



Retirement Commission  
*Whiriwhiria!*

**Recommendations  
to the  
Minister for Building and Construction  
on the  
Retirement Villages  
Code of Practice 2008**

**Retirement Commissioner**

**September 2008**

# Table of Contents

- Introduction ..... 1
- Background ..... 1
- Process ..... 1
- Overview of submissions..... 2
- Advice ..... 2
- Approach..... 2
- Overview of Clause 49 ..... 2
- Recommendations ..... 3
  - Part 1            The Retirement Villages Code of Practice ..... 3
  - Part 2            General Requirements..... 3
  - Clauses 7-10    Policies and procedures, notices and induction requirements..... 3
  - Part 3            Minimum requirements to be included in any occupation right agreement..... 4
  - Clauses 11-14   Staffing of retirement village ..... 4
  - Clauses 15-17   Safety and personal security of residents ..... 4
  - Clauses 18-22   Fire protection and emergency management ..... 4
  - Clauses 23-24   Transfer of residents within retirement village ..... 5
  - Clauses 25-30   Meetings of residents with operators and resident involvement ..... 5
  - Clauses 31-35   Complaints facility ..... 5
  - Clause 36-38    Accounts ..... 5
  - Clauses 39-44   Maintenance and upgrading ..... 6
  - Clauses 45-53   Termination of an occupation right agreement ..... 6
  - Clause 49        Refurbishment cost and process ..... 7
  - Clauses 54-56   Communicating with residents for whom English is a second language .. 9

# Recommendation to the Minister for Building and Construction on the Retirement Villages Code of Practice 2008

## Introduction

As Retirement Commissioner, pursuant to section 89(4) of the Retirement Villages Act 2003, I make my recommendations on the Retirement Villages Code of Practice 2008 referred to me in June 2008 by the responsible Minister, Hon Shane Jones. In accordance with section 91 of the Retirement Villages Act, on 12 June 2008, I jointly notified with the Department of Building and Housing, the proposed Code and invited submissions on it, to be received in my office by 15 August 2008.

I have carefully considered the proposed Code and the 300 submissions and the advice received on it. My recommendation on the main proposed amendment to clause 49 of the Code of Practice is that it does not proceed. I make a number of other recommendations but which are of a more minor nature.

## Background

The Retirement Villages Code of Practice 2006 was approved by Hon Clayton Cosgrove on 25 September 2006. It covered the ten topics required by schedule 5 of the Retirement Villages Act. Section 90(1) of the Act provided that the Code come into force on 25 September 2007. From this date the Code's minimum requirements applied to all existing occupation right agreements and residents. When in force, the Code is enforceable as a contract and prevails over any less favourable provision in a resident's agreement.

However following an application for a judicial review initiated by the Retirement Villages Association of New Zealand Inc, the Code of Practice 2006 was declared invalid on the grounds of process in the Wellington High Court on 19 December 2007. The proposed Code of Practice 2008 was developed by the Minister of Building and Housing.

## Process

In June 2008 the Minister referred to me the proposed Code of Practice 2008. The consultation process was undertaken jointly with the Department of Building and Housing. The joint submission process on the Code was gazetted on 12 June 2008, notified on our website at [www.retirement.org.nz](http://www.retirement.org.nz), published in major newspapers, and copies of the Code sent to all known Retirement Villages and key groups in the sector.

Copies were available to read from Community Law Offices, Citizen's Advice Bureau, regional offices of the Department of Building and Housing, and to obtain by phoning the Department's 0800 number.

## Overview of submissions

The majority of the 300 submissions received on the 2008 Code were from residents (161), retirement village operators (91) and from residents' committees (29). The Retirement Village Association (the "RVA") in its submission on behalf of its members, states that it represents 253 member villages, with some 16,050 dwelling units housing more than 20,000 New Zealanders. A joint submission from Age Concern New Zealand, Grey Power New Zealand Federation and the Royal New Zealand Returned and Services' Association was received. Submissions also came from Kapiti Coast Grey Power, Senior Care (Taranaki), Lawyers, Community Law Centres, Statutory Supervisors, the Ministry of Health, Nurses Organisation of New Zealand, and the Insurance Council of New Zealand.

