adequately outline the scope of the Committee. The Code assumes all retirement villages have an engaged and active population of residents to establish such a Committee. However, forum discussion has revealed not all residents wish to partake in committee activities. Therefore, this Section of the Act is not universally applicable.

The ACT should consider *Section 154* of the *Retirement Villages Act (Qld) 1999* which outlines a process for preliminary dispute negotiation. Under this Section, the

first party to a dispute must give the second party written notice outlining the matter in dispute. This notice must also nominate a date for the parties to meet within the village to attempt to resolve the situation. This Section of the Act requires the second party to respond to the notice within seven days.

The preliminary negotiation process outlined in *Section 154* of the Queensland Act forms the first level of a three tiered dispute resolution process which is further outlined on pages 24 and 25 of this discussion paper.

This first tier encourages communication between residents and does not involve financial costs for either party.

Part 5, Division 1 of the Code states costs associated with the dispute resolution process shall be met through an annual fee levied on residents. However, as disputes do not arise very often in most villages, residents do not believe they should have to pay an annual fee.

Recommendations

Recommendation 5.1.1

The ACT should implement *Section 154* of the *Retirement Villages Act (Qld) 1999* to establish a preliminary negotiation process for dispute resolution between residents. This forms the first tier of the dispute resolution process.

Recommendation 5.1.2

The Dispute Resolution Fund should be abolished and residents should not be required to pay a fee.

5. Dispute Resolution

5.2 Mediation

Discussion

Under *Part 5, Division 3* of the Code, disputes surrounding contracts and budgets are referred to a contract or budget referee who is appointed by the Director of the Office of Fair Trading. This dispute resolution process is separate from the Disputes Committee, described in *Division 2*.

In comparison to legislation in other jurisdictions, this Division does not adequately outline the dispute resolution process.

The ACT should consider *Division 9, Part 2 and 3* of the *Retirement Villages Act (Qld) 1999*. This Division outlines Queensland's second tier of the dispute resolution process. This tier states the role of an independent mediator who, as described under *Section 155* of the *Retirement Villages Act (Qld) 1999*, is employed to resolve village disputes including those between residents and management.

Under *Section 157* of the Queensland Act, a party to a dispute may apply to have the dispute referred to mediation. *Section 158* outlines that the mediator must be appointed to set a date, time and place for a mediation conference. If an agreement is made at the conference, both parties must sign a written record of the agreement, as detailed in *Section 163* of the Act.

This tier of the dispute resolution process is external and independent. Although this tier includes administration fees, it is cost effective as the fees are relatively small and it does not involve legal costs.

Mediation agreements are enforceable under the Queensland legislation.

Recommendations:

Recommendation 5.2.1

The ACT should adopt *Part 2 and 3 of Division 9 of the Retirement Villages Act (Qld) 1999* to establish the role of a mediator to oversee disputes which cannot be resolved through preliminary negotiation. This will form the second tier of the dispute resolution process.

5. Dispute Resolution

5.3 Tribunal

Forum discussion and research has revealed:

- placing significant costs on applications to the tribunal may prevent its exploitation
- residents may be unable to appear before a tribunal due to poor health or because they are intimidated
- residents need a final avenue for the settlement of disputes should previous efforts fail.

Discussion

Section 167 of the *Retirement Villages Act (Qld) 1999* states that if a matter cannot be resolved through the methods detailed on pages 22 to 24 of this discussion paper, a party to a dispute may apply to the tribunal for resolution.

The ACT should consider this Section of the Queensland Act to form the third tier of the dispute resolution process. The ACT should also consider *Section 191* of the Act which outlines that a tribunal may make orders to resolve a retirement village conflict. The ACT should also ensure a tribunal's orders are enforceable by adopting *Section 197* of the Queensland Act.

The ACT should consider *Section 174* of the *Retirement Villages Act (Qld) 1999*. This Section allows another resident or a relative to appear before a tribunal on behalf of a resident if they are unable to appear before a tribunal.

