

**Retirement Villages Act 2003 Monitoring Project:
Disputes Process**

**Report 2: The Practice, Experience and Views of Dispute
Resolution**

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1 INTRODUCTION

This report is one of two reports produced for the Commission for Financial Capability's (the Commission) monitoring project on the dispute resolution process set out in the Retirement Villages Act 2003 (the Act). The first report presented a comparative review of dispute resolution processes in retirement village and retirement housing in jurisdictions beyond New Zealand, in Australia and the United Kingdom. This report focuses on the practice of retirement village dispute resolution as formally set out by the Act.

This report consists of:

- A case study of disputes where a dispute notice has been issued. This involved a paper-based analysis and interviews with the parties in cases where they were available and agreed to participate.
- Residents' and operators' awareness, understanding and views of complaints and disputes processes.
- The experiences and views of key advisors to residents and operators – statutory supervisors and lawyers – on complaints and disputes processes.

This report is structured as follows:

- Section 2 sets out the approach to monitoring the dispute resolution process.
- Section 3 provides an overview of the key themes and findings of the monitoring project.
- Section 4 presents findings from case studies of the 23 disputes where a dispute notice was issued.
- Section 5 explores residents' awareness, understanding and views of complaints and disputes. Data was gathered through focus groups, interviews and surveying.
- Section 6 explores operators' awareness, understanding and views of complaints and disputes. Data was gathered through focus groups, interviews and surveying.
- Section 7 presents information from interviews with statutory supervisors.
- Section 8 presents information from interviews and surveying of lawyers with knowledge about the retirement village sector.

2 MONITORING PROJECT SCOPE, OBJECTIVES & DATA COLLECTION

The dispute resolution process is one of the statutory protections established in the Retirement Village Act 2003. Effective provision of that protection requires that:

- Residents are aware of and can activate dispute resolution processes.
- The independent dispute panel is seen as providing transparent, timely, credible and fair deliberations.
- The framework and process for dispute resolution take into account the needs of residents and operators and their mutual interests in ensuring retirement villages provide a sustainable living environment, and take account of other contractual agreements, the Code of Residents Rights and the Code of Practice.

This section briefly discusses why the Commission is interested in monitoring complaints and the formal dispute process and summarises the methods used to collect data for this report.

2.1 Commission Monitoring, Project Scope and Objectives

The Commission has a responsibility to monitor the operation of the industry and regulatory settings and whether they deliver adequate protection for residents and support the viability of the sector. This monitoring project focuses on the operation of the structures and processes for dispute resolution set out in the Act and regulations. Briefly, that process requires operators to have a written policy and procedure within their village to deal with complaints (a complaints facility). If a complaint cannot be resolved, the matter may require resolution by a dispute panel established in accordance with provisions in the Act and in the Retirement Villages (Disputes Panel) Regulations 2006. The Commission administers the dispute process and approves the list of people that can be appointed to a panel.

The aim of the monitoring project is to assess the level of effectiveness of the formal dispute resolution structures and processes. It is intended to provide a resource for the Commission and those involved in retirement villages as advisors, consumers or operators. The key objectives of this monitoring project are to examine:

- Levels of understanding among residents and operators of the dispute process.
- Experiences of those who have used the dispute process including residents, operators, dispute panellists, statutory supervisors and lawyers.
- Users' assessment of the effectiveness of the dispute process in resolving issues.
- Whether the dispute process achieves the aims of the Act and protects residents' interests in the village.

The following parameters have been used to frame the project:

- Both the village complaints facility and the dispute process as set out in the Act are examined.

- The focus of investigation is on the adequacy of structures and processes of dispute resolution.
- The project does not review the substance of the matters disputed or the outcomes of disputes processes.
- The project does not review the efficacy of village policies, practices or contractual arrangements that have led to the dispute.

2.2 Data Collection

This monitoring project has sought information on both ‘disputes’ and ‘complaints’. There are two reasons for this approach. Firstly, the Act includes provision for dealing with complaints through a procedure within the village, as well as disputes through the dispute panel. Together those provisions offer a framework within which residents and operators can resolve issues. Secondly, there is an obvious relationship between complaints and disputes. If a complaint is not dealt with fairly and to the satisfaction of parties, it may then become a more serious dispute.

For data collection and analysis, a clear working definition of complaint and dispute was required. The term ‘complaint’ refers to an issue or matter that a resident brings to the attention of the manager or operator for resolution. A complaint denotes that an issue has reached a level of sufficient concern for the resident to expect ‘something to be done about it’. A complaint is distinguished from a suggestion or request to the operator. A ‘dispute’ refers to an issue that is the subject of formal dispute resolution.

To assess the efficacy of the dispute resolution process, this monitoring project has sought the engagement of a wide range of stakeholders. Those include:

- Residents and operators who have used the dispute process set out in the Act.
- Retirement village residents.
- Village operators.
- Legal advisors, dispute panellists and statutory supervisors.
- Other key sector groups, government agencies and organisations.

The methods for each component are described in the relevant sections below. All components explore:

- Issues of awareness, understanding and the informational needs of the key parties.
- Opportunities to improve accessibility, transparency, efficient determination and fairness of the disputes resolution process.
- Emerging trends in the nature and protagonists in disputes and opportunities to reduce the incidence of disputes and achieve early resolution.

This report brings together findings from Report 1, the case studies of disputes and the experiences and views of sector stakeholders about the dispute resolution process. It

presents the range of issues and solutions identified by stakeholders and compares them with the principles for dispute resolution set out in Report 1. Those are:

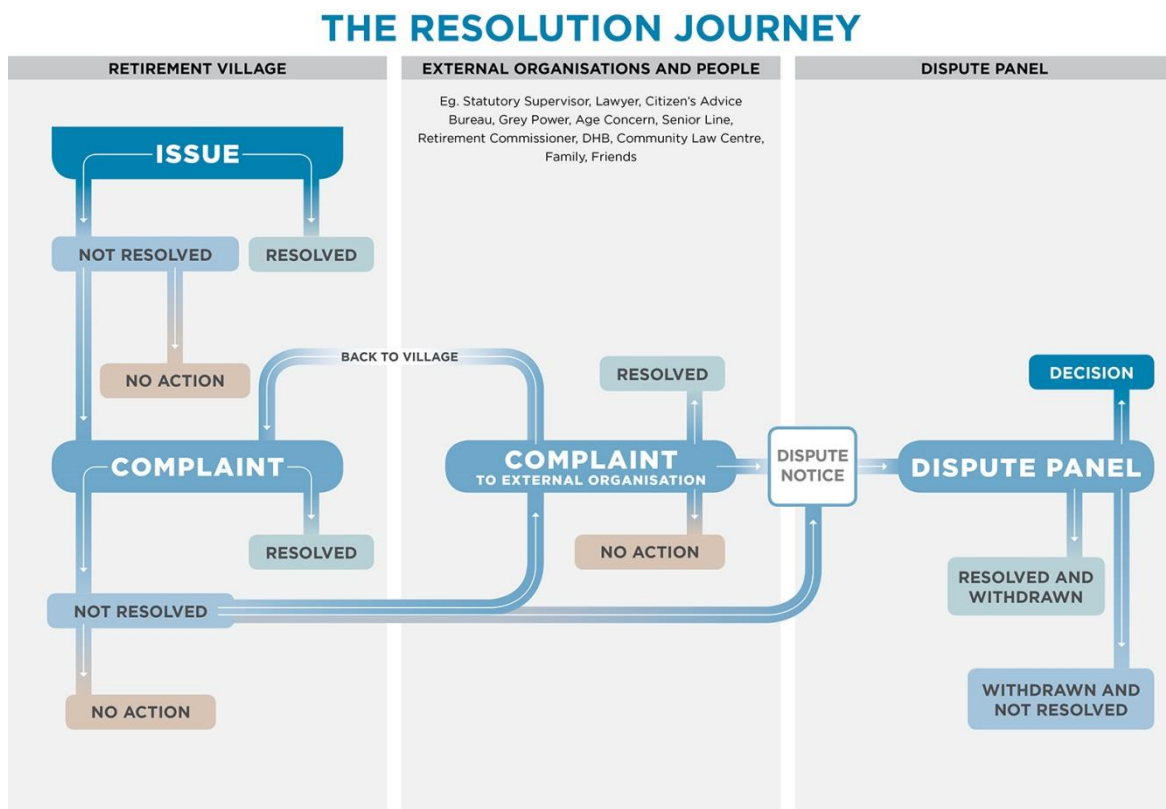
- Prevention and impact – public awareness and education to improve public understanding of housing rights and responsibilities; dispute decisions contribute to service improvement; decrease in the number and recurrence of disputes.
- Access – accessible information about disputes resolution; cost of process does not deter participation.
- Early resolution – availability of advice, referral and assistance to resolve disputes; availability of alternative dispute resolution options.
- Quality and expertise – decision-makers have appropriate technical and professional expertise and meet acceptable service standards.
- Independence – decision-makers are, and are seen to be, independent of parties, impartial and neutral.
- Fairness – procedural fairness; equality of arms; appropriate avenues for appeal or review.
- Efficient and proportionate – speedy and efficient determination; there is a sensible relationship between the resources used and the nature of the dispute.
- Effective – disputes are resolved to the satisfaction of parties and the system produces the right answer.
- Transparency – the process of reaching decisions and reasons for decision are clear.
- Customer focus – meets the needs and expectations of users.
- System coherence – different services and components of the system are coherent and connected.

3 OVERVIEW OF FINDINGS

Monitoring reports that are based on extensive engagement with stakeholders are inevitably detailed and long. For that reason, this section provides an overview of the key themes and findings that emerged from the monitoring project. It also identifies some solutions proffered by stakeholders to the deficiencies they identified in the current dispute process.

This monitoring research has found that what becomes a dispute is part of longer journey (see Figure 1.1 below) in which issues get raised and if not resolved, some may eventually become a dispute as legally defined under the Act. Not all complaints or issues in dispute go into that formal process. Some do not because the issue does not lie within the scope of the statutorily defined process. Others do not because the issue is satisfactorily resolved. In some instances those affected feel unable to pursue the matter. One of the critical findings of this monitoring report is that more effort needs to be given to resolving issues effectively, and by doing so preventing disputes and improving the provision and experience of retirement village living.

Figure 1.1: The Resolution Journey



3.1 Improving Dispute Resolution

Although stakeholders held different views about some aspects of disputes and dispute procedures, there was overwhelming agreement that change is needed to make the current retirement village dispute resolution system more customer-focused, efficient and effective. What people want is to be treated fairly and to have their issue resolved in a timely way. The system must meet the needs of all residents, especially residents who are vulnerable, residents who have impairments that make communication difficult, or residents who are reluctant to complain. Importantly, any dispute resolution system must support the retention and restoration of long-term relationships between residents and the operator. As one operator said, “this village is their home”. This report suggests four areas of focus to achieve an improved system.

Alternative dispute resolution Alternative ways of resolving disputes outside of the panel adjudication process need to be made available and more actively promoted to parties.

Improve current panel process A point of debate is whether retirement village disputes should continue to be handled by the current specialised panel, or whether they would be better handled by an existing tribunal. If the current panel is to be retained, the following areas need attention:

- Parties need more assistance with initial identification of the problem, followed by identification and clarification of the appropriate options and best pathway for resolution of the dispute. The best pathway may be an alternative process, outside of the panel.
- Parties need better information to help them manage dispute resolution themselves:
 - Guidelines on complaints and dispute resolution for operators and residents.
 - Advocacy and advice support to residents to use the panel process.
- Allocation of panel members to disputes by an impartial body.
- Review the need for three panel members to hear certain types of disputes.
- Review the payment structure for panellists, including consideration of a set fee.
- Clarify and promulgate information about how orders will be enforced, and the agency responsible for carrying out enforcement.

Use an existing tribunal

There is some support for using the tenancy tribunal, which already deals with housing disputes, or the disputes tribunal to handle retirement village disputes. There are strengths and weaknesses of both options.

Dispute prevention

A focus on dispute resolution is lacking in the current retirement village dispute resolution system. To strengthen dispute prevention, the following actions should be considered:

- Good practice guides to address commonly-arising issues. These are aimed at improving policy, procedures and service delivery. A useful example is the work of Consumer Affairs Victoria 2012 *Retirement villages: good practice to address key issues*.
- Identifying, codifying and promulgating good practice in village complaints handling and resolution.
- Identifying, codifying and promulgating good practice in consultation.
- Age-friendly documentation for intending residents and residents.
- Promulgation of information on the roles and responsibilities of agencies in the retirement villages sector, and in retirement village dispute resolution.
- Improve public awareness and understanding of retirement village legislation, operator and resident rights and responsibilities.
- A process to collect and use learnings from disputes to address underlying retirement village issues, so that the same disputes do not recur.
- An advocacy and advice service for residents to assist them in understanding their rights and obligations in relation to their contract and legislation.

3.2 The Pattern of Complaints and Disputes

Report 1 presented data on the number of retirement village complaints and disputes in New Zealand:

- Over an eight year period (2007-2014), 23 disputes entered the formal dispute resolution process under the Act. The number of disputes heard by a disputes panel per year has ranged from none to four. Of those 23 disputes, 14 reached a decision. Nine disputes were withdrawn and may or may not have been resolved outside of the panel process.
- In addition to the 3 disputes heard by a disputes panel in 2014, statutory supervisors reported a total of 92 complaints coming to their attention in 2014.

- Three national level organisations – Commission for Financial Capability, Retirement Villages Association, and Citizen’s Advice Bureau (CAB) – reported a total of 49 complaints in 2014 from residents (although this may double count some complaints which were made to more than one organisation).
- In addition, four national level organisations – Age Concern, Consumer New Zealand, Seniorline and Grey Power Federation – received an estimated 122 complaints from residents in 2014. Again, this may double count some complaints.
- The latest random surveying of residents undertaken in April and May 2015 for the advice, information and education (AIE) project found almost 12 percent of residents made a complaint to their village over the last two years.
- The large majority of complaints are made by residents or residents’ families.
- National organisations receive a far greater number of enquiries seeking information and advice about retirement villages than complaints about villages.
- Residents and their families use a range of organisations to seek information and advice and to make complaints about retirement villages. These include the Commission for Financial Capability, Retirement Villages Association, CABs, Age Concern, Consumer New Zealand, Seniorline, Grey Power Federation, District Health Boards and Community Law Centres.