There were many 'form' submissions from operators and some lawyers supporting the RVA's submission. Many of the resident's submissions were on a single issue.

The majority of submissions address the issue in clause 49.

## Advice

I have taken legal and other expert advice on the proposed Code of Practice 2008 from John Greenwood, Partner, Greenwood Roche Chisnall.

## Approach

This report does not consider and make recommendations on the many relatively minor issues and drafting points raised by submitters. While my office has tried to cover as many of these as we thought had merit in the submissions analysis, the large number of submissions and the limited time in which to properly examine them has prevented this. Where relevant I will consider the points raised by submitters in my monitoring role.

## Overview of Clause 49

In many of the submissions the refurbishment clause raised concern. I recommend that the changes proposed in the 2008 Code to clause 49 on refurbishment do not proceed. I consider the wording on this issue should remain as was originally approved in clause 49.1.e in the 2006 Code of Practice. However I do recommend an enhanced exemption process for those operators for whom the clause is truly unfair and will cause financial hardship.

My reasons are:

- I support a code that is applicable to all residents.
- There is virtually no support for change by residents
- Changes have since been made to the financial arrangements with residents (in particular capital deductions in some villages have increased from 20% to 30%).
- Inadequate process and protection exists in the current Code concerning refurbishment for residents.

Weighing all sides of this complex issue I believe that retaining the original clause 49.1.e of the 2006 Code of Practice is fairest to most people. So much has changed since 2003 that to try to talk of original contracts between operator and residents is to ignore increases in fees since then. Also the proposed review of the Act itself will present an opportunity for change.

# Recommendations

The recommendations are made in numerical clause order. There are a number of submissions which deal with minor grammatical, spelling, formatting and consistency issues which I do not intend to comment on and leave to the judgement of the Department of Building and Housing in their drafting of the final version of the 2008 Code.

I would make the observation that I have no problem with allowing introductory notes if that has the effect of aiding the interpretation. Indeed more introductory or explanatory notes could be supplied in the Code.

I do not believe it significant where minor changes or refinements have been made such as changing one month to 20 working days.

## Part I: The Retirement Villages Code of Practice

### 2 Definitions

I received a number of submissions on the definitions section. I agree that the capital repayment definition and the fixed deduction definition need some refinement. My advice is that the definition of 'capital repayment' could be deleted but in the definition of 'fixed deduction' have the words "capital or otherwise" inserted after the word payment.

Recommendation: That the definition for "Fixed deduction" in Clause 2 read "Fixed deduction means any payment, capital or otherwise, that may be payable by a resident to an operator ....."

I have some sympathy with the many submissions received from operators wanting to limit the amount of documentation required to be given to intending residents (not helped by the level of detail required in the disclosure statement). My advice is that changing the definition of "intending resident" as proposed by the RVA would be inconsistent with section 30 of the Act which requires intending residents to receive a copy of the Code of Practice. The Act itself would need to be changed to effect the change suggested by the RVA. I recommend this is considered in a review of the Retirement Villages Act although I do not necessarily accept that the definition of "intending resident" in the Act has been interpreted correctly.

Recommendation: That a review of the Retirement Villages Act 2003 and the Regulations consider whether the definition of "intending residents" could be refined with consideration to the amount of documentation required to be given to them.

I am happy for DBH to take advice and decide whether amendments to the definitions of "Enduring Power of Attorney", "Termination Date" and "Retirement Village Property" are required.

## Part 2: General Requirements

### Clauses 7-10 Policies and procedures, notices and induction requirements

I am sympathetic to the concerns expressed by operators, particularly those of small villages with no on site office, to the difficulties of providing copies of village documentation to residents and intending residents. My recommendation above addresses this issue.