To deter residents and operators from proceeding to a tribunal with minor disputes, and avoid unwarranted and costly proceedings, a tribunal will require a significant cost to be placed on applications made to the tribunal. This is to assist disputes being resolved earlier if possible, so that matters are resolved in a time effective and

inexpensive manner through the mediation or internal dispute resolution method, rather than proceeding to the tribunal

Recommendations

Recommendation 5.3.1

The ACT should adopt *Sections 191 and 197* of the *Retirement Villages Act (Qld) 1999* to establish the third tier of the dispute resolution process. This involves a tribunal, which has a significant cost, invested with the power to make orders.

Recommendation 5.3.2

The ACT should adopt *Section 174* of the *Retirement Villages Act (QLD) 1999* to allow a fellow resident or a relative to appear before the tribunal on behalf of a resident in the event that they are unable to appear.

6. General

6.1 Registration

Forum discussion and research has revealed:

- some residents believe minimum standards of safety and services should be prescribed across the board for retirement villages.

Discussion

Unlike other jurisdictions, there is no mechanism or provisions in the Code for retirement villages to be registered in the ACT.

The ACT should consider *Section 27* of the *Retirement Villages Act (Qld) 1999* which states the minimum requirements necessary for a retirement village scheme to become registered.

The ACT should also consider *Section 35* of the *Retirement Villages Act (Qld) 1999* which states a register of retirement villages must be kept and that the public should have access to information on the register. This assists prospective residents, in addition to the *Public Information Document*, to choose a retirement village suitable for their needs.

Recommendations

Recommendation 6.1.1

The ACT should adopt *Section 27* of the *Retirement Villages Act (Qld) 1999* to ensure minimum standards are being adhered to in all retirement villages in the ACT.

Recommendation 6.1.2

The ACT should adopt *Section 35* of the *Retirement Villages Act (Qld) 1999* to ensure the public has access to information on the register.

6. General

6.2 Commissioner

Forum discussion and research has revealed:

- some residents would like an independent commissioner appointed to administer retirement villages in the ACT
- some residents are unaware there is a Commissioner for Fair Trading and a Commissioner for Health Services who oversees the Code.

Discussion

Currently the Commissioner for Fair Trading oversees the Code in the ACT. Additionally, the ACT employs the *Human Rights Commission Act (ACT) 2005*, under which the Health Services Commissioner is mandated to oversee complaints relating to services for older people.

The official title of the Commissioner does not reflect the nature of their role. Resultantly, residents and operators of retirement villages are unaware there is an independent body to oversee services for older people.

Recommendations

Recommendation 6.2.1

The ACT should amend the title of the Health Services Commissioner to reflect the functions they perform under the *Human Rights Commission Act (ACT) (2005)* which encompasses retirement villages.

7. Explanation of matters beyond the scope of this Discussion Paper and Legislation

7.1 Accreditation

Some residents have called for an independent system of accreditation for the retirement village industry to be implemented.

Currently the Retirement Villages Association (RVA) oversees a voluntary accreditation system with basic standards to which retirement villages can comply.

If this system is to become mandatory, discussions relating to accreditation should be overseen by the RVA.

7.2 Appointment of a retirement villages ombudsman

During forum discussion, some residents called for the appointment of a retirement village ombudsman, however, such a appointment is beyond the scope of the legislature.

A retirement village ombudsman should be appointed at the discretion of the retirement villages industry.

7.3 Assessment for retirement village living

Some residents believe it should be compulsory, through legislation, for prospective residents to seek financial, legal and other advice, prior to entering into a contract.

It is important prospective residents are aware of the implications involved in moving into an independent living situation such as a retirement village.

Although it is encouraged, it is beyond the scope of legislation to require retirement village operators to prompt prospective residents to seek advice before entering into a contract.

This issue is one which needs to be addressed through the education of prospective residents or could be included in advice in the *Public Information Document*.

7.4 On-going review of contract

Some residents may reside in a retirement village over a prolonged period of time and over the course of their tenure, their circumstances and expectations may change. These circumstances relate to the resident's ability to meet payments for their cost of living and the level of services provided by the village. During forum discussion, some residents requested the option of being able to have an on-going review of their contract.

As long as the contract is a leasehold contract, it is possible, as with most contracts, to alter most conditions of the contract on the provision that both parties agree to the change of contract.

7.5 Background of management

Some residents would like legislation to ensure it is compulsory for background information of staff within the retirement village to be disclosed.

