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**FREEDOM AND FAIRNESS IN RETIREMENT VILLAGES:
AN ANALYSIS OF THE REGULATORY FRAMEWORK**

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Abstract

New Zealand's ageing population has contributed to the rapid expansion of the retirement village sector and will continue to do so in coming decades. It is therefore essential that the regulatory framework governing retirement villages be fit for purpose and that it meet its policy objective of protecting retirement village residents' rights and interests. The regulatory framework has not been subjected to a comprehensive review since the enactment of the Retirement Villages Act 2003. This paper analyses the degree to which the regulatory framework has achieved its aims. It draws on data from interviews with residents and management from retirement villages to identify ways in which the regulatory framework could be altered to better balance the rights of residents and operators. It proposes amendments to the framework to ensure that residents thoroughly understand their contracts with retirement village operators, and to provide for fairer provisions around the financial terms the contracts may contain. It also recommends the establishment of an independent advisory facility to support residents and intending residents both prior to and after their entry into villages.

Key words

Retirement Villages Act, regulation, elder law.

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I Introduction

Retirement villages are a form of accommodation for older people that allows them to live independently in units while enjoying a variety of facilities and amenities in a community setting.¹ In New Zealand they are governed by the retirement villages regulatory framework (the regulatory framework), which the Ministry of Business, Innovation and Employment (MBIE) administers. Given the growing numbers of people who will be entering retirement villages in coming years, and the increasing average age at which they are doing so,² it is important to ensure that the regulatory framework is functioning effectively to protect residents' rights and interests.

This paper examines the regulatory framework to assess whether it fairly balances the rights of retirement village residents with those of retirement village operators. It responds to concerns raised in the literature and by interested parties that the framework does not adequately regulate the relationship between residents and operators. Rob Wilson, former president of the Retirement Village Residents' Association of New Zealand (RVRANZ), recently stated that he thought the time had come for review of the Retirement Villages Act 2003 (Act), with a view to deciding whether more consumer protections should be implemented for the benefit of residents.³ RVRANZ noted in a recent submission to the Retirement Commissioner that residents were told that the Act would be reviewed after three years of operation, but that this has not occurred.⁴

Research in this area has highlighted various issues relating to the contracts between retirement village residents and operators known as "occupation right agreements"

¹ Michelle Burke "Retirement Villages and Rest Homes" in Kate Diesfeld and Ian McIntosh (eds) *Elder Law in New Zealand* (Thomson Reuters, Wellington, 2014) 343 at 344.

² JLL *New Zealand Retirement Village Database (NZRVD) November 2017* (Whitepaper, April 2018) at 7.

³ Rob Stock "Retirees hoping for a level playing field" *The Press* (online ed, Christchurch, 4 October 2017) at A12.

⁴ Retirement Village Residents' Association of New Zealand Inc "Submission on the Retirement Villages Code of Practice 2008" at 1.

(ORAs). These include the concern that the legal constraints around ORAs are too light-handed, favouring operators by permitting them to place unfair financial burdens on residents. Further concerns exist around: the complexity of agreements between residents and operators; the favourability to operators of many of the financial terms in these agreements; the sufficiency of the legislated cooling off period; the adequacy of financial disclosure by operators; the quality of legal advice received by residents; the effectiveness of dispute resolution processes under the Act; and residents' understanding, and the actual effectiveness of the role of statutory supervisors as protectors of residents' interests. This paper assesses the regulatory framework in light of these concerns and the framework's aims, with input from residents and village management. It takes guidance from Derek Gill's four stage regulatory process, which consists of: "policy development and design, implementation, administration and enforcement, and review."⁵

Part II begins by explaining the background to the promulgation of the regulatory framework and evaluates the extent to which the framework has achieved its aims. It identifies the respects in which the framework has failed to do so. There is a specific focus on the provisions around ORAs, the extent to which residents are able to participate in village decision-making, financial management of villages and the role of the statutory supervisor. It concludes that further policy interventions are needed to improve the functioning of the framework. Part III proposes options to amend and supplement the regulatory framework. It suggests specific amendments as well as the provision of an independent facility to provide advice and support to residents and intending residents.

The conclusions in this paper were influenced and supported by empirical research which employed qualitative research techniques to understand the perspectives of stakeholders affected by the regulatory framework. The Victoria University of Wellington Human Ethics Committee approved this research with the approval number #0000025858. It consisted of semi-structured interviews with 12 residents from three retirement villages,

⁵ Derek Gill "Regulatory Management in New Zealand: What, How and Why?" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 173 at 179.

and two managers from two villages. A number of resident participants were also involved in older people's interest groups including Grey Power and the RVRANZ. Interviews were between 10 minutes and one hour in duration and were recorded in audio format. Transcripts or summaries of the interviews were provided to participants for their approval. The questions used to guide these interviews are provided in Appendix 1. These interviews do not purport to provide findings generalisable to the whole population.

II Context of the Retirement Villages Regulatory Framework

A The State of the Retirement Village Sector in New Zealand

As of 2017, 5.4 per cent of people over the age of 65 in New Zealand lived in retirement villages.⁶ Although the proportion of older people entering retirement villages is not expected to increase significantly, the total number of retirement village units is increasing rapidly, concurrent with the demand arising from New Zealand's ageing population. The future demand for retirement village units is predicted to be approximately 1,834 units each year from 2017 – 2043.⁷

New Zealand's retirement villages sector has undergone changes in composition since its inception. While it was previously dominated by religious and welfare groups, it has seen an influx of commercial operators who now make up the majority of the industry.⁸ Although historically considered a "lifestyle" choice, many retirement villages now also integrate rest home care facilities.⁹ This allows residents to benefit from a "continuum of care" as their needs increase.¹⁰

The most common business model under ORAs is the licence to occupy (LTO). Ninety-one per cent of ORAs to which member villages of the Retirement Villages Association

⁶ JLL, above n 2, at 10.

⁷ JLL, above n 2, at 8.

⁸ Law Commission *Retirement Villages: A Discussion Paper* (NZLC PP34, 1998) at 1.

⁹ JLL, above n 2, at 25.

¹⁰ Burke, above n 1, at 344.