Across stakeholders there is general agreement that the focus of disputes will shift in future. As old contracts used prior to the introduction of the Act are phasing out and there is greater standardisation and clarity around contractual matters, it is expected that disputes around disposal matters, valuation and refurbishment will reduce. Similarly, as more villages move to fee structures with set annual increases or fixed fees then disputes over the method of fee setting and amount of increases are likely to reduce. However, there are other areas of interaction and service provision that may become increasingly issues at dispute in the future. Those include both changes in the nature of protagonists, and changes in the nature of issues.

With regard to protagonists:

- Residents’ increasing expectations about the quality and standard of service, communal facilities, and dwelling amenities may trigger disputes. Future ‘baby boomer’ residents are likely to have higher expectations and a greater willingness to complain than the current cohort of residents.
- Greater involvement of baby boomers in advocating for and complaining on behalf of their aged parents living in retirement villages.
- Complainants with cognitive impairment or mental health issues.
- Parties with enduring power of attorney and trusts that have an interest in the occupation Right Agreement (ORA).

- People moving out of retirement villages. Residents may move for a wide variety of reasons, not simply for residential care. The survey of lawyers conducted for the AIE project found that 48 percent of those lawyers had been consulted by a resident about moving out of their retirement village. In total, 119 reasons were given for clients seeking a move. The most common reason for moving (33 percent) was around a mismatch between the client and the services, amenities or lifestyle they wanted and those provided in a particular village. Over a quarter of the reasons (28 percent) related to moving into residential care.

With regard to issues:

- Complaints about service quality and charges relating to serviced apartments and in-home care. Associated with this, confusion among service users about the appropriate complaints facility to use.
- Disputes about length of time for disposal of a property if market conditions become unfavourable.
- As villages grow older and need upgrading, disputes may emerge around the quality of the village built environment, maintenance expenditure and the length of time taken to sell old units.

The dispute resolution process needs to be able to address the changing terrain of disputes effectively. There is some doubt whether the current structure, scope and practice is adequate to that task.

3.3 Views of Residents and Operators Involved in Disputes

Residents and residents' representatives involved in the dispute resolution process were critical of the current structure, process and practice. Their strong view was that it is: not user friendly for residents; not responsive to residents' needs, situations and circumstances; a process that disadvantages the resident; and often fails to get to the nub of the real matters of concern.

Operators who have used the process were much more positive about it, inevitably because it was generally a successful outcome for them. However, they also identified a number of problems. Like residents, most operators considered the overall experience a negative one.

Neither residents nor operators are keen to use the process again.

Key points:

- Almost all dispute notices have been initiated by or on behalf of residents or former residents. Almost all respondents have been operators. The preponderance of residents as applicants appears to be due to: frustration that the dispute had not been resolved by the operator in a timely way; a strong desire to be heard; a feeling that there is nowhere else to go to for resolution, and a breakdown in the relationship between resident and operator.

- Written decisions and comments from panellists do not indicate that there is a tendency for residents to use the dispute process for vexatious or frivolous reasons, despite this being a concern expressed by some operators.
- All sizes and ownership structures of villages have been involved in disputes.
- The 23 disputes cover a range of issues, but financial matters, particularly around disposal of the dwelling's occupation right have dominated. Most of those disputes related to old contracts prior to the Retirement Villages Act.
- There is considerable variation in use of panellists. Three of the seven panellists have been used in the majority of disputes. One panellist has not been used at all.
- Panellists must not only be independent, but be seen to be independent. Some do not regard the panel as independent because it is paid for by the operator, and there is opaqueness around how the operator selects the panellist. It does appear that the operator consults with the resident about the panellist, but residents also noted that they have no sound information on which to base their choice.
- Fewer residents/residents representatives than operators have used legal representation. The original policy objective, that users of the dispute process would be able to participate without legal representation, has not been realised, and it appears that those without legal representation are disadvantaged when presenting their case in an adversarial process.
- Dispute process users are concerned about the duration of disputes. The median time between the dispute notice and the decision or withdrawal of the dispute is around 5 months. A major cause of delays appears to be the time needed to define and clarify the nature of issues in dispute.
- Outcomes have been more favourable for the operator. In all, 12 of the 14 decisions were fully or substantially in favour of the operator. One decision was fully in favour of the resident and one was substantially in favour of the resident.
- Some believe that the potential to award costs against residents is a barrier to their using the process. Of the 14 disputes with a decision, eight applied for costs and seven of those had costs awarded. Five decisions awarded costs against residents/residents representatives and two decisions awarded costs against an operator. The amount of costs awarded against a party ranged from \$250 (against an operator) to \$8,000 (against a resident's representative).
- The costs of the panel, which operators have the responsibility to pay for, can range from \$9,000-\$20,000 (based on available data). There were differing views on whether the operator should pay for the panel, but generally it is seen as an incentive for operators to resolve disputes. It is also assumed that the operator has a greater ability to pay than the resident, and that expecting the resident to share in the costs of the process may be a barrier to residents using the process.

- None of the interviewed residents/residents representatives felt their issues had been resolved, regardless of whether their dispute had failed, succeeded or had been withdrawn and was deemed to have been settled.
- There was a common view that there is a gap between the village complaints process and the dispute panel, and that alternative dispute resolution should be used to avoid disputes going to a panel. There were different views on the types of disputes suited to the panel and the types of disputes that should be handled in other ways.
- In the absence of clear alternative pathways for dispute resolution, it appears that panellists perform an assessment and attempt to divert disputes they consider should not be, or do not need to be dealt with by a panel. Panellists also appear to be using mediation methods within the panel process to effect resolution.
- There are areas where the Act may be having unintended consequences. For example:
 - Was the relatively high number of instances where costs are awarded against residents expected and intended?
 - The original objective of being able to take a dispute without legal representation has not been realised.
 - Costs of using the process are often disproportionate to the nature and value of the dispute.
- There have been instances where there has not been sufficient role clarity, powers or procedural guidance to address major process problems. For example:
 - The operator delaying appointment of the dispute panel.
 - Lack of enforcement of operator compliance with an order.

3.4 Some Broader Views around Disputes: Residents, Operators, Statutory Supervisors and Lawyers

Although the vast majority of residents and operators have not been involved in a formal dispute process, their views reflected very much the concerns of those who had.

Many residents were not aware of the dispute process. Those who were, argued for two changes:

- Independent appointment of the panel.
- Re-design of the process to make it user- and age- friendly.

Among residents there was general support for the operator paying the costs of the panel. There were mixed views about the potential for the resident to have costs awarded against them. There was some disquiet, because of the disparity between the typical financial situations of a resident vis a vis an operator. But on balance residents thought that awarding costs is part of the dispute process and it is something that a resident should weigh up in deciding whether to take a dispute.