It is not possible for legislation to compel management to disclose background information of staff to prospective residents. Further, in this context it is not possible to oblige operators of retirement villages to hire staff with financial management, for instance.

Operators retain the right to decide who is employed at a village and what information relating to employees is provided to residents.

7.6 Services provided by a retirement village

During forum discussion, it emerged that some residents believe professional care and services should be provided by retirement villages. For example, some residents called for villages to provide personal medical alarms and first-aid on-site 24 hours.

It should be noted that retirement villages are considered independent living arrangements and it is beyond the Government's jurisdiction to make these services mandatory for all villages. However, it is suggested in this paper that operators clearly disclose the level of care and services provided at their village (as described under the *Public Information Document*) to prospective residents.

7.7 Retirement village resident's entitlement to nursing home places

Many retirement village complexes offer progressive living arrangements. In such instances, a nursing home is located on the same property or near the retirement village. In forum discussions, some residents indicated they believe an operator who also provides hostel and nursing home accommodation should guarantee residents, who reside within a village, places in their higher care facilities.

It should be noted that, given nursing home places and similar operations of progressive living are regulated by Commonwealth legislation, such an issue is beyond the scope of this discussion paper and any ACT legislation. Rather, it is an issue which should be raised at a Federal level.

7.8 Maintenance fee charge

Forum discussion revealed some residents cannot afford to pay the maintenance fee on an on-going basis. Rather, residents explained they would like it deducted from the proceeds of the sale of their property following the death of the resident.

Fee paying arrangements are made at the discretion of operators and therefore beyond the scope of this legislation.

Again, the *Public Information Document* should assist residents in making an informed decision about which retirement village is financially suitable to their needs.

7.9 Rates

Forum discussion revealed some residents would like their water, sewerage, power and management fees individually charged.

The way in which rates are charged by an operator depends on when the building was constructed and clauses included in a resident's contract. In some instances these services will be metered separately, whereas in other instances residents will be issued with a quarterly statement which is their share of the total cost across the village.

It is the responsibility of operators to decide how residents are charged for their rates. The matter of how rates are charged by a retirement village is beyond the scope of this legislation.

However, issues relating to transparency of fees is addressed in this document. This discussion paper suggests operators should be required to provide such information to prospective residents in the *Public Information Document*. This ensures residents are aware about the way rates are calculated prior to entering a village.

7.10 Meeting of the residents

Some residents have requested that committees be comprised exclusively of residents. Conversely, others would like independent persons with sufficient financial knowledge to be present at budget meetings and an officer from Fair Trading to be included on the residents committee.

As explained previously in this paper, if residents choose to establish a residents committee, they are entitled to decide the makeup and procedures of the committee.

7.11 Communication between residents and management

During forum discussion, issues relating to communication between residents and management were raised on numerous occasions. However, it was found that levels of communication, between residents and management at retirement villages, vary from satisfactory to poor.

Some retirement villages in the ACT employ numerous avenues of communication within their village, including a chaplain, care worker and resident counsellor. All of these parties attend meetings with senior management and discuss how the organisation is meeting the needs of residents.

Some residents have requested that regular and compulsory meetings of the residents be included in legislation. Other residents have called for a notice board, weekly management newsletter and social get-togethers to be organised.

Such requests are beyond the scope of legislation however, it is recommended that all retirement villages establish communication protocols.

It was noted that matters of dispute can often be resolved through effective communication.

7.12 Resident representation on management boards

During forum discussion it emerged that some residents would like a resident representative on the board of management.

As many retirement villages are managed by large organisations which also oversee villages in other jurisdictions, it would be unreasonable to oblige organisations to have a representative from each of their retirement villages on the board of management.

7.13 Construction of retirement villages

Some residents have identified problems with the interior fittings of their units, such as the height of cupboards as well as the size of bathrooms and door ways.

This issue, whilst important and in need of attention, is beyond the scope of this legislation and should be considered as part of future planning regulations in the ACT.

7.14 Building standards

Some residents believe regulations enforced in the wider community relating to purchasing a property, should apply to retirement villages. That is, the current owner must provide, on request and at his or her expense, an Energy Efficiency Ratio, building inspection report and pest control report.

Currently, when moving into a retirement village, it is up to the prospective resident, who is about to take ownership of the property, to arrange and pay for the above matters.

