

3 August 2018

Retirement Living
Property Council of Australia
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By email: retirementliving@propertycouncil.com.au

To Whom It May Concern,

Submission on the proposed *Retirement Living Code of Conduct*

Thank you for the opportunity to provide our feedback on the *Retirement Living Code of Conduct* (the **Code**).

Caxton Legal Centre's Park and Village Information Link (**PAVIL**) has a particular interest in participating in this discussion, given our ongoing advocacy for better legal protections for residents of retirement villages and residential parks across Queensland.

Background

PAVIL is a community legal service that has been funded by the Queensland Government's Department of Housing and Public Works since 2014. The aim of our service is to provide increased housing security to Queenslanders living in retirement villages and manufactured home parks, by assisting them to:

- understand their rights and responsibilities under the relevant legislation;
- build capacity to present their interests to village and park operators; and
- have increased access to appropriate legal advice services.

PAVIL's services include the provision of legal advice, information and referral services to assist consumers and resident groups to resolve issues with village and park operators.

For these reasons, our submission is aimed at addressing issues that we have identified as being of concern to residents, based on our experience in delivering these services.

In addition to our client work, we are also involved in ongoing consultation with other stakeholders (including the Queensland Government Department of Housing and Public Works, resident advocacy groups, seniors organisations and industry representatives) who contribute to the development of legislation and policy in this area. We have shared our feedback regarding the draft code with some of those stakeholders, and note that a number of resident advocacy organisations have expressed their support for this submission.

Comments on the draft code

From the outset, we acknowledge it is positive to see the retirement living industry attempting to introduce methods of self-regulation to improve standards for residents. There are some aspects of the code, such as the complaints handling process, which include practical measures that will improve the lives of residents in retirement living communities.

However there are many sections of the code which do little to improve on the existing legislative framework. It is also clear that this move towards self-regulation has been adopted in response to negative media attention surrounding the industry, and is geared towards repairing the reputation of operators (and reducing the need for legislative intervention), rather than genuinely addressing the concerns of residents.

In this regard, it should be noted that the effectiveness of any self-regulation model will depend on the extent to which it can be monitored and enforced. Our overarching concern with the code in its current form is that it does not contain adequate monitoring and enforcement mechanisms. This means there is a real risk that certifying operators as signatories to the code will be tokenistic, and potentially even misleading to consumers.

Aside from those general comments, our specific suggestions for improvement are set out below.

A General Provisions

A1 Overall

*A1.1 As a signatory to the Code, we will comply with the Code Commitments in relation to our Retirement Communities. **Our activities will be consistent with the spirit of the Code and we will not bring it into disrepute.** We will readily implement any relevant guidance from the Code Administration Committee (CAC) on Code compliance matters.*

It is recommended that further background information be included about the “spirit of the Code” to give some clarity as to what this means in practice. The general provisions of the code should define the “spirit” or guiding intentions, to assist with its interpretation. In the absence of any such definition, the statement is vague and lacks any real meaning.

A1.2 In all our dealings with our current, potential and future residents, we will act with integrity, and in a professional, reasonable, fair, transparent, and non-discriminatory manner.

Again, it is noted that the standards set out under this section of the code are rather vague, and do not clearly specify what it means to act with “integrity” or in a “professional, reasonable, fair, transparent, and non-discriminatory manner”. If the industry is suggesting that this creates greater expectations than what is already set out under the legislation, there is a need to elaborate on these standards and describe what is expected. For example:

- acting with integrity may mean “going beyond mere compliance with legislation, taking into account ethical factors in making decisions about the day-to-day operation of the retirement living community, recognising and respecting the dignity of every individual living in a retirement living community”;
- acting in a professional manner may mean “adhering to policies and procedures, ensuring staff act with a level of professionalism with regards to the way that they present themselves and communicate to residents, being open and honest in dealings”;
- acting in a way that is reasonable or fair may include “only charging fees that can reasonably be justified for services provided, taking individual circumstances into account when making decisions”;
- being transparent may mean “being open and honest in dealings, disclosing and/or avoiding any conflicts of interest, providing reasons to substantiate decisions made, ensuring financial records are made available for inspection”; and
- acting in a non-discriminatory manner may require operators to implement anti-discrimination policies and arrange for their staff to participate in training activities such as unconscious bias workshops, cultural awareness training and other activities aimed at improving engagement with elderly people, those with disabilities, and culturally and linguistically diverse individuals.