### Part 3: Minimum requirements to be included in any occupation right agreement

#### Clauses 11-14 Staffing of retirement village

I support the deletion of the word “volunteers’ in clause 11.1. The term “unpaid” is sufficient.

I note a number of submissions from residents and from several organizations expressed concerns about the quality of staff employed in a retirement village, particularly where supported care services are provided. Proposals included a police check on prospective staff members for any history of assault, dishonesty or physical abuse convictions. Training for new staff on recognising and responding to elder abuse and neglect was proposed in the Age Concern submission. The Nurses Organisation is concerned about the ability of staff to communicate with residents in English and their familiarity of New Zealand systems. Operators wanted to ensure the wording of clause 11.2 would enable flexibility such as the employment of a school leaver who may have no experience or specific qualifications. Clearly there are labour market issues affecting the sector in obtaining suitable staff, but I do not think they can be effectively addressed by amendments to the Code.

**Recommendation:** I support the deletion of the word “volunteers’ in clause 11.1. The term “unpaid” is sufficient.

#### Clauses 15-17 Safety and personal security of residents

The changes proposed for these clauses (largely by operators) were relatively minor and are more appropriately addressed by the DBH.

#### Clauses 18-22 Fire protection and emergency management

In the submissions there were a number of useful proposals made on this topic. My concern is that the diversity of building types within retirement villages is now such that over prescriptive requirements in the Code would be impracticable and excessive in some of the smaller villages. For example, having a practice of an emergency procedure in a large multi story village building may well be prudent, but unnecessary in say a 10 unit, village of separate villas. As the topics covered in this section relate to the wider responsibilities of the DBH I propose to leave any changes to these clauses to their expertise.

With regard to Clause 21 on issues of insurance I accept the Insurance Council of New Zealand’s views in their submission that the wording is inconsistent and limiting. I recommend that DBH take up their offer to discuss this issue further in order to ensure a workable clause. Some residents supported the reinstatement of clause 21.5 from the 2006 Code concerning the distribution of insurance proceeds if a destroyed unit is not rebuilt. This omission is relatively important where a resident pays for their own insurance cover. Further there should be a requirement to rebuild unless there are good reasons that prevent rebuilding such as physical dislocation caused by earthquake. Other submissions wanted the provision of temporary accommodation to be required under 21.7. As part of a review of the clauses related to insurance I suggest the DBH discuss this with the Insurance Council of New Zealand.

**Recommendation:** That DBH and the Insurance Council work with operators and residents to find workable, fair clauses for this section of the Code.

#### Clauses 23-24 Transfer of residents within retirement village

I support the amendment to clause 23 proposed by many operators to enable residents to shift between different types of independent living accommodation without needing an assessment.

Some residents proposed amending clause 24 to ensure residents were not charged any fixed capital deduction twice. It may be that a general 'unfair and unconscionable' clause in any amendment to the Act could be promoted to deal with such practices.

Recommendation: I support the amendment to clause 23 proposed by operators. I leave the precise wording of this to the DBH. I support a review of clause 24 as part of the review of the Act.

#### Clauses 25-30 Meetings of residents with operators and resident involvement

A large number of relatively minor suggestions were proposed for this section. While many sought to clarify the particular rules, for example, resident's annual or special meetings I am reluctant to have the Code become an overly prescriptive document. I believe that the diversity of retirement villages now, both in size and ownership type, makes such an approach difficult. In situations where the relationship between the operator and some or all of the residents has soured, I appreciate the Code is looked to for detail to resolve issues. It can only go so far and cannot replace good communication, goodwill and a willingness to effect the spirit of the Code.

There was support by operators and residents groups for a minor rewording of clause 26.4 on the role of the statutory supervisor and the chairing of meetings which I accept. Other issues related to statutory supervisor and the costs of their services. I propose to discuss this in our monitoring project on the role and function of statutory supervisors and will be making recommendations to the DBH following the completion of our current review of statutory supervisors. These are more likely to be picked up in the review of the Act.