(RVA) are party use this model.¹¹ Under this model, residents receive contractual rights to occupy the unit, but receive no proprietary interest in the unit or the land underneath. Incoming residents pay an upfront capital sum for the LTO. Operators retain this sum until the resident vacates and the unit is resold.¹² A fixed deduction (also called a “deferred management fee”) accrues over several years, as set out in the ORA. This is a percentage of the entry fee which usually amounts to a maximum of 20 – 30 per cent of the sum initially paid by the resident. When the resident vacates the unit (usually either upon their death or when they move to a higher level of care) and the operator enters into an ORA with a new resident, the capital sum is repaid to the former resident or their estate minus the fixed deduction. Less common forms of ORA models include stratum estates, cross-leases and rentals.¹³ ORAs also provide for fixed periodic outgoings (also described as “maintenance fees”) which are charged weekly and used to cover village maintenance and operation.¹⁴

B Previous Law

Prior to the Act there was no legislation specifically aimed at ensuring that residents were protected and treated fairly.¹⁵ Various regimes applied, depending on the occupancy model used. Protections therefore depended on the underlying legal structure. LTOs constituted a security under the Securities Act 1978.¹⁶ This required villages to provide residents with a prospectus.¹⁷ Villages with stratum estates under the Unit Titles Act 1972 used management contracts between residents and operators, with residents each purchasing separate stratum titles to their units.¹⁸ Lease for life schemes were registerable under the

¹¹ *Retirement Villages Association Annual Report* (Retirement Villages Association of New Zealand Inc, 2018) at 10.

¹² Sara Jones “The financial implications of living in a retirement village: a comparative review of the financial terms of the occupation right agreement” (2017) 9 NZFLJ 2 at 3.

¹³ Jones, above n 12, at 3.

¹⁴ Jones, above n 12, at 4.

¹⁵ John Greenwood and Simon Marks “Retirement Villages” (seminar presented through the New Zealand Law Society, Auckland and Christchurch, February – March 2004) at 5.

¹⁶ Burke, above n 1, at 345.

¹⁷ Securities Act 1978, s 33(1)(c).

¹⁸ Law Commission, above n 8, at 2.

Land Transfer Act 1952.¹⁹ The variety of legal structures under this regime, and the attempts of retirement village operators to avoid the application of the Securities Act, created an environment of confusion as to what the implications of entering into a retirement village might be for residents.²⁰

A 1998 Law Commission report stated that protections found in the general law and the Securities Act were insufficient because the confusing financial reporting requirements did little to convey the actual financial position of villages. This was an issue because some retirement village developers were under-capitalised, risking financial harm to residents and intending residents.²¹ The Securities Act aimed primarily to protect financial investments and securities trading, and the Securities Commission was unsuitable for policing the retirement villages sector because it lacked the necessary resourcing and expertise.²² Moreover, not all villages acknowledged that they were required to comply with the Securities Act. The report also noted that compliance costs under the Securities Act outweighed any benefits.²³

The ORA documentation used by lawyers was overly complex, and disclosure statements lacked clear and plain English.²⁴ This made it difficult for residents to have meaningful input in the sale process. There was a risk of residents failing to understand the difference in terms of security between fee simple ownership and the contractual rights under an LTO.²⁵ Residents would not respond to warnings about the risks of entering into a retirement village unless these were strongly expressed. The Law Commission suggested that the legislature implement a requirement for strong warnings to educate retirement

¹⁹ At 3.

²⁰ Greenwood and Marks, above n 15, at 3.

²¹ Law Commission, above n 8, at 5.

²² Greenwood and Marks, above n 15, at 6.

²³ Law Commission, above n 8, at 6.

²⁴ *Report of the Resident Funded Retirement Villages Taskforce* (April 1993) at 10; Securities Commission *Resident Funded Retirement Villages: Proposals for Reform of the Law* (December 1993) at 2.

²⁵ Securities Commission, above n 24, at 1.

village residents about these risks.²⁶ The Securities Commission, in its 1993 proposal for reform, identified the high level of commitment that entry into a retirement village required, noting that residents were elderly and had often invested a large portion of their assets, including selling their family home, to finance their entry into a unit.²⁷ This made the need for protections more acute. Further, residents were not well placed to fight for their entitlements should anything go wrong with the development of the village.²⁸ There were concerns that operators did not sufficiently attend to residents' concerns, and that dispute resolution mechanisms were inconsistent among villages.

C The 2003 Legislation

The Act was a policy response to the difficulties discussed above, entering into force in 2004.²⁹ Parliament wanted a comprehensive code to govern all retirement villages.³⁰ The Act consolidated the disparate legislation governing retirement villages and addressed characteristics particular to retirement villages.³¹ Its purposes include “protect[ing] the interests of residents and intending residents...” and “enabl[ing] the development of retirement villages under a legal framework readily understandable by residents, intending residents, and operators”.³² It sits alongside the Retirement Villages (General) Regulations 2006, Retirement Villages (Disputes Panel) Regulations 2006, Retirement Villages (Fees) Regulations 2006, the Retirement Villages (Crossdale Courts) Order 2008 and the Retirement Villages Code of Practice 2008 (the Code).

1 Occupation right agreements

ORAs set out operators' and residents' respective rights and obligations. The Act provides a broad definition of ORAs, which includes:³³

²⁶ Law Commission, above n 8, at 7.

²⁷ Securities Commission, above n 24, at 1.

²⁸ Law Commission, above n 8, at 6.

²⁹ Bill Atkin “The Elderly, the Law and Accommodation Arrangements: Some Reflections from New Zealand” (2003) 2 *Elder Law Review* 1 at 8; Greenwood and Marks, above n 15, at 4.

³⁰ Greenwood and Marks, above n 15, at 13.

³¹ *Report of the Resident Funded Retirement Villages Taskforce*, above n 24, at 3.

³² Retirement Villages Act 2003, s 3.

³³ Retirement Villages Act, s 5.

any written agreement or other document or combination of documents that—

- (a) confers on any person the right to occupy a residential unit within a retirement village; and
- (b) specifies any terms and conditions to which that right is subject.