Further exploration in this matter is needed; however it is beyond the scope of this legislation.

8. Conclusion

As our population ages, an increasing portion of the community will seek to enter retirement villages.

This paper has identified areas which are not adequately addressed under the current Code. Specifically, it has been found that areas of the Code relating to information disclosure, financial management and dispute resolution require review.

This paper demonstrates how other jurisdictions govern retirement villages and suggests how protection currently offered to residents and operators may be improved by implementing similar legislation in the ACT.

A clear legal framework, which sets out the rights and obligations of a retirement village residents and operators, would improve current levels of protection.

However, it is also recognised that good process and good communication are the key to making any legislation work on the ground. Many of the issues that were discussed during the initial consultations are matters that could be more effectively addressed through improved communication.

This paper recommends that Members of the Legislative Assembly note the paper and support the introduction of retirement village legislation in the ACT.

9. Glossary of terms

Capital replacement - the replacement or improvement of items of capital, and includes the reinstatement of residential premises.²

Capital replacement fund - a fund established for replacing the retirement village's capital items.³

Capital replacement fund contribution - a percentage of the new resident's ingoing contribution, decided by the scheme operator and described public information document as a contribution to the capital replacement fund.⁴

Contract - 1 or more written contracts, other than an excluded contract, about residence in a retirement village entered into between a person and the scheme operator.

Exit fee - the amount that a resident may be liable to pay to, or credit the account of, a scheme operator under a residence contract arising from—

- a) *the resident ceasing to reside in the accommodation unit to which the contract relates; or*
- b) *the settlement of the sale of the right to reside in the accommodation unit*⁵

Former resident - a resident, or a former resident, of the retirement village:

- a) *Who has permanently vacated any residential premises in the village, and*
- b) *Whose residence contract has been terminated, and*
- c) *Who continues to have rights or liabilities under a village contract relating to the village,*

*And includes the executor or administrator of the estate of such person.*⁶

² From *Retirement Villages Act (NSW), 1999*, Page 8.

³ *Retirement Villages Act (Qld), 1999*, page 17.

⁴ *Retirement Villages Act (Qld), 1999*, page 17.

⁵ *Retirement Villages Act (Qld), 1999*, Page 15.

⁶ *Retirement Villages Act (NSW), 1999*, Page 8.

General services - the services provided, or made available, by or on behalf of the operator, to all residents of a Retirement Village. Examples of *general services* are management and administration services and gardening and general maintenance.⁷

In-going contribution - the amount payable by a person under a residence contract to secure the person's, or someone else's, right to reside in a retirement village, but does not include a recurrent payment for rent, fees or charges.⁸

Item of capital -

- a) *Any building or structure in a retirement village, and*
- b) *Any plant, machinery or equipment used in the operation of the village, and*
- c) *Any part of the infrastructure of the village, and any such item*⁹.

Maintenance reserve fund - a fund established for maintaining and repairing the retirement village's capital items.¹⁰

Maintenance reserve fund contribution - that part of the general services charges, decided by the scheme operator and described in the public information document as a contribution to the maintenance reserve fund.¹¹

Operator - the person who manages or controls the retirement village, and includes:

- a) *A person (other than a resident) who owns land in the village, but does not include:*
- b) *the relevant association of a community land scheme or the owners corporation of a strata scheme, or*
- c) *the managing agent of such a scheme*¹²

Personal services - optional services provided, or made available, by or on behalf of the operator, to individual residents of a retirement village. Examples are the

⁷ *Ibid.*

⁸ *Retirement Villages Act (Qld), 1999, Page 15.*

⁹ *Retirement Villages Act (NSW), 1999, Page 10.*

¹⁰ *Retirement Villages Act (Qld), 1999, Page 17.*

¹¹ *Retirement Villages Act (Qld), 1999, Page 17.*

provision of meals, laundry services and the cleaning of a resident's residential premises.¹³

Prospective resident - a person who indicates, (or on whose behalf it is indicated), to the operator of the retirement village that he or she is, (or might be), interested in becoming a resident of the village¹⁴.

Proxy - a person appointed by the resident for the purpose of voting on the resident behalf at meetings of residents.¹⁵

Reinstatement of a property - for the purposes of this proposal, means to put the property back into its former condition as of when the resident first moved in.