Recommendation: I support the proposed rewording by the RVA of clause 26.4 on the role of the Statutory Supervisor and the chairing of meetings.

#### Clause 31-35 Complaints facility

There was support from residents, their organizations, and operators for the inclusion of a mediation step in the complaints process. As this step in the dispute process is not in the Act, I recommend this be refined when the complaints process is addressed under a review of the Act.

Recommendation: I recommend the inclusion of a mediation step be refined when the complaints process is addressed under a review of the Act.

#### Clause 36-38 Accounts

I support the proposal to allow residents to waive their right to receive monthly invoices where payment is made by direct credit or automatic payment and the amount is unchanged.

Recommendation: I support the amendment to allow residents to waive their right to receive a monthly copy of their invoices. I leave the precise wording of this to the DBH.

#### Clause 39-44 Maintenance and upgrading

After reading concerns in submissions about maintenance and upgrading I believe the proposal put forward in one submission to have a 10 year maintenance plan (this is consistent with the Unit Titles Bill) with a process to update and consult, and how to fund such a plan, has merit. It is an area that would benefit from greater transparency. However this would be a new proposal and would probably need further consultation which I recommend DBH undertake.

I would like to see the concern by some submitters for better design in retirement village buildings addressed. I recommend the Ministry of Health is further consulted by DBH over the issues they raise in their submission and that the elements of 'Universal Design' are more widely promoted to operators by DBH.

Recommendation: I recommend that the DBH undertake further consultation on the proposal for a 10 year maintenance plan. I further recommend DBH consult with the Ministry of Health over the issues of design in retirement villages.

#### Clause 45-53 Termination of an occupation right agreement

The majority of single issue submissions were on this section. In particular, clause 49 on the refurbishment; clause 45-48 on termination of an ORA; and changes to payments and capital charges in clause 53.

The RVA and operators support a rewording of clause 46.2. Our suggestion would be to change the last sentence in paragraph two to read *"If a decision is made to end the contract both parties acting in good faith should work out agreement on the terms to end such a contract."*

With respect to clause 47 concerning the termination of an agreement by the operator I am persuaded by the views of the Nurses Organisation and other residents that in the first instance, any assessment of the resident should be by the resident's General Practitioner where they have one, and then by an additional independent medical practitioner. Being forced from your home is a serious matter and a strong process is required. I do not support any change to clauses 47.4.c. or 48.3.f.

#### Recommendation:

- I recommend clause 46.2 is amended to read "If a decision is made to end the contract both parties acting in good faith should work out agreement on the terms to end such a contract."
- I recommend any assessment of a resident with respect to termination an agreement be done by the resident's general practitioner where they have one, and then by an independent medical practitioner.



#### Clause 49 Refurbishment costs and process

I do not support the amended clause 49 in the 2008 Code. The submissions I received from residents, their organizations and some individuals were overwhelmingly of the view that the 2006 code provision should not be changed.

The majority of operators and the RVA supported the proposed wording in the 2008 Code. A small number of submissions proposed different dates later than 25 September 2006 for the clause to become effective.

In making my decision I have been looking for any compelling reasons additional those I was presented with in the last two round of consultation on this issue. Since then there has also been the decision by the High Court. I find support for a retrospective Code in that decision. Furthermore I am not persuaded that in the time elapsed since the original Code was promulgated operators have not taken steps to adapt to this clause by changing their fee structure. Some residents now face a fees/cost structure which has been altered to cover refurbishment costs, increasing the capital deduction by a further 10%. Accordingly a number of residents may face the prospect of paying twice if the fair wear and tear provision is removed.