The regulatory framework takes into account the specific circumstances under which people tend to enter ORAs. Older people enter contracts with retirement village operators who are often much better-resourced commercial entities with expertise in the area of retirement villages. The regulatory framework limits parties' freedom of contract with respect to ORAs in several respects. Firstly, it requires that intending residents receive independent legal advice as to the "general effect of the agreement and its implications" before entering into ORAs.³⁴ This explanation must be appropriate to intending residents' ages and understandings. The Act requires operators to issue disclosure statements to intending residents before they sign ORAs, with the purpose of informing them about important aspects of the village including its ownership, management, financial disclosure practices and the role of the statutory supervisor.³⁵ If these requirements are not met, the ORA is voidable at the resident's option upon sending written notice to the operator and statutory supervisor.³⁶ The Act also provides for a mandatory "cooling off" period of 15 days during which residents can cancel ORAs and receive a full refund of the fee paid for the LTO.³⁷ This protects residents by giving them time to reflect upon their decision once they have entered into the ORA.

The Act includes the right for a resident to void an ORA where the retirement village is: not registered as required; where its registration is suspended; where the ORA fails to include information prescribed by the Act; or if other prescribed information is not provided to the resident before they enter into the agreement. Further, the Code requires a 50 per cent decrease in the rate of fixed periodic outgoings charged six months after the

³⁴ Section 27.

³⁵ Section 30(1)(a).

³⁶ Section 31(1).

³⁷ Section 28.

ORA terminates if a new ORA has not been entered into. This ensures that residents are not trapped in contracts where villages are not meeting their legal obligations and prevents them being charged full fixed periodic outgoings where they no longer occupy the unit.

2 Financial management

The financial wellbeing of villages benefits both operators and residents. The framework regulates villages' financial health through a variety of mechanisms. Firstly, villages must be registered with the Registrar of Retirement Villages and provide the Registrar with audited financial statements on an annual basis. Further, operators must appoint a statutory supervisor.³⁸ The statutory supervisor's role is to monitor the financial position of the village and make annual reports to the Retirement Villages Registrar and residents on the performance of its duties. It may require operators to supply all residents with information according to its specifications or direct the operator to operate the village in a particular manner if it does not judge the financial position or management of the village to be adequate.³⁹ Villages may apply to the Registrar for an exemption from the requirement to appoint a statutory supervisor under the Act.⁴⁰ The Registrar is only likely to grant this if there is low risk to residents and if appointing a supervisor would in fact be detrimental to residents' interests.⁴¹

3 Resident participation

Operators must provide a written internal complaints procedure and residents may additionally, or alternatively, raise formal complaints. The right to a "speedy and efficient process for resolving disputes" is included in the code of residents' rights⁴². If complaints are not resolved internally, the Regulations provide for referral to a Disputes Panel. Operators must ensure that residents are informed of this.

³⁸ Sections 42–43.

³⁹ Michelle Burke and John Greenwood "Retirement Villages – the full impact of the Act" (seminar presented through the New Zealand Law Society, Auckland and Wellington, March 2007) at 29.

⁴⁰ At 30.

⁴¹ At 31.

⁴² Retirement Villages Act, sch 4 art 5.

The Code also provides for residents' rights to be informed about any matters which might affect their residency, and to be consulted if the operator proposes changes to services, benefits or charges that may affect residents' occupancy or ability to pay for services or benefits.⁴³

The Code of Practice empowers residents to form a residents' committee, which can call meetings with the operator or the statutory supervisor. The operator or statutory supervisor is expected to attend these meetings where the request to do so is reasonable.⁴⁴ Residents are able to involve the statutory supervisor in any dispute they have under s 55 of the Act.⁴⁵

D Have the Aims of the Regulatory Framework Been Achieved?

The regulatory framework has improved the quality, and quality control, of retirement villages in New Zealand and the standard of care they provide.⁴⁶ Many of the residents interviewed, even those who expressed dissatisfaction with aspects of the regulatory framework or life in a village, stated that they did not regret the decision to enter into the village, with a general sentiment that the advantages outweighed the disadvantages. Despite this, concerns remain around its effectiveness at protecting consumers in several key respects.

1 Occupation right agreements

It is important that residents understand ORAs and that their terms are substantively fair because ORAs place significant financial burdens on residents and their estate, primarily in the form of the deferred management fees and fixed periodic outgoings. The main way the Act aims to ensure residents understand ORAs is through the mandatory provision of legal advice to residents prior to entering into the agreement. Retirement village managers

⁴³ Retirement Villages Code of Practice, art 28(3).

⁴⁴ Article 30.

⁴⁵ Burke and Greenwood, above n 39, at 30.

⁴⁶ Michelle Burke and John Greenwood "The Retirement Village Option – advising your client on the benefits and pitfalls" (seminar presented through the New Zealand Law Society, Auckland and Wellington, 2013) at 1.

were consistent in their practice of supplying residents' lawyers with the documentation to ensure they could meet their obligations under the Act.

Previous focus group research raised concerns about compliance issues relating to the quality of legal advice provided to some residents prior to entering into ORAs.⁴⁷ Although the Act sets a specific standard for the level of understanding required, a number of residents were of the opinion that lawyers (and financial advisers, where used) do not provide broad enough advice, or merely repeat the terms of the ORA. The result of this is that in some cases residents failed to fully appreciate the implications of their entry into a village.⁴⁸ This suggests that legal advice is not consistently meeting the requirements of the Act.

Residents had mixed responses when asked about the substance of the legal advice they received. Advice consisted of either discussing the terms, advantages and disadvantages of the ORA or taking residents through contracts clause by clause.⁴⁹ Most were satisfied with the level of understanding of the basic terms of the ORA that their lawyers provided, although some felt that they were receiving this advice merely to satisfy the requirements of the Act. Despite being generally satisfied with their legal advice, residents expressed differing understandings of certain terms. For example, some were unsure whether villages could charge residents for renovations to a unit after they vacated. They were uncertain of how well their lawyer had explained this to them. Nonetheless, there was a consensus that lawyers had sufficiently noted the pitfalls of entering into a village. Some residents even stated that their lawyers had advised them against the move altogether due to the financial implications of the decision.⁵⁰

⁴⁷ Bev James and Kay Saville-Smith *Retirement Villages Act 2003: Residents' Perspectives* (Retirement Commission, Monitoring Report, July 2011) at 21.

⁴⁸ At iv.

⁴⁹ Interview with retirement village residents (the author, Wellington, 23 July 2018).

⁵⁰ 23 July 2018 interview, above n 49.