Residents' suggestions for good practices to prevent disputes

- There is prompt attention to routine service requests.
- Efforts are made to resolve complaints quickly.
- There is regular and relevant communication and information provision.
- Consultation is sincere.
- Multiple avenues are available for residents to raise concerns.
- Residents can raise a matter confidentially.
- Residents can have a support person to help them make a complaint.
- The residents committee gives advice and support to residents to help them with their concerns.
- There is information for families to help them understand the ORA, residents' rights and responsibilities and how the village operates.

The main concerns of operators were the costs of the process and resolution delays. The potential for vexatious or frivolous disputes brought by a resident was also raised. Managers said that they would be extremely reluctant to initiate a dispute, not only because of costs, but also because of reputational damage and disruption to other residents in the village.

Manager's suggestions for good practices to prevent disputes

- Treat the resident with respect and compassion and take their complaint seriously.
- The village manager must be available to residents to discuss their concerns.
- Thoroughly and impartially investigate complaints.
- Thoroughly document complaints, efforts made to resolve them and the outcome.
- Deal with complaints quickly, and if resolution takes time, keep the resident fully informed. Acknowledge the complaint and the response in writing.
- Continuously seek informal feedback from residents.
- Give residents accurate and up-to-date information about what is happening or proposed in the village.
- Provide mentoring, training and professional support to managers to improve how they manage and resolve complaints.
- Talk with the family as appropriate, particularly if that would support the resident and clarify the issue.
- Make strenuous attempts to resolve the complaint 'in-house' if at all possible.
- Monitor the number and nature of complaints.
- Treat complaints as an opportunity to improve services.

Statutory supervisors raised issues about the costs of the process, delays and the lack of alternative processes for resolving disputes.

Statutory supervisors' suggestions for good practices to prevent disputes

- Good governance, financial, management and operational systems.
- Strong communications and consultation practices.
- Strong customer service ethic and practices.
- Deal with complaints in a timely manner.
- Adequate resourcing of the complaints process.
- Well-functioning residents' committees can help both residents and village managers to deal with complaints.

Lawyers agreed that the panel needs to be more accessible and user-friendly for older people. They also thought that the panel is being used for some types of disputes that would be more suited to alternative dispute resolution. Some suggested that the process could be simplified and thought the current process was 'overly legalistic'.

Lawyers' suggestions for good practices to prevent disputes

- Simple, easy-to-understand summary information covering the key aspects of ORAs and disclosure statements, targeted to answering intending residents' common questions.
- Continue to standardise ORAs and terminology across the sector.
- Multiple channels for provision of information to older people, who are not necessarily connected to the internet and like to receive information in written form.
- Sound management systems.
- Good practice in communication and consultation.
- A complaints facility that is designed for older people, particularly those who are most vulnerable.
- Good village practices in dealing with complaints: express concern and genuinely acknowledge the complaint; if at fault, apologise; work on a speedy resolution; fix up the problem so that it doesn't happen again – this may require a new or improved policy or procedure.
- Active residents' committees.
- Provide family members of intending residents and residents with information.
- A willingness of both residents and operators to seek legal advice.

3.5 Views around Complaints Processes

The majority of operators appear to be genuinely committed to addressing complaints quickly and fairly and there is pride in achieving and maintaining residents' high satisfaction with their service. There appears to be widespread understanding among operators of their responsibilities with regard to complaints handling and resolution. Generally complaints policies and procedures are comprehensive and comply with the Act, but weaknesses in implementation were identified by some residents, statutory supervisors and lawyers.

There are some poor communication practices, while a few operators do not appear to welcome complaints and treat residents who raise issues as an irritation. The area requiring most improvement is consultation, as requirements appear to be poorly understood and there is little evidence of good practice.

3.6 Suggested Solutions

In summary, the issues that emerged across all components of the project were:

- The formal dispute resolution process is not user-friendly or fair for residents.
- The dispute panel's perceived lack of independence.
- Insufficient preliminary assessment of disputes to identify issues and the appropriate options for resolution.
- Lack of alternative dispute resolution options, both as an alternative to using the dispute panel, and within the panel process.
- A need for greater resident advice and support in dispute resolution.
- Costs of the process are out of proportion to the nature and value of the disputes.
- A need for better information about agencies with roles and responsibilities relating to retirement villages and dispute resolution.
- There is insufficient focus on dispute prevention and using dispute decisions to improve service delivery.
- Whether it is appropriate to have a dispute resolution process specifically for retirement villages or if parties would be better served by an existing tribunal process.

Table 3.1 brings together the range of issues and solutions identified by those who have used the dispute process and other stakeholders, and maps them against the principles for dispute resolution identified in Report 1. These issues and solutions are, of course, diverse and reflect the different structural positions and interests of stakeholders. As a way forward, some suggested that a workshop of retirement village sector stakeholders be convened to progress solutions.

Where only one stakeholder has identified an issue or solution this is noted. All other issues or solutions were put forward by two or more stakeholders.

Table 3.1: Issues and Solutions

	ISSUES	SOLUTIONS
PREVENTION AND IMPACT	<p>The underlying issue in dispute remains unresolved (residents)</p> <p>Lack of system enforcement of operator compliance with orders</p> <p>Unclear how some decisions contribute to improved management (statutory supervisors)</p>	<p>Proactive monitoring of and enforcement of panel orders (residents)</p> <p>Establish a mandatory audit of retirement village compliance with the Act (residents)</p> <p>Simple, clear guidance on complaints handling and information about the dispute process for managers and staff (operators)</p> <p>Improve residents' information about ORAs, disclosure statement and continue to standardise ORAs (lawyers)</p> <p>Provide information to older people and their families about retirement villages through multiple channels (lawyers)</p> <p>In villages:</p> <ul style="list-style-type: none"> • Good governance, financial and management systems • The complaints process is clear, accessible and appropriately resourced • Prompt attention to resolving residents' requests and complaints • Regular communication with residents • Multiple channels for residents to raise concerns • Improve consultation practices • Treat complaints as an opportunity to improve service delivery • Provide information to families
ACCESS	<p>Lack of information about the dispute process</p> <p>Lack of information to make an informed choice of panel (residents)</p> <p>Deterred from taking a dispute by potential impacts on other village residents if operator passes on costs of process to them (residents)</p>	<p>Provide advocacy and advice support for residents to use the process</p> <p>Provide parties with information about dispute resolution options</p> <p>Provide information about dispute resolution options to family members</p> <p>Ensure operators do not pass on the costs of the dispute panel to residents through village fees</p>
EARLY RESOLUTION	<p>Lack of alternative options for dispute resolution</p> <p>Panel deals with some disputes that should have been dealt with earlier using alternative dispute resolution</p>	<p>Promote mediation and other dispute resolution options as an alternative to the dispute panel, both before and during the panel process</p> <p>Deal with retirement village disputes in the disputes tribunal or tenancy tribunal</p> <p>Establish a retirement villages sector 'visitor' with an advisory role in dispute resolution (residents)</p>