A2 Monitoring Compliance with the Code

*A2.1 We will nominate a **suitably trained** Code Compliance Officer who will:*

- a) Provide a first point of contact for our residents and stakeholders and the Code Administration Committee (CAC) on Code compliance matters.*
- b) Maintain an overview of the implementation of the Code across all our Retirement Communities.*
- c) Communicate information on the Code, and any guidance on compliance matters from the CAC, to residents and staff in our communities.*
- d) Ensure that we implement any guidance from the CAC on compliance matters and any future amendments to the Code, by amending our materials, processes and systems, as necessary, as soon as possible.*

The requirement for a Code Compliance Officer goes some way towards creating a mechanism for self-regulation, however further detail needs to be provided in the code as to what actually amounts to suitable training for this role. In addition, it should be specified that the Code Compliance Officer should not be involved in a managerial role at a particular retirement community, to ensure that the position is somewhat independent from management.

A2.2 We will internally audit our own compliance with the Code annually, act to rectify any failings as necessary and provide written confirmation to the CAC of compliance. The Annual Compliance Certificate form is contained in Appendix A of this Code. We will foster and encourage a culture of continuous improvement with a focus on quality outcomes for residents.

This process allows for operators to conduct their own internal audits, and merely requires them to “sign off” to certify compliance. In our view, these arrangements are insufficient and would not provide for the level of accountability or transparency that is needed to give legitimacy to the code.

There is clearly a strong need for some kind of external monitoring by the CAC committee, which perhaps could involve the appointment of CAC “investigators” who have the power to conduct unscheduled audits, meet with Code Compliance Officers to review compliance measures, or receive reports of complaints made against operators and investigate issues of concern. If CAC signatories are genuinely interested in improving their reputation by subscribing to the code, then it is surely in their interests to be able to demonstrate that there are meaningful monitoring and compliance regimes in place.

A3 Promoting the Code of Conduct

A3.1 We will inform residents and stakeholders we subscribe to this Code and make them aware of its benefits. In particular, we will:

- a) Reference we are a Code signatory in our marketing materials;*
- b) Display the Code Compliance certificate prominently at our Communities;*
- c) Make the Code available via our website;*
- d) Make hard copies of the Code available to residents free of charge upon request.*

In addition to the activities listed under section A3.1 to promote an operator’s compliance with the code, the code should make it mandatory for operators to disclose their status as a signatory to the code in any legal proceedings between a resident and operator (to the extent this is relevant and permitted at law). This is so that the relevant court or tribunal may take into account the operator’s status as a signatory to the code, if this is relevant to the assessment of an operator’s involvement in the dispute. For example, if a resident brings a claim against an

operator alleging unconscionable conduct, the standards set by the code may be relevant in judging the operator's conduct.

A4 Handling and resolving complaints

A4.8 We will follow a cascading complaints-handling policy, which allows complaints to be escalated in a way that seeks to resolve them in a cost effective and efficient manner that is fair and reasonable to all parties. The escalation pathways will be detailed in writing in our policies. This Code does not preclude an operator from offering or maintaining additional complaints handling and dispute resolution processes. However, the escalation pathway should include the following stakeholders:

- a) The manager of the Retirement Community;*
- b) A senior manager or executive of the operator who is not the manager of the Retirement Community;*
- c) The Code Administration Committee (CAC) for its referral to an external independent dispute resolution service, procedures and processes which are outlined in Appendix H.*
- d) The relevant statutory authority*

In our experience, many elderly people find it difficult to approach a village or park operator to attempt to resolve a dispute. This is often because they perceive the operator to be in a significant position of power (both in terms of their financial resources and their ability to exercise control over the resident's living situation). We also encounter situations where communication issues or stubborn approaches to management mean that operators will refuse to negotiate with a resident or even respond to a complaint. This can result in unnecessary escalation of an issue that should be able to be resolved through negotiation or mediation.

In our view, the concept of a confidential complaints-management system and escalation process for complaints will ensure that disputes are handled by operators in a professional manner, and allow for complaints to be reconsidered at different levels.

It is also suitable that this process allows for complaints to progress to an independent dispute resolution service. However, it is not clear why a matter needs to be forwarded to CAC before being referred to an independent dispute resolution service. In Queensland, the Department of Justice and Attorney-General's Dispute Resolution Centre provides a free mediation service that could be accessed by residents or operators without the involvement of CAC.

We are also concerned that the non-mandatory aspect of the complaints handling process will, to some extent, render it meaningless. It is our view that any operators who subscribe to the code should confirm that they will follow this process before commencing legal proceedings.

A4.11 We will respect and cooperate in the same way with an intermediary acting on behalf of complainants as we would with the complainants themselves.