None of the residents interviewed had formally sought financial advice prior to entry into the village. Nonetheless, many felt they had adequate financial advice either from family members who were accountants, lawyers, and public servants; from their lawyer, or through their own professional knowledge. They did not see the need for specific financial advice.⁵¹ When the prospect of a legislative requirement for financial advice (additional to the requirement for legal advice) was raised, none of the interviewees thought this should be a legal prerequisite for entry into a village.⁵² One resident stated that lawyers should provide this advice. Others thought that financial advice should be available, but not obligatory.

Despite being generally satisfied with their advice and understanding of ORA documents, some residents noted that their lawyers were unable to ensure that they had a meaningful appreciation of the implications of the contracts. This was due to lawyers not having experienced these implications themselves, or due to a lack of training in how to advise about these implications.⁵³ Focus group participants in James and Saville-Smith's research suggested that the Act would be more effective if the information in ORAs was easier to understand and presented in a large font,⁵⁴ but residents interviewed for this research were more concerned about not having appreciated the *implications* of the terms of ORAs, rather than the format in which these terms were presented. This limited understanding is consistent with the New Zealand Law Society's guidance to lawyers, which encourages them to refrain from giving advice outside of the scope of their legal knowledge.⁵⁵ It may be necessary to take a more holistic approach to advising residents under the regulatory framework, either by expressly requiring lawyers to give broader advice, or by providing and encouraging the use of an independent advice facility for intending residents.

⁵¹ 23 July 2018 interview, above n 49; interview with retirement village resident (the author, Wellington, 25 July 2018).

⁵² 23 July 2018 interview, above n 49; 25 July 2018 interview, above n 51; interview with retirement village residents (the author, Wellington, 30 July 2018).

⁵³ 23 July 2018 interview, above n 49.

⁵⁴ James and Saville-Smith, above n 47, at iii.

⁵⁵ Burke and Greenwood, above n 39, at 43.

Interviewees were dissatisfied with substantive aspects of ORAs and their financial implications.⁵⁶ Under many ORAs, vacating residents or their estates do not share in any capital gains which operators make upon reselling LTOs. On the other hand, some ORAs allow residents to share in capital gains but contain a capital loss clause, whereby residents share in any capital loss on their LTO.⁵⁷ One resident in a not-for-profit village stated that she felt it “suited” that she should partake in neither capital gains nor losses. She was satisfied that, although this was not a financial investment, it was an investment in other ways.⁵⁸ Many residents viewed it as important to weigh up the financial disadvantages of the ORA with the advantages that village life provided. However, most thought that not receiving a share of capital gains on units was a drawback.⁵⁹ Despite being uncomfortable with these terms, residents felt that they had limited options as the alternative was to remain living in a home which was unsuitable for them given their state of health. Some residents accepted that their choice to enter into the village became more financially sound when they stayed past the point at which the deferred management fee had fully accrued.⁶⁰

Although not unhappy with the rates of fixed periodic outgoings per se, residents from one village expressed concerns about the frequency and level of fee increases.⁶¹ They saw these increases as unjustifiably placing stress on them when they had entered into the village to decrease the levels of stress and inconvenience in their lives.⁶² This was a pressing issue for those who are cash-poor and rely on New Zealand superannuation. A resident from a not-for-profit village stated that she was happy with the rates of these fees.⁶³ Residents in a corporate village had received a guarantee from the village that their fees would not increase during their occupancy of the unit, and were very happy with this arrangement.⁶⁴

⁵⁶ 23 July 2018 interview, above n 49; 30 July 2018 interview, above n 52.

⁵⁷ Jones, above n 12, at 6.

⁵⁸ 25 July interview, above n 51.

⁵⁹ 23 July 2018 interview, above n 49; 30 July 2018 interview, above n 52.

⁶⁰ 23 July 2018 interview, above n 49; 30 July 2018 interview, above n 52.

⁶¹ 23 July 2018 interview, above n 49.

⁶² 23 July 2018 interview, above n 49; 30 July 2018 interview, above n 52.

⁶³ 25 July 2018 interview, above n 51.

⁶⁴ 30 July 2018 interview, above n 52.

Residents voiced strong opposition to the ongoing charging of fixed periodic outgoings (as outlined in section A of this part), including the reduced rate after six months of a resident vacating their unit. This is consistent with the feedback from James and Saville-Smith's focus groups, who suggested that they would have more certainty as to the financial implications of entering into ORAs if the Act required periodic outgoings to cease on termination of the agreement. Jones suggests that it would be fairer for the periodic outgoings to end when the ORA terminates because at that point residents no longer benefit from living in the village.⁶⁵ Focus group participants wanted the Act to limit the level of periodic outgoings and, similarly to residents interviewed for this research, required clarification as to what the charges cover.⁶⁶ Both managers interviewed stated that in the current commercial environment it was unlikely that a unit would remain vacant for months at a time. They justified the ongoing fees because these did not relate to the specific villa, but to village-wide electricity, insurance and other expenses.⁶⁷

In light of interview feedback, it appears that the legislation around fixed periodic outgoings provides inadequate certainty for residents, even if the commercial reality means that it is unlikely that they or their estate will be charged these fees for a long period due to demand for units. If the Act required fixed periodic outgoings to cease entirely soon after the unit is vacated, residents would have more certainty as to the financial implications of their ORAs. Most operators would not be particularly affected by this change, and those who are could account for this in their pricing schemes.

Residents were largely happy with the legislated cooling off period of fifteen days. Most residents were of the view that at the time of entering into the ORAs they had already put a lot of thought into the decision and "burned their bridges" by selling their house.⁶⁸ Management of one village stated that regardless of the legislated period they would not

⁶⁵ Jones, above n 12, at 4.

⁶⁶ James and Saville-Smith, above n 47, at iii.

⁶⁷ Interview with retirement village manager (the author, Wellington, 23 July 2018); interview with retirement village manager (the author, Wellington, 25 July 2018).

⁶⁸ 23 July 2018 interview, above n 49.

hold people to their contracts if they did not want to move into the village because this would negatively affect the community.⁶⁹ It follows that it is not necessary to revise these provisions of the Act.

2 Resident participation

As outlined above, the primary means by which residents may influence the running of the village and ensure their rights are protected are through residents' committees, dispute resolution processes, consultation obligations, and the statutory supervisor.