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QUALITY AND EXPERTISE	<p>Little opportunity to de-brief and review (panellists)</p>	<p>Provide professional development for panellists (residents)</p>
INDEPENDENCE	<p>Perception that the panel is not independent</p>	<p>An independent and impartial body allocates panellists to disputes</p>
FAIRNESS	<p>Residents are in an inherently weaker position, as they do not have resources to hire legal representation and are less legally literate</p> <p>Some disagree with awarding costs against residents (residents)</p>	<p>Provide legal advice for residents</p> <p>Dispense with legal representation for all parties</p> <p>Tighten up criteria for awarding costs against residents so that this is done only in exceptional circumstances</p> <p>Abolish ability to award costs against residents (residents)</p>
EFFICIENT AND PROPORTIONATE	<p>Process does not work in a timely way</p> <p>Three person panel is excessive</p> <p>Operators find the process costly</p> <p>Costs are disproportionate to the size and scale of the problem</p> <p>An overly-legalistic approach is cumbersome and does not result in simple solutions</p>	<p>Proactive monitoring of the timeliness and progress of the dispute and step in to expedite it where necessary</p> <p>Establish a set fee for panellists, instead of payment on an hourly rate</p> <p>Charge only a lodgment fee (similar to disputes tribunal and tenancy tribunal)</p> <p>Share panel costs between operator and resident</p> <p>Abolish requirement for a three member panel</p>
EFFECTIVE	<p>Concern whether the process is sufficiently flexible to allow them to use a range of dispute resolution tools (panellists)</p> <p>Are there sufficient safeguards to prevent vexatious or frivolous disputes? (operators)</p> <p>The underlying issue in dispute remains unresolved (residents)</p>	<p>Promote mediation and other dispute resolution options as an alternative to the dispute panel, both before and during the panel process</p> <p>Proactive monitoring of and enforcement of panel orders (residents)</p>

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 RETIREMENT VILLAGES ACT 2003 MONITORING PROJECT: REPORT 2 – THE PRACTICE, EXPERIENCE
 AND VIEWS OF DISPUTE RESOLUTION

TRANSPARENCY	<p>Lack of system enforcement of operator compliance with orders</p> <p>Unclear how some decisions contribute to improved management (statutory supervisor)</p>	<p>Proactive monitoring of and enforcement of panel orders (residents)</p> <p>Provide parties with information about dispute resolution options</p> <p>Provide information about dispute resolution options to family members</p>
CUSTOMER FOCUS	<p>Residents do not find the process user-friendly</p> <p>The process is not age-friendly</p>	<p>Advocacy and advisory service for residents</p>
SYSTEM COHERENCE	<p>Lack of clarity about different roles and responsibilities of the various agencies with a function in relation to the Retirement Villages Act</p>	<p>Provide information to older people and their families about retirement villages through multiple channels (lawyers)</p>

4 CASE STUDIES OF DISPUTES

This section presents the findings from case studies of those 23 disputes where a dispute notice was issued. This analysis is not concerned with the specific details of a case but instead the structure, procedures and practices of the process. Analysis also focuses on the patterns the cases show in relation to the nature of disputes, the characteristics of the parties, and the life-cycle of a dispute. Analysis was largely by review of the administrative records. In addition, some parties involved in the disputes were interviewed and their experiences and views are presented in this section.

This section covers the following:

- Case study method.
- A description of the dispute resolution process as set out in the Act.
- The journey to dispute.
- Number and location of disputes.
- Who is involved in disputes.
- Accessing the dispute process.
- Issues in dispute.
- Appointment and use of panellists.
- Procedures before the hearing.
- Withdrawn disputes.
- At the hearing.
- Duration of disputes.
- Use of legal advice and representation.
- Outcomes for parties.
- Awarding of costs.
- The costs of the panel.
- Alternative dispute resolution options.
- Residents,' operators' and panellists' experiences and views of the process, and suggestions for improvement.

4.1 Method

The case study involves both a paper-based analysis of the disputes and outcomes, and interviews with the parties in cases where they were available and agreed to participate.

The paper-based analysis focused on the 23 disputes with a dispute notice lodged at the Commission. These included both disputes that resulted in a decision (14) and withdrawn disputes where no decision was issued (9).

To gather data about those disputes a systematic review was conducted of all files relating to those disputes held by the Commission. The templates used to compile data are presented in Appendices B and C.

Some parties in the disputes were contacted to find out about their experiences and views on the process. It was difficult to contact all operators and residents (or resident's representatives) involved in those cases. With regard to operators, this was because of change in village ownership or management, resulting in parties to the dispute no longer contactable. Similarly, some residents or the resident's representative were unable to be located. Parties in one dispute were excluded from interviewing because it was considered inappropriate to interview them while there are unresolved aspects of the dispute that the Commission is investigating.

In all, the following were interviewed:

- Eight of the 11 operators involved in the 14 cases with a decision have been interviewed. Four of those operators also had experience of a withdrawn case. Their views and experiences are presented in this section. The views of a wider group of operators, almost all of whom have not experienced the dispute panel process, are explored in Section 6 below.
- Nine residents or the resident's representative (family member or other personal representative) involved in six disputes were interviewed. This included residents who were involved in a withdrawn dispute. The views of a wider group of residents, who have not experienced the dispute process are contained in Section 5 below.
- All disputes panellists were interviewed.
- As part of interviewing statutory supervisors, information on their involvement in a dispute was gathered. Few have had direct involvement in a dispute that has gone to a panel. Their views are included in section 7 below.
- Three lawyers who were involved in disputes have been interviewed. One lawyer who was approached refused to be interviewed. Their views are included in section 8 below.

The reflections of the residents/residents representatives and operators on the extent to which they found the dispute resolution process satisfactory were explored. Both parties were able to separate out their views of the process from their satisfaction (or otherwise) with the outcome. That is, regardless of whether a party succeeded in the dispute, they were able to comment on the strengths and weaknesses of the process itself. Interviews with the parties to disputes focused on:

- Dynamics leading up to the dispute including whether there were attempts to resolve the dispute outside of the formal process.
- The ease of applying for and moving through the dispute resolution process.
- Effectiveness of the process.
- Opportunities to improve processes in relation to:
 - Accessibility
 - Transparency
 - Efficient determination, and
 - Fairness.

- Views around dispute prevention and alternative models of resolution.

Similar matters were canvassed with dispute panellists, lawyers and statutory supervisors.

4.2 Statutorily Defined Dispute Resolution Process

The dispute resolution process set out in the Act is designed to resolve issues between residents and operators. It can also be used to deal with disputes between residents. The Act sets out who may use the process. Those are:

- Residents
- Operators
- Former residents
- A personal representative of a resident.

The dispute resolution process is not intended to be the only pathway by which issues within villages between residents and operators or between residents are to be resolved. Rather the formal process is designed to ensure an orderly mechanism by which disputes can be resolved where they appear to be irresolvable through the more ordinary means of discussion and negotiation between parties. Indeed, the Act requires each village to operate a ‘complaints facility’ for dealing with complaints from residents.¹ There is an expectation that efforts will be made to deal with a dispute through the village process and that the operator has made reasonable efforts to resolve the dispute with the resident.²

Some complaints and disputes will not be dealt with through the formal process set out in the Act. The disputes that can be adjudicated on under the Act are those relating to:

- A resident’s occupation right agreement disputes.
- Disputes alleging breaches of the Code of Residents’ Rights.
- Disputes alleging breaches of the Code of Practice.