In the past we have dealt with situations where an operator or manager refuses to talk to a resident's legal representative, despite the fact that the resident has specifically asked them to direct any future communications to that legal representative. Section A4.11 addresses this issue. We would recommend that section A4.11 be extended to also clarify that the operator will not oppose the resident being legally represented at any alternative dispute resolution or legal proceedings in relation to a complaint, as this would go some way to addressing the imbalance of power between residents and operators.

B Moving into the Community

B2 Contracts and terms and conditions

B2.2 We will encourage all potential residents to seek independent legal advice before signing a contract to purchase a residence, and that this advice should be in a language they understand. We encourage potential residents to share this information with family members and trusted advisers.

We support the requirement for operators to recommend that prospective buyers seek legal advice before signing a contract. This section could be improved by adding a further term that prohibits operators from referring individuals to certain legal advisors.

We also suggest that an additional section be added with similar provisions relating to financial advice, so that prospective residents are also encouraged to see an accountant or adviser before making their decision.

Managing relationships with residents and stakeholders

C1.2 We will invite feedback from residents (in the form of a survey) on our facilities and services, including those provided by any contractors, at least once a year. We will report back to residents on the findings and on any resulting actions. If we cannot act on any suggestions we will explain why.

The wording of any such survey should be developed by resident advocacy groups rather than industry groups, to ensure that the survey is conducted in an impartial manner and is not simply reinforcing what has been described as the 'happy resident' myth (as per previous criticisms of industry self-survey methods). This will allow the surveys to be used as another method of monitoring operators.

C2 Managing our staff

It is suggested that the code should also require signatories to conduct background checks to ensure that their employees/agents/representatives involved in the management or operation

of a retirement living community (including sales and promotional roles) do not have relevant criminal convictions. In our view this is necessary to ensure that elderly people who may have particular vulnerabilities are protected from exploitation and abuse. The wording of such a term could be easily modelled on section 88 of the *Retirement Villages Act 1999 (Qld)*.

C3 Managing property and safety

In our view, this section of the code should contain an additional term recognising that many elderly people suffer from an impairment or disability of some nature, and on this basis operators must ensure that if any reasonable adjustments are required by residents to improve accessibility in the retirement living community, these must be dealt with as a matter of priority.

Leaving the Community

D1 Clarity of contracts

We recommend that an additional section be added under this part requiring operators to explain the resale process to prospective buyers. In particular this should acknowledge that delays in re-selling a resident's home may affect their ability to access any capital that they have invested in the home.

We have noted that many of our clients are economically and/or socially disadvantaged in some way. As elderly members of the population they may be particularly vulnerable to exploitation, with the majority being dependent on the Centrelink Aged Pension, and many having disabilities or impairments associated with old age. For this reason, we recommend that operators should commit to taking into account circumstances of financial hardship during the resale process, and genuinely consider whether early part-payment of exit entitlements or buy-back offer can be made to ease the financial burden on former residents who are struggling financially.

D2 Communication

<p><i>D2.3 Where we are undertaking the re-sale and marketing, we will keep outgoing residents, their guardians or their estates regularly updated with information about the number and timing of prospective purchasers.</i></p>
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In addition to the obligations under D2.3 (which really only reflect the current position at law), there should be a requirement for operators (when acting as sales agents) to use their best endeavors when providing the services of a sales agent, and avoid any conduct which could be viewed as prioritising the sale of newly built homes over secondhand/pre-loved homes.

Administration

Code Adoption and Code Register

All retirement village operators are encouraged to subscribe to the Code.

It is our view that this should also extend to operators of land lease communities, who should also be encouraged to subscribe.

In addition, we recommend that the costs of subscribing to the code and ensuring compliance should be borne as an out-of-pocket expense of the operator itself – and should not be subsidised by resident contributions. Accordingly there should be an additional term which confirms that signatories must maintain transparent records to demonstrate that this is a cost that is borne by the operator directly, and not subsidised by residents.

Self-Assessment and Compliance

As noted above, our view is that the process for self-assessment and certification is inadequate. We recommend that there should be a mandatory requirement for signatories to report any incidents of non-compliance to CAC as soon as they are brought to the operators' attention, and this should inform any future auditing/investigation by CAC to monitor compliance.

The CAC's Involvement in Complaints

If resolution of a complaint at the community or operator level fails, a complainant or operator can escalate the matter to the CAC. The CAC will handle complaints according to its own complaints handling procedure (outlined in Appendix H: Code Administration Committee Charter).