Residents had varied levels of understanding of and satisfaction with the statutory supervisor's role.⁷⁰ In one village, residents were unhappy with the statutory supervisor's performance. They saw problems stemming from the nature of the role itself. They understood that the statutory supervisor was legally required to act in their interests, but believed that in reality the statutory supervisor saw their role as "keeping the owners happy," particularly because the supervisor was appointed by the owners.⁷¹ This is consistent James and Saville-Smith's research.⁷² Residents were of the opinion that the statutory supervisor's role needed clarification, and that supervisors should be funded independently of retirement village operators. They were concerned at a perceived lack of independence. Some residents felt that the statutory supervisor was not there to assist them, and that they could not approach the supervisor with questions.⁷³ At a not-for-profit village, one resident explained that she understood that the "on paper" role of the statutory supervisor was to represent residents, but that she had no personal experience of how well the system works because she had never laid a complaint. She noted a general feeling that "it doesn't make a lot of difference one way or the other."⁷⁴

⁶⁹ 23 July 2018 interview, above n 67.

⁷⁰ 23 July 2018 interview, above n 49; 25 July 2018 interview, above n 51; 30 July 2018 interview, above n 52.

⁷¹ 23 July 2018 interview, above n 49.

⁷² James and Saville-Smith, above n 47, at 55.

⁷³ James and Saville-Smith, above n 47, at 53.

⁷⁴ 25 July 2018 interview, above n 51.

Residents interviewed for this paper also noted that the statutory supervisor was remotely located and worried that this meant they were reluctant to visit the village when requested by residents. Some residents were of the opinion that the representative of the statutory supervisor for their village was insufficiently trained. One stated that she would like there to be an agreement between the statutory supervisor and the villagers, through which the villagers could hold the statutory supervisor accountable. Another noted that the proportion of statutory supervisors to villages was insufficient, and that the business of statutory supervision was not profitable enough.⁷⁵

Managers had greater satisfaction with the performance of statutory supervisors. One stated that “key players” were aware of the role of the statutory supervisor and that the supervisor runs their Annual General Meeting.⁷⁶ Another acknowledged that the statutory supervisor was employed by the operator, but denied that statutory supervisors were entitled to favour the operator’s perspective.⁷⁷ Although dissatisfaction with the statutory supervisor is not uniformly present across villages, the inconsistent understandings of the role among residents suggest that the framework is not functioning effectively to inform residents about how the statutory supervisor protects them. Further, even a perceived lack of independence in statutory supervisors may serve to undermine residents’ confidence in contacting the supervisor in situations where this may be necessary. This prevents the statutory supervisor from fully realising the role of protecting residents under the Act.

Turning to the matter of dispute resolution, residents in James and Saville-Smith’s research expressed the view that they wanted to “overhaul and improve” the dispute resolution process.⁷⁸ Similarly, some residents interviewed for this paper were dissatisfied with the dispute resolution processes within their own village and within New Zealand retirement villages generally. They noted that many villages lacked residents’ committees and people

⁷⁵ 23 July 2018 interview, above n 49.

⁷⁶ 25 July 2018 interview, above n 67.

⁷⁷ 23 July 2018 interview, above n 67.

⁷⁸ James and Saville-Smith, above n 47, at iii.

with expertise to pursue disputes against village operators.⁷⁹ This was consistent with the not-for-profit village, where the manager stated that residents were aware they had the option of setting up a committee under the Act, but had not done so.⁸⁰ Residents also noted that many older people in retirement villages may not feel confident “taking on the management” and raising complaints. One resident explained that the RVRANZ has a relatively small membership compared to the total number of retirement village residents in New Zealand, citing the association’s membership fee as a disincentive for prospective members.⁸¹ Some residents noted their surprise at the small number of residents’ committees in existence across the villages owned by that corporation. They felt that the operator was reluctant to listen to residents’ voices and that forming a residents’ committee should be mandatory in villages. One resident interviewed for this research stated that she was aware of the existence of a dispute resolution process, but that none of her issues had escalated to the level where she had to pursue these processes.⁸² On the other hand, managers who were interviewed stated that they had not had complaints of a serious enough level to engage the dispute resolution process and that they were satisfied with the informal fora they provided for raising complaints through regular meetings with village owners and management.⁸³ The inconsistency between residents’ sentiments and those of management suggests that the Act’s requirements are failing to ensure residents are informed of how they may pursue their complaints. The Act is therefore not consistently achieving its aims of protecting residents and ensuring their rights are respected.

3 Disclosure obligations and financial management

Most residents do not regret their decision to move into a retirement village. Despite this, some participants in focus groups were concerned that this choice does not provide them with the level of financial security and certainty in their future that they had anticipated.⁸⁴ One cause of this was the frequency of increases in rates of fixed periodic outgoings

⁷⁹ 23 July 2018 interview, above n 49.

⁸⁰ 25 July 2018 interview, above n 67.

⁸¹ 23 July 2018 interview, above n 49.

⁸² 25 July 2018 interview, above n 51.

⁸³ 23 July 2018 interview, above n 67; 25 July 2018 interview, above n 67.

⁸⁴ James and Saville-Smith, above n 47, at iv.

charged in some villages which placed residents under psychological stress.⁸⁵ Similarly, residents in James and Saville-Smith's research raised concerns that there have been increases to these charges beyond what they believe they agreed to in their ORAs.⁸⁶ A further criticism from one resident interviewed for this paper noted the lack of engagement between statutory supervisors and auditors. The resident stated that this has led to a situation where statutory supervisors are ignorant about villages' accounts, which prevents them from adequately monitoring the village's financial health.⁸⁷

Residents thought that operators should be subject to regular audits to ensure they were complying with the regulatory framework.⁸⁸ Similarly, several interviewees expressed the desire to be made aware of their respective villages' financial situations and to be informed of how villages were spending their fees.⁸⁹ There appear to be failures to meet the Act's requirements relating to maintenance plans, charges, disclosure, consultation and complaints management.⁹⁰ Anecdotes from James and Saville-Smith's discussion groups suggest that villages had reduced the services and amenities which fees were allocated towards and had allowed amenities to degrade through under-investment. Some had not provided amenities as promised in development plans; had added new units and higher care-level facilities without previously disclosing the intention to do so; and had changed their operation systems, management, and ownership without consulting residents.⁹¹ The lack of clarity around financial management and disclosure obligations suggests a need for tighter regulation so that residents know what information they are entitled to and can hold operators to account for their spending.