Residence right - the person's right to occupy residential premises in a retirement village, being a right arising from a contract:

- a) *Under which the person purchased the residential premises, or*
- b) *Under which the person purchased shares entitling the person to occupy the residential premises, or*
- c) *In the form of a lease, license, arrangement or agreement of any kind, other than a residential tenancy agreement, or*
- d) *That contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement, or*
- e) *In the form of any other contract of a kind prescribed by the regulation, Or any other right of a kind prescribed.*¹⁶

Resident - a person who has a right to reside in the retirement village and a right to receive 1 or more services in relation to the retirement village under a residence contract.

¹² Retirement Villages Act (NSW), 1999, Page 10.

¹³ *Ibid.*

¹⁴ Retirement Villages Act (NSW), 1999, Page 11

¹⁵ *Ibid.*

¹⁶ Retirement Villages Act (NSW), 1999, Page 11.

Retirement village - *premises where retired persons reside, or are to reside, in independent living units or serviced units, under a retirement village scheme.*

(1) *In this section—premises does not include a site within the meaning of the Manufactured Homes (Residential Parks) Act 2003.*¹⁷

This term should further be extended to restrict the term Retirement Village to Retirement Villages that are registered under the registration scheme¹⁸.

Retirement village scheme - a scheme under which a person—

- a) *enters into a residence contract; and*
- b) *in consideration for paying an ingoing contribution under the residence contract, acquires personally or for someone else, a right to reside in a retirement village, however the right accrues; and*
- c) *on payment of the relevant charge, acquires personally or for someone else, a right to receive 1 or more services in relation to the retirement village.*¹⁹

Spouse - a person living with another person on a *bona fide* domestic basis, whether or not legally married to that person.

Total of general services charges - for a financial year, means the sum of all charges for general services for the financial year, other than the following charges—

- a) *a charge for a general service that has been increased by more than the (cost of living) percentage increase for the financial year and that the retirement village residents, by special resolution at a residents meeting, have approved;*
- b) *a charge for a general service that has been increased by more than the (cost of living) increase for the financial year and that is allowed under section 107*²⁰.

¹⁷ *Retirement Villages Act (Qld), 1999, Page 12.*

¹⁸ See the section entitled Registration of Retirement Villages in the proposal.

¹⁹ *Retirement Villages Act (Qld), 1999, Page 13.*

²⁰ *Retirement Villages Act (Qld), 1999.*

Urgent circumstances - a circumstance in which it is not prudent to wait for the usual 14 days written notice of a meeting to be given.

Village emergency system - a system (such as buttons in residential premises and common areas, or bracelets that can be worn by residents) which enables residents to summon assistance in an emergency.

10. Appendix

Human Rights Commission Act (ACT) 2005

<http://www.legislation.act.gov.au/a/2005-40/current/pdf/2005-40.pdf>

Retirement Villages Industry Code of Practice (ACT) 1992

http://www.fairtrading.act.gov.au/pdfs/OtherInds/RVI_COP_Nov-2005.pdf

Retirement Villages Act (NSW) 1999

<http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>

Retirement Villages Act (Qld) 1999

<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/R/RetireVillagA99.pdf>

Retirement Villages Act (SA) 1987

<http://www.legislation.sa.gov.au/LZ/C/A/RETIREMENT%20VILLAGES%20ACT%201987/CURRENT/1987.46.UN.PDF>

Retirement Villages Act (Vic) 1986

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/2184e627479f8392ca256da50082bf3e/3AF51154D74972C9CA2573EC00101DF2/\\$FILE/86-126a055.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/2184e627479f8392ca256da50082bf3e/3AF51154D74972C9CA2573EC00101DF2/$FILE/86-126a055.pdf)

Queensland Public Information Document

[http://www.consumer.qld.gov.au/OFT/OFTWeb.nsf/AllDocs/1E024338D7CC55E64A256EBD007F000A/\\$File/Retirement_Village_F1_V3_0306_FSO%20editable.pdf](http://www.consumer.qld.gov.au/OFT/OFTWeb.nsf/AllDocs/1E024338D7CC55E64A256EBD007F000A/$File/Retirement_Village_F1_V3_0306_FSO%20editable.pdf)