The purpose of the Retirement Villages Act 2003 is to provide consumer protection for residents and intending residents of retirement villages. The Code of Practice contains information that improves consumer protection and provides a minimum standard that all retirement village operators must attain or exceed. It is unfair to select out one group of residents who should not receive this standard of minimum protection. In analyzing the submissions a frequently mentioned concern by residents is the unknown financial risk they face because there is a poorly defined process of refurbishment. There is particular resistance to taking on this risk when there is no sharing of the capital gain with the sale of the unit. Residents point out many examples in the refurbishment process where there is ambiguity and decisions/issues open to interpretation, and this is unfair when they have unequal bargaining power.

Residents made the point that this is the third time they have had to make submissions on the same point.

The operators supported the clause as written in the 2008 Code or with a later date. Their arguments for supporting the clause are the cost to the industry if this provision is made fully retrospective. Their estimate is 7000 agreements at a cost of \$80 million. I have no way of assessing the accuracy of the cost. The change in recent years to the fees/cost structure of ORA's would need to be fully analysed and is beyond the scope of this exercise. I do not take the fact that the figure was not contested in the High Court hearing as agreement on its validity.

Operators argue that the function of the Act is to ensure residents are properly informed of the terms and conditions of the ORA, as opposed to prescribing them. The purpose of consumer protection legislation is to safeguard against unfair practices and outcomes.

The Act and the Code need to be workable for both residents and operators and as argued by the operators industry 'buy in' is essential for this to happen. I regret that this has not been the case and that if anything relations between operators and residents have in some villages deteriorated since the RVA - High Court decision.

There were suggestions to distinguish in the Code dependent on who received the capital gain on the sale of a unit with the refurbishment costs being carried out by the beneficiary of the capital appreciation. I do not believe the Code can impose any artificial contractual

term on the issue of the sharing of capital gain as proposed by some residents. Equally I believe it to be unfair for operators to have significant capital deductions, such as 30%, and to also take a deduction for refurbishment.

The suggestions by residents that before they would accept paying for refurbishment costs there needs to be a transparent process, clear definitions, a cap on the total cost, and a sharing with the operator of costs where they do not share in the capital gains from the sale, or their other exit payments are significant.

If there was to be an ability to apply for an exemption to this clause it is important that the refurbishment process is clearly defined. The sub paragraphs in clause 49.1.a-c could be rewritten to require that only the actual cost of refurbishment is paid for, an independent quantity surveyor to certify the actual expenditure made, and there is a limit on the amount spent (apart from rectifying any damage).

Recommendation:

- I do not support the 2008 Code wording of clause 49 but do recommend enhancement to the exemption process. As this clause is of concern to both operators and residents it is important that it be addressed carefully. An exemption process could be run by a nominated person (such as a retired ombudsman/judge). Clear criteria could be developed and cases placed before this adjudicator. Over the next few years the need for this process will decrease and finally not be required.
- DBH should develop a clear exemption process and reword clause 49 to provide a clear pathway for dealing with actual refurbishment costs.

Clause 50: Submissions on this clause were trying to improve the communication process over the sale or disposal of a unit. I am conscious of the need to make this process fit with the range of practices that exist, for example, operators that use an independent registered valuer at the beginning of the sale process. Where some of those concerns can be addressed by clarifying the wording I suggest DBH do so.

Clause 51: The suggestion to shorten the period before which a dispute can be taken to six months is more properly addressed by a review of the complaints process as part of a review of the Act.

Clause 52: There were suggestions to clarify the wording of this clause which I agree is unclear and ambiguous eg using the terms “fair market value” and “market value” instead of “current market value”.)

Recommendation: DBH should review the process of valuation with the New Zealand Institute of Valuers since the proposed wording is unclear and inconsistent.

Clause 53: The submission by the RVA and others on this clause concerning fixed deductions proposed a grand parenting clause.

Recommendation: I support clause 53.3 in 2008 Code as it reflects a fair outcome for residents.

Clauses 54-56 Communicating with residents for whom English is a second language

Recommendation: We support clause 55 as written in the 2008 Code.