⁸⁵ 23 July 2018 interview, above n 49.

⁸⁶ James and Saville-Smith, above n 47, at iii.

⁸⁷ 23 July 2018 interview, above n 49.

⁸⁸ 23 July 2018 interview, above n 49.

⁸⁹ 23 July 2018 interview, above n 49; 30 July 2018 interview, above n 51.

⁹⁰ James and Saville-Smith, above n 47, at iv.

⁹¹ At iii.

III Responses to Issues with the Regulatory Framework

This section posits possible responses to issues with the regulatory framework. The issues identified in the preceding discussion relate to an array of aspects of the regulatory framework. It is unlikely that the best response to these issues will be purely legislative. Legislation sits alongside other options at the Government's disposal such as fiscal interventions (taxes, subsidies, price controls), performance-based or technology-specific standards, direct information provision and mandatory disclosure, and the use of licensing and certification to provide information in an indirect manner.⁹²

A Regulatory Responses

The choice to regulate needs to be justified. When the state chooses regulation over other policy interventions, it employs its coercive power to limit the choices available to citizens and businesses.⁹³ Regulating may place compliance costs on those supplying services and products.⁹⁴ If compliance costs are too high it will not be profitable for traders (in this context, retirement village operators) to provide their products. This in turn risks reducing the number of options available to consumers, harming the welfare of consumers as a whole.⁹⁵

Freedom of contract provides several justifications for reluctance to regulate ORAs more heavily. Liberal societies recognise the right of individuals to autonomously choose whatever course of action they wish.⁹⁶ A utilitarian perspective holds that refraining to review the product of parties' free agreements is good for individuals and society in general. It makes for more efficiency in agreements by allowing agreements to reflect the

⁹² Gill, above n 5, at 176.

⁹³ At 177.

⁹⁴ Kate Tokeley "Consumer Law and Paternalism: a Framework for Policy Decision-making" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 267 at 288.

⁹⁵ At 288.

⁹⁶ Chris Willett *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate, Aldershot, 2007) at 22.

preferences of individuals in the market in a stable and certain manner, free from interference.⁹⁷ More specifically, the freedom of contract approach holds that, as long as the contract is transparent enough that the consumer is aware of the existence of its terms, there should be no further transparency requirements. Consumers are free to investigate the terms to the extent that they wish and to make decisions based on this, and traders should be free to pursue their self-interest in ways they deem fit.⁹⁸ Following this view, even if there is a disparity in the parties' bargaining strength, the consumer should still be free to bargain with the trader, to decline to enter into the contract altogether, or to enter into the bargain despite not being satisfied with its terms.⁹⁹

On the other hand, regulation is likely to ensure fairer substantive outcomes for consumers. Tokeley reiterates findings from behavioural economics that:¹⁰⁰

...consumers in a free market do not always make rational choices that maximise their self-interests. Consumers suffer from impulsiveness, excessive optimism, status quo bias, a lack of will power, poor ability to adequately weigh up short-term and long term benefits and an inability to process large amounts of complex information.

An approach which examines contracts from the perspective of fairness pays more attention to the context in which agreements are made. It considers whether a consumer was able to protect their interests when entering into the agreement. Certainty and fairness are not easily reconcilable in the context of agreements where the bargaining power of one party is inferior.¹⁰¹ To view consumers as free to make any choices they wish neglects the reality that it is unrealistic for some consumers to do without the product that is being bargained

⁹⁷ At 23.

⁹⁸ At 27.

⁹⁹ At 29.

¹⁰⁰ Kate Tokeley "Consumer Law and Paternalism: A Framework for Policy Decision-Making" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 265 at 265.

¹⁰¹ New Zealand Law Commission "*Unfair*" *Contracts: A discussion paper* (NZLC PP11, 1990) at 6.

for: for many older people, their health and lifestyle needs dictate their entry into a village.¹⁰²

Tokeley's framework for analysing policy problems provides considerations to help regulators balance policy imperatives for regulation against concerns around paternalism. She suggests a multi-factorial analysis to determine whether and to what degree a paternalistic approach might be appropriate. Depending on the extent to which the law may be considered paternalistic, the number and significance of factors necessary to justify regulatory paternalism varies. "Hard paternalism," where regulation severely restricts or eliminates consumer choice in a particular area, requires more compelling factors to be justified.¹⁰³ In contrast, "soft paternalism", which aims to nudge consumers in a particular direction, does not restrict their autonomy to the same extent so is more easily justifiable.¹⁰⁴ The factors provided for determining the legitimacy of a paternalistic intervention are:¹⁰⁵

...the magnitude of the potential consumer harm, the probability of consumer harm, the irreversibility of potential consumer harm, the degree to which addiction is affecting consumer choice, the degree to which consumers want to be protected, the degree to which the problem is affecting children, young adults or other potentially disadvantaged groups, the degree to which there are additional, non-paternalistic reasons for enacting the law, and the probability of non-legal responses, such as education or support programmes, failing to provide solutions to the problem within an acceptable time frame.

The Act evinces a willingness by legislators to engage in hard paternalism in regulating contracts, for example where it provides for the cooling off period and mandatory legal advice. This is because the legislative environment for ORAs differs from regular contracts.

¹⁰² Willett, above n 96, at 30.

¹⁰³ Tokeley, above n 94, at 271.

¹⁰⁴ At 273.

¹⁰⁵ At 272.

An application of Tokeley's framework to the retirement villages context strongly suggests that further regulation is justifiable. Residents have invested significant amounts of capital in their units and are seeking a lifestyle with reduced stress. Residents cannot easily reverse their entry into a village if they regret the move given that most have already sold their homes and invested capital into their LTO. Many older people are cash-poor and need certainty as to the fees that they must pay to operators. There is a risk of serious disruption to residents' lifestyle if they are unable to easily resolve disputes. Further, discussions arising from the interviews suggest that residents desire protection through legislative interventions. As expressed by the residents themselves, older people often move into a village because they have experienced health difficulties which decrease the viability of living at home. Even without these difficulties, older people as a group are potentially vulnerable, particularly vis-à-vis retirement village operators. Damage arising from entering into an "unfair" contract is limited to financial effects for operators. For individual consumers, if there is a breach or an unfair contract then it is likely to directly affect and disrupt their private lives.¹⁰⁶ This is a pertinent consideration in the sphere of ORAs. These contracts affect the way in which consumers are likely to live out the remainder of their lives. While providing residents with information and support may help to mitigate risks associated with entry into a retirement village, it is necessary to legislate to achieve outcomes in relation to the role of statutory supervisors and the substantive provisions of ORAs. For all of these reasons, some amendments to the regulatory framework are justified. Proposed changes are discussed in the following passages.