The panel may refuse to hear a dispute for various reasons, including that the dispute is frivolous or vexatious, or that the dispute should be heard by a court of law.³

Broadly the disputes resolution process is structured as follows:

The applicant issues a dispute notice. The form in which this is written is set out in the Retirement Village (Disputes Panel) Regulations 2006. The dispute is then heard by an independent dispute panel. The operator appoints one or more people to sit on the panel, selecting them from a list approved by the Retirement Commissioner. The operator is required to consult with the other parties in choosing the panel. In the case of disputes about the operator’s breach of the resident’s occupation right agreement or code of practice in

¹ Retirement Villages Act 2003 section 51.

² Retirement Villages Act 2003 section 52.

³ Retirement Villages Act 2003 section 66(1).

disposing of a residential unit in a retirement village formerly occupied by the resident, at least three panel members must be appointed.⁴

The panel then conducts the dispute resolution process. This includes a pre-hearing meeting or other method that allows all parties to communicate with one another, and the hearing. Hearings are held in public, although there is provision for holding all or part of a hearing in private in certain circumstances. The panel may also prohibit publication of all or any of the hearing proceedings.

The conduct of the hearing is to be done “in a manner that is most likely to ensure the fair and expeditious resolution of the dispute.”⁵ The general principles of law, natural justice and fair process apply. Parties are able to give evidence, and call, examine and cross-examine witnesses.

After the hearing the panel gives a written decision. The panel has certain powers to make orders that parties comply with obligations under the ORA or code of practice. The panel may decide to award costs and expenses to or against any of the parties, and there are certain criteria for making this decision.⁶ The decision is binding and is enforceable as if it were an order of the district or high court. Any party may appeal the decision. The dispute outcome is made public on the Commission’s website.

At any time in the process the applicant may withdraw the dispute by giving a written notice. This must happen before the end of the dispute hearing.

4.3 Journey to Dispute

The diagram presented in section 3 depicts the journey to dispute in a simplified form, outlining some typical steps that might have occurred. Since it is most likely to be a resident who raises an issue (rather than the operator), the journey is described from the position of a resident.

All disputes start as an issue within the village. Some are not resolved and may then be framed as a complaint to the operator or village manager. It is likely that most complaints are resolved within villages. Unresolved complaints may follow three pathways. There may be no action on some. Other complaints may be raised with an external body. A few may become the subject of a dispute notice at that point.

Some residents or their families who are not satisfied with the way their complaint is handled by the operator seek advice about the matter from an external organisation or individual, such as a statutory supervisor, a lawyer or a community organisation.

⁴ Retirement Villages Act 2003 section 60 (4).

⁵ Retirement Villages (Disputes Panel) Regulations 2006 section 20 (1).

⁶ Retirement Villages Act 2003 section 74 (3).

The resident who seeks external advice about their complaint may or may not have it resolved at that stage. There are four possible pathways. The resident can:

- Be referred back to the village operator. The resident may receive some support from the external body to resolve the complaint with the operator.
- Obtain some form of alternative dispute resolution, e.g. through a mediator or use of a lawyer to advocate on their behalf to the operator.
- Issue a dispute notice to the village operator.
- Decide to take no further action.

The last step that an unresolved complaint may take is be adjudicated by a dispute panel. The outcome may be a decision, or the dispute may be withdrawn.

4.4 Number and Location of Disputes

The first disputes were heard by a panel in 2007. Over an eight year period (2007 and 2014), 23 disputes issued a dispute notice. Of those, 14 cases proceeded to a decision, while one further dispute was heard before a panellist and was then withdrawn. In consequence, a decision about that dispute was not issued. In addition, 8 other disputes were withdrawn between a dispute notice being issued and the hearing.

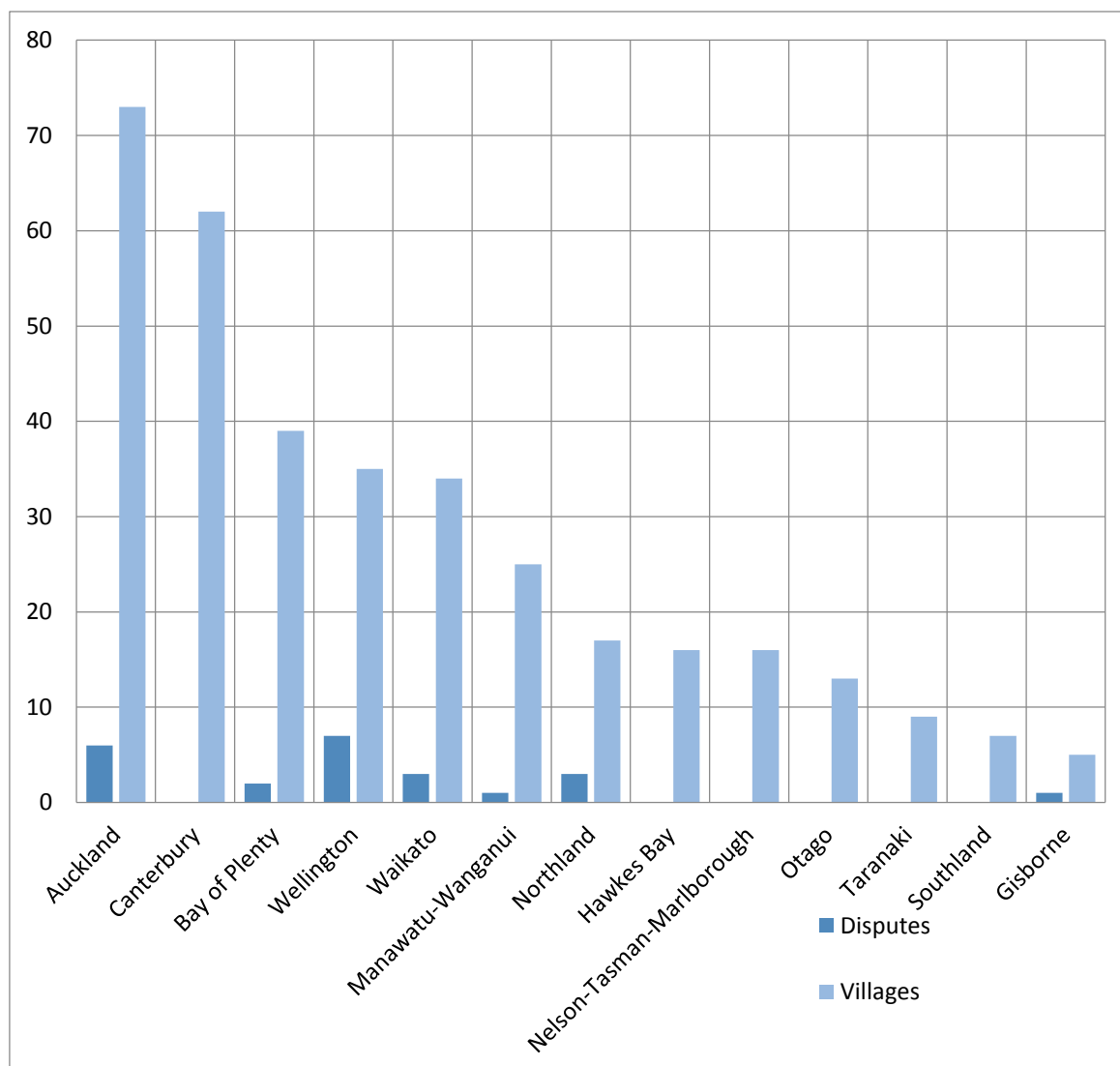
Table 4.1 shows the distribution of disputes between 2007 and 2014. The number of disputes that have been ‘in the system’ per year; i.e. either a decision was issued or the dispute withdrawn, has ranged from one to five. The number of disputes heard and decisions issued per year has ranged from zero to four. This is a ‘point in time’ depiction of the number of disputes per year.