It is unclear why complaints that have been forwarded to the CAC must be handled according to the CAC's own complaints management system before progressing to an independent dispute resolution service. In our view, this only serves to delay the resolution of a matter and add an unnecessary layer of bureaucracy to the complaints management process.

Escalated complaints need to be made in writing to the CAC. Certain types of complaints (such as resident-to-resident complaints) will not be handled or recorded by the CAC.

The term "resident-to-resident complaints" should be clearly defined here, as there are many situations we have encountered where residents may have a complaint regarding the behavior of another resident, but the actual legal issue involves an operator's failure to take any action to manage the dispute (despite having legislative obligations to do so).

The complainant and operator (the "parties") must both agree to the selection of the independent dispute resolution service, which will be charged at the agreed commercial rates and the costs will be borne by the parties in an agreed ratio.

In our view it is unfair for any costs of dispute resolution to be borne by residents, when any such dispute resolution process would be initiated by the operator (and it is their own decision

to subscribe to the complaints management process under the code). In any event, the nominated dispute resolution service provider in Queensland is a free government service which should allay any concerns raised by operators about cost.

Disciplinary action for non-compliance

In cases of gross repeated non-compliance, including those arising out of relevant proven criminal activity, the CAC will remove a signatory from the Code Register.

It is submitted that the concept of “gross non-compliance” should be better defined, and certainly not restricted to issues involving criminal activity. For the code to carry any kind of weight and adequately reflect a higher standard of service provided to residents (than that which is already required at law), any instances of non-compliance should be treated seriously and removal from the code register should not be threatened as a “last resort” punishment, but rather a quality control process.

Appendix D – Guidelines for Complaints Management in the Retirement Community

Scope of complaints

- 3.4 *A complaint management system may prescribe the circumstances where a complaint will not be considered or may be stopped by the operator. These include:*
- (a) The unreasonable conduct of a party in making:
 - (i) repetitive, vexatious, unsubstantiated complaints;*
 - (ii) using inappropriate, derogatory or crude language;*
 - (iii) fanciful, irrational complaints;**
 - (b) The failure of the complainant to cooperate or respond to reasonable requests of the operator during an investigation.*
 - (c) The parties issuing or tendering correspondence or writing that is defamatory towards the operator or any of its employees.*
 - (d) A party seeks information in relation to another person that could constitute a breach of that person's privacy.*

We appreciate that the code is attempting to create some reasonable limits to the scope of the complaints management system. However section 3.4(c) here is of particular concern, as we are familiar with situations where operators will simply refuse to deal with a matter because they consider a complaint to be “defamatory” (with little regard to the legal definition of defamation and whether the complaint falls within that category). Section 3.4(a) already

provides for the dismissal of unreasonable complaints and, in our view, is more than adequate for this purpose.

Management of the parties to a complaint

6.1 Parties to a complaint must respectful, courteous, reasonable and fair manner. The operator may at any time stop a complaint process if parties fail to act in a reasonable manner.

We are concerned that the wording of section 6.1 is ambiguous and gives the operator too much control over the complaint management process. It should be recognised that when people have legitimate complaints about their living situation, they may act in a manner that is perceived to be unreasonable, rude or unfair, due to the stress involved in bringing such a complaint. Retaining the current wording of section 6.1 would provide operators with the ability to discretion to discontinue a complaint simply because they do not agree with the complainant's view or manner of communication.

Appendix F – Complaints Form

In our view the complaints form is unnecessarily complex and legalistic. That document has been based on a form used to initiate legal proceedings in the Queensland Civil and Administrative Tribunal, which is a document that we often have to assist residents with drafting because they find it difficult to complete themselves. Requiring complaints to be lodged in this format also disadvantages those with literacy issues or where English is not their first language.

It is submitted that there should not be a specific “complaint form” that needs to be completed by residents, but rather residents are able to set out their complaint in written correspondence to the operator, which then initiates the complaints management process.

Conclusion

Thank you for providing us with the opportunity to share our feedback on the draft code. This submission was prepared by Caxton's PAVIL lawyer, Brittany Smeed.

Should you wish to discuss any aspect of this submission, please do not hesitate to contact our office.

Yours faithfully



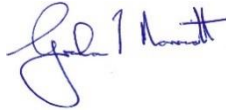
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Addendum

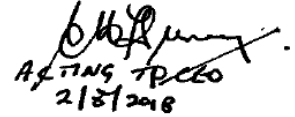
The following organisations confirm that they support the submissions of Caxton Legal Centre Inc. as set out in this letter: the Association of Residents of Queensland Retirement Villages (**ARQRV**), Associated Residential Parks Queensland (**ARPQ**) and Tenants Queensland (**TQ**).



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