1 Legal and financial advice

In 1993 the Resident Funded Retirement Villages Taskforce recommended that there only be minimum requirements for ORAs, leaving parties to contract as they wished beyond this. It viewed this as balancing commercial flexibility with the need to protect residents.¹⁰⁷ But the sentiments expressed by residents in James and Saville-Smith's focus groups suggest that minimum requirements are failing to ensure that residents have a sufficient understanding of ORAs.

¹⁰⁶ Willett, above n 96, at 38.

¹⁰⁷ *Report of the Resident Funded Retirement Villages Taskforce*, above n 24, at 34.

2 Recommendation

Financial advice is not suggested as a mandatory requirement in the Act. This reflects feedback from residents interviewed for this research who were satisfied with receiving advice on the financial aspects of ORAs from avenues other than formal consultation with a financial adviser. It is nonetheless suggested that operators be required to make efforts to encourage intending residents to seek financial advice. This recognises that it is important to ensure that residents *do* receive financial advice in some form. Further, the legal advice requirement in s 27 of the Act should be extended to require that the lawyer providing advice be satisfied that the resident actually understands the financial effects of the ORA and what implications this may have for them. While this slightly increases operators' obligations, it holds significant potential benefits for intending residents. A regulatory response targeting the Retirement Villages Act itself is likely to be the most effective way to address concerns around residents' lack of appreciation of the implications of ORAs. Mandated duties of disclosure could address any asymmetries of information between the parties to ORAs.¹⁰⁸ This approach also allows consumers to compare various options in a meaningful way. Suggested amendments to s 27 are included below, with new provisions underlined:

- (3) An intending resident must receive independent legal advice before signing the occupation right agreement.
- (3A) The operator of the village entering into the occupation right agreement with the intending resident must—
 - (a) suggest to the resident that the resident seek financial advice before entering into the occupation right agreement; and
 - (b) assist the resident to access the services of an independent financial adviser.
- (6) The explanation required to be given by subsection (5) must be given in a manner and in language that is appropriate to the age and understanding of the intending resident.

¹⁰⁸ Hugh Collins *Regulating Contracts* (Oxford University Press, Oxford, 1999) at 281.

(6A) The lawyer giving the explanation in subsection (5) must certify that, before the resident signed the agreement, the lawyer was satisfied that the intending resident actually understood the terms, effect and implications of the agreement.

3 *Capital gains and losses*

A further source of discomfort for residents, as discussed above, is that few operators share capital gains with residents, but in some cases require residents to share in capital losses. Residents may face financial barriers if they wish to move to units which have appreciated in value, but are unable to share in capital gains with operators. The likelihood of such a situation occurring is unclear, but the financial effects on residents are irreversible once the cooling off period has lapsed. Further, residents in focus groups expressed a wish for financial burdens to be reduced.¹⁰⁹ When consumers make purchasing choices which require them to process a lot of complex information, they are more likely to make choices which expose them to harm.¹¹⁰ While non-legal responses such as information campaigns may go some way to making residents aware of these terms, they are unlikely to completely solve the problem of the risks posed by the terms. They are used by many operators in the industry, making it difficult for residents to “shop around”.

4 *Recommendation*

Managers stated that clauses requiring them to share capital gains could negatively affect their businesses because they are not incorporated in current pricing structures. Further, one manager justified their village retaining capital gains in the reselling of LTOs as this helps finance the rest home and hospital levels of care within the village, which are less profitable than the “independent living” units. He stated that if there were a legal requirement that residents share in capital gains on their units then these costs would need to be offset in another way. In order to balance these competing imperatives in a manner which is consistent with the Act’s aims and the need for fairness, this paper suggests that clause 54 of the Code of Practice should require ORAs to either allow residents to share in capital gains *and* capital losses on a unit’s LTO, or to take part in neither:

¹⁰⁹ James and Saville-Smith, above n 47, at iii.

¹¹⁰ Tokeley, above n 100, at 277.

Capital gains and losses

- 1 If the occupation right agreement requires the resident to share in any capital losses made on the resale of a licence to occupy a unit, it must also contain a provision allowing the resident to share the same proportion of any capital gain that may be made on the resale of the licence to occupy.

5 Periodic outgoings

Operators' ability to retain residents' entry fees until the LTO is sold to a new resident, and to continue to charge periodic outgoings poses a financial risk to residents which is not insignificant. This is exacerbated if they require their capital to finance higher levels of care. Therefore, a further substantive aspect of ORAs where the balance struck between residents' and operators' interests should be revisited is the duration for which operators may charge fixed periodic outgoings on a unit once the resident has vacated. It would provide residents with more certainty as to their future financial position if fees were required to cease sooner after residents vacate the unit. Further, changing the provisions relating to the ongoing charges of periodic outgoings in this way is unlikely to significantly detriment operators because LTOs for units tend to be resold very quickly. Clause 54 of the Code of Practice should be amended as below:

Continuing charges for outgoings

- 2 The operator must cease the outgoings charged to the former resident if no new occupation right agreement has been entered into for a former resident's unit by the later of:
- a three months after the termination date; or
 - b the date the former resident stops living in the residential unit and removes all their possessions.

A final, related aspect of ORAs which could better balance residents' interests with those of operators is the frequency at which operators may increase the rates of periodic outgoings. While it may not be realistic to expect all villages to guarantee that they will not increase periodic outgoings charged to residents, it would give residents more certainty and

provide more transparency if increases required the statutory supervisor's approval. This is consistent with the statutory supervisor's role in monitoring the financial situation of villages and protecting residents' interests. This requirement could be added to Part 2 of the Code of Practice:

Increases in periodic outgoings charged

- 5 Operators must—
- a inform residents of the intention to increase the rate of periodic outgoings; and
 - b explain the reasons for the increased rate of periodic outgoings.
- 6 Operators must explain the proposed increased rates to the statutory supervisor and receive the statutory supervisor's approval before increasing the rate of periodic outgoings charged.