Table 4.1: Number of Disputes by Year

Year	Decision Issued (n=14)	Withdrawn (n=9)	Total (n=23)
2007	4	0	4
2008	1	0	1
2009	2	3	5
2010	1	0	1
2011	1	3	4
2012	0	2	2
2013	2	0	2
2014	3	1	4

Figure 4.1 shows the number and locations of retirement villages and the number and locations of the 23 disputes. Wellington region, with the fourth highest number of villages has had the highest number of disputes, at 7. The region with the highest number of villages, Auckland, has had the second highest number of disputes (6). The rest of the disputes occurred in Waikato (3), Northland (3), Tauranga (2), Manawatu-Wanganui (1) and Gisborne (1).

Figure 4.1: Number and Location of Retirement Village Disputes⁷



4.5 Who is Involved in Disputes?

Tables 4.2 and 4.3 show the composition of dispute applicants and respondents, for those 14 disputes where a decision was issued, and for the 9 withdrawn disputes. Almost all of the applications are initiated by or on behalf of residents or former residents. Almost all respondents are operators.

In over half of the disputes (13), applicants were residents. In seven of those 13 disputes, at least two residents were joint applicants. The largest number of residents involved in a dispute was 23. This dispute was withdrawn. Another withdrawn dispute had nine named residents, and two disputes with a decision had three resident applicants in each. When residents, former residents and resident’s representatives (usually family) are combined, in

⁷ The number of villages in each region is based on 2013 data from Jones Lang LaSalle 2014.

almost all disputes (21 of 23), the applicants fall into the broad category of residents. Only two of the applicants were operators.

Table 4.2: Dispute Applicants (n=23)

Type of applicant	Decision Issued (n=14)	Withdrawn (n=9)
Resident(s)	7	6
Former resident	3	1
Resident's representative	2	2
Operator	2	0

In contrast, almost all respondents were operators. Of the 24 respondents, 21 were operators. In one dispute the respondent was a former resident, and in another dispute, there were two separate respondents; one a former resident and one a family representative of a resident.

Table 4.3: Dispute respondents (n=24)*

Type of respondent	Decision Issued	Withdrawn
Resident(s)	0	0
Former resident	2	0
Resident's representative	1	0
Operator	12	9

* One dispute had two separate respondents.

Reasons given by residents, operators and panellists for the preponderance of residents as applicants included:

- A level of frustration on the part of residents that the dispute had not been resolved by the operator in a timely way.
- The resident's strong desire to be heard. The resident may have a number of grievances that have built up over a considerable period.
- The resident feels there is nowhere else to go to get their concerns resolved.
- Breakdown in the relationship between resident and the operator so that there is no possibility of parties resolving the dispute themselves.

Residents commented:

I would have liked to sit down with the operator but it was their intransigence, they stuck to their view (resident).

The operator would not discuss anything with us, I wanted to sit down with the operator right from the start and they wouldn't sit down so where do you go?(resident).

The main driving force behind my actions was the fact that too many residents were complaining to me of what they considered high handed behaviour and lack of consultation (resident).

I didn't feel there was anyone else to go to for advice, filing a dispute notice was the only course of action to sharpen their [operator's] attention (resident).

Some operators were also mindful of the genuine concerns raised by residents:

There were issues that the resident had which were valid, there was a history in the village of issues arising and not being dealt with ... most were little things that had been festering away ... it was a classic issue that could have been resolved through mediation, he was offered mediation but didn't want it (operator).

We inherited the problem ... there had been plenty of angry meetings with residents. It had dragged on for a long time for them (operator).

Panellists commented on the underlying breakdown in communications between resident and operator:

There was a lot of talking past each other ... I'm not sure that some operators know how to consult properly (panellist).

Often the real problem is not the problem the dispute is about, it's because they [resident] think they have not been treated fairly or by what they thought the agreement was (panellist).

Some people really need to be heard ... there was a history of poor relationships between the resident and the operator (panellist).

Panellists commented that operators try to avoid bringing disputes as applicants, not only for financial reasons, but because of the potential negative reputational effects and disruption to village residents. Operators who were interviewed also commented on this:

The reputation of the village is number one in importance. It can affect the whole industry if you have a dispute.

We are small, have less financial resources at our fingertips, we don't have lawyers in-house. We try to resolve issues before they get to that level.

We only issued the dispute notice because the resident's lawyer was taking such a long time and we wanted to get it sorted ... we would have preferred to settle because it would have been a lot cheaper.

Everybody in this village is affected one way or another ... they know something's going on and they start worrying ... also, people thinking of moving in, they find out about the dispute, it could affect them wanting to live here.

Village characteristics

There were 19 villages involved in 23 disputes. One village was involved in three disputes and two villages were involved in two disputes. The remaining villages were involved in one dispute each.

Twelve of the 19 villages had a decision issued and nine of the 19 villages had a dispute withdrawn (Table 4.4). The village that was involved in three disputes had one withdrawn dispute. One of the villages with two disputes had one of those withdrawn. Seven villages only experienced a withdrawn dispute.

Table 4.4: Villages, Decisions Issued and Withdrawn

	Decision Issued	Withdrawn
Number of villages	12	9

Of the 19 villages involved in disputes, eight are small, two are medium and nine are large villages. Two of the small villages were involved in two disputes each and one of the large villages was involved in three disputes (Table 4.5). Small villages have been mainly affected by disputes involving interpretation of old contracts signed prior to the introduction of the Act. Table 4.6 shows the size of villages in relation to decisions and withdrawn disputes.

Table 4.5: Size of Villages by Number Involved in a Dispute

Size of village	Number of villages (n=19)	Number of disputes (n=23)
Small (under 35 units)	8	10
Medium (35-99 units)	2	2
Large (100+ units)	9	11

Table 4.6: Size of Villages, Decisions and Withdrawn Disputes

Size of village	Decision Issued (n=14)	Withdrawn (n=9)
Small (under 35 units)	6	4
Medium (35-99 units)	1	1
Large (100+ units)	7	4

Operator characteristics

There were 15 operators involved in the disputes. Table 4.7 shows that disputes were spread across corporates, independent for-profits and not-for-profits. In all, six corporates, four independents and five not-for-profits were involved in disputes.