6 The role of the statutory supervisor

The residents interviewed for this paper identified the role of the statutory supervisor as an area where improvements to the Act are necessary to protect consumers, consistent with those in James and Saville-Smith's focus groups. While the Act sets out the duties and powers of the statutory supervisor, it does little to explain what this means for residents in practical terms. Although the statutory supervisor plays a crucial role in protecting residents' interests, it is necessary for residents to *understand* the supervisor's role to utilise it to its full potential. A simple solution to this problem could involve clarifying the statutory supervisor's role in the Code of Practice, and requiring that operators make specific information as to the supervisor's role available to residents upon entry into the village.¹¹¹

A more complicated issue is that of residents' perceptions of the statutory supervisor's independence. Despite being authorised by statute, supervisors are employed and paid by operators. Confusion around the extent to which statutory supervisors serve residents' interests is exacerbated by inconsistencies between various supervisors' charging practices.

¹¹¹ Gill, above n 5, at 177.

This includes extra charges by some statutory supervisors when they are required to attend to particular issues in villages. Given statutory supervisors' crucial role in ensuring villages run smoothly and comply with the Act, and their role in supporting residents where needed, residents must be able to rely on the statutory supervisor to protect their interests.

One option to address these issues is to vest the task of statutory supervision in government. Residents stated that they would see the role as more independent if it was a government service. The Public Trust has experience in this area because it already provides statutory supervision services.¹¹² A risk of vesting all statutory supervision of retirement villages in the Public Trust is that it would negatively impact the corporate providers of statutory supervisory services. However, comments from residents suggest that these companies do not see statutory supervision of retirement villages as a profitable business, so moving this function to the Trust may not have extremely negative effects on their businesses in general. This option would also eliminate inconsistent charging practices because these could be determined centrally by the Trust. Expertise could more easily be shared between representatives of the statutory supervisor if this were centrally coordinated, and uniform training and accountability processes could be implemented.

B Extra-regulatory Responses

1 Independent advisory facility

The range of residents' views around the quality of advice suggests the need for a means of supporting them to make decisions. Residents noted their support for this idea. In their view, they needed an advocate both before entering into the village and after doing so. James and Saville-Smith identify the option of an independent decision-making support mechanism for residents and intending residents.¹¹³ Such a facility could feasibly sit within the Commission For Financial Capability (CFFC), alongside the Disputes Panel. This would have the advantage of the CFFC's familiarity with dispute resolution processes under the regulatory framework, and could provide residents with information on and

¹¹² Public Trust "Who are we?" < www.publictrust.co.nz >.

¹¹³ James and Saville-Smith, above n 47, at v.

guidance through these processes. This facility could also direct residents to other sources of legal services.

2 Compliance mechanism

In addition to the recommendations for an independent advisory facility and requirements that ORAs be easy to understand, a non-legislative means of encouraging operators to comply with the Act is to implement an independent rating system. This could publicise the financial, service, amenity and procedural aspects of villages and would encourage quality control and improve residents' understanding of their decisions relating to entry into a village.¹¹⁴ It would facilitate consumers' exercise of informed consent and afford them scope to negotiate terms, as well as assist them to shop around for the best bargain, encouraging competition in the market.¹¹⁵ As with the independent advisory facility, this resource could be situated within the CFFC. This would be appropriate because the CFFC's web site already contains advice for individuals who are considering entering into retirement villages.

IV Conclusion

This paper has examined the retirement villages regulatory framework to compare the current state of the sector against the aims of the framework at its inception, with a focus on the extent to which the framework protects residents' rights. It drew on interviews with retirement village residents and management to determine what issues persist within the regulatory framework. These include: confusion around the role of the statutory supervisor; concerns around the supervisor's independence; insufficient financial disclosure by operators; issues with residents' appreciation of the implications of ORAs; the substantive terms of ORAs; a lack of compliance with the regulatory framework; and unsatisfactory dispute resolution mechanisms.

¹¹⁴ At iv.

¹¹⁵ Willett, above n 96, at 56.

Based on discussions in the literature around retirement villages and the interviews conducted for this research, this paper has concluded that further policy interventions are necessary to improve the functioning of the regulatory framework. Both legislative and non-legislative options were suggested. Such options seek to protect residents' rights and interests, while balancing these with the legitimate business interests of operators. It is suggested that a combination of these options be employed by policymakers in order to comprehensively effect the aims of the regulatory framework.

Word count

The text of this paper (excluding table of contents, appendices, footnotes, and bibliography) comprises approximately 7994 words.

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VI Appendices

A Appendix 1: Questions Used to Guide Interviews

1 Questions for Residents

What kind of advice did your lawyer give you prior to you signing the occupation right agreement? Did this help you to understand the contract?

Did you seek financial advice before you signed the occupation right agreement? If so, did this clarify the contract for you?

Were you comfortable with the financial implications of moving into a retirement village regarding the deferred management fees, fixed periodic outgoings and capital gains and loss clauses?

Did you think the cooling off period was long enough?

Were you concerned about the terms of the occupation right agreement regarding capital gains and losses?

Are you comfortable with the system of accruing the deferred management fees? Did you clearly understand the financial impact that moving into a retirement village would have on you?

What is your understanding of the role of the statutory supervisor?

Are you satisfied with the dispute resolution process the village uses?

2 Questions for Operators

What processes do you use to ensure that intending residents understand occupation right agreements?

What is the justification for continuing to charge fixed periodic outgoings on a unit once a resident has vacated it?

What influences how you set the length of the cooling off period? What influences how you set your levels for deferred management fees? Fixed periodic outgoings?

How might your business be affected if the retirement villages regulatory framework introduced a standard form occupation right agreement?

How might your business be affected if the retirement villages regulatory framework required that residents share in capital gains from the sales of licences to occupy?

B Appendix 2: List of Abbreviations

CFFC: Commission For Financial Capability

LTO: Licence to occupy

ORA: Occupation right agreement

RVA: Retirement Villages Association

RVRANZ: Retirement Village Residents' Association of New Zealand