Approximately 66 percent of New Zealand’s retirement villages are corporates, 18 percent are independent for-profit companies and 16 percent are not-for-profits.⁸ Given those percentages, corporate involvement in disputes appears to be under-represented (12 disputes, or under one half). Not-for-profits (7 disputes, or over one quarter) appear to be

⁸ Retirement Villages Association data.

over-represented in disputes. However, this should be treated with considerable caution because of the small number of disputes.

Table 4.7: Type of Village by Number of Operators, Number of Villages and Number of Disputes

Type of village	Number of operators (n=15)	Number of villages (n=19)	Number of disputes (n=23)
Corporate	6	10	12
Independent for-profit	4	4	4
Not-for-profit	5	5	7

Table 4.8 shows the type of village and whether the dispute issued a decision or was withdrawn.

Table 4.8: Type of Village by Decisions and Withdrawn Disputes

Type of village	Decision Issued (n=14)	Withdrawn (n=9)
Corporate	6	6
Independent for-profit	2	2
Not-for-profit	6	1

The six corporates were involved in 12 disputes. Two corporates had three disputes each (including one each withdrawn). Another corporate had three disputes, one that issued a decision and two that were withdrawn. The remaining three corporates had one dispute each. Five not-for-profits were involved in seven disputes. Two of those not-for-profits were involved in two disputes each. Of the seven disputes that not-for-profits have been involved in, four involved disposal issues and old contracts. Some of those interviewed also suggested that small not-for-profits and independents may face governance and management issues that result in or exacerbate disputes. Four independents were involved in four disputes, which covered a variety of issues, none of which involved old contracts.

4.6 Accessing the Dispute Process

Before a complaint can enter the Act’s dispute process, the applicant, which is usually the resident, must be able to access the process. The residents and resident’s representatives who were interviewed said it was very difficult to find out how to access the process. Some were not aware of the complaints process in their village. All but one knew nothing about the formal dispute process. Even the person who was aware of the panel did not find it easy to use the process.

Residents sought help with understanding, accessing and navigating their way through the dispute process from a wide range of sources including: the village statutory supervisor, their solicitor, local Community Law centre, local CAB office, the Retirement Commissioner, the Registrar of Retirement Villages, the Retirement Villages Association, local MP, the Minister with responsibility for the Retirement Villages Act, and Fair Go. Residents had a real impression that if they were not proactive, the dispute would not

progress. This was not only the view of those without legal representation, but also the impression of those with a lawyer.

Comments included:

I didn't know about it. I didn't really have any information. Even my lawyer didn't know what would happen. No-one explained what would happen.

We were shoved from pillar to post. Just went around in circles ... I would have liked someone to advise us and to help us fill in the dispute form.

I was never really made aware of the complaints process in the village, even though I asked them about it ... I was told there was a statutory supervisor.

Those who approached the statutory supervisor for help did not always find this guided them through the process. There was a strong feeling among some of the residents that the supervisor does not have an impartial position and therefore would not necessarily support the resident to access the dispute process.

We did go to [statutory supervisor], no help whatsoever. They are paid by the operator, they're not independent ... approached them several times before putting in the dispute notice, we're actually paying them.

I felt that the statutory supervisor needed to step in, should have had much more involvement ... it should have been taken on board by the statutory supervisor because it was affecting a lot of people in the village ... I talked to [statutory supervisor] about my concerns, I didn't get any information, [statutory supervisor] was a waste of space.

On the other hand, one resident found the statutory supervisor very helpful in explaining the dispute process in the Act, particularly around resident representation.

4.7 Issues in Dispute

The most common issues dealt with through the dispute panels reflect the type of dispute a panel is able to deal with under the Act, i.e., the occupation right agreement (ORA), and breaches of the Code of Practice and Code of Residents' Rights. The 23 disputes since 2007 cover a range of issues, but financial matters, particularly around disposal of the dwelling's occupation right have dominated (11). Other financial matters in dispute have included fee setting and the treatment of GST. In all, 14 disputes concern financial matters. Four disputes have been about the behaviour of residents or manager. Three disputes have related to the provision of facilities or services. Table 4.9 shows the types of disputes.

Table 4.9: Dispute Issues

Issue*	Number
Disposal matters including marketing, valuation, length of sale, refurbishment, on-going charges and exit payments	11
Fees setting, amount and increases	2
Validity of termination of ORA	2
Resident's behaviour	2
Conduct of manager towards resident	2
Residents' expectations around the provision of promised facilities and services	2
Repairs and maintenance to resident's dwelling	2
Treatment of GST in fees and charges	1
Compliance with regulations regarding village bank account	1
Provision of information about village expenditure and budgets	1
Consultation with residents about changes in communal and personal spaces	1

*Issues sum to more than 23 because some disputes concern more than one issue.

Nine disputes related to disposal matters of valuation, refurbishment, ongoing charges and exit payments. All those disputes related to old contracts dating from before the Retirement Villages Act came into force and the requirement of villages to become registered. The Act and associated registration has resulted in village contracts having to be aligned with the requirements of the Act. Since the introduction of the Act contracts have been much clearer about disposal matters, valuation and refurbishment, which had a strong potential for dispute. Small villages appear to have been particularly affected by the preponderance of disputes involving old contracts, as seven of the ten disputes in small villages involved interpretation of contracts that were in use prior to the introduction of the Act.

Multiple issues

As Table 4.9 shows, some disputes involved more than one issue. A cluster of problems was apparent in some dispute notices, for example:

- The resident challenged the ethics, charges and processes in relation to the transfer into residential care. Sought a refund of the majority of charges, plus interest and compensation. Disputed charges upon termination of the ORA including refurbishment charges and resale costs.
- The resident complained about: the length of time to undertake repairs in the unit and payment of cost of replacement of lock; manager's and contractors' entry to the unit without notice; manager intimidation and lack of respect; replacement of resident's appliances without consultation; moving resident's property without agreement.
- Residents' dispute was about the presentation of financial information, information about insurance policy and costs, the use of communal facilities by non-residents, and procedures and delays around repairs to the hot water system.
- The resident's representative lodged a dispute about: what should be subject to valuation for the purposes of calculating exit payment; what is the current valuation method; what

amount are the former residents entitled to? Submitted that the operator failed to provide a copy of the Code of Practice and Code of Residents Rights to existing residents and failed to operate a Complaints Facility or has not advised how to reach this facility.

Multiple issues within one dispute may affect the time taken to deal with the dispute, and contribute to residents' feelings that their dispute is not resolved.

Issues ruled out

In some of the disputes the panel decided that it does not have jurisdiction to rule on an issue. Those issues have included:

- To direct the operator to require the manager to undertake training.
- Provision of hospital and restoration of a rest home to a hospital facility.
- The meaning of the term 'pristine' in relation to delivering the interior of the unit in pristine condition to the operator on termination of the ORA.
- Issues raised in the hearing that were not in the dispute notice.

The lack of a forum to resolve some matters included in a dispute notice may also contribute to residents' feelings that their dispute is not resolved.

4.8 Appointment and Use of Panellists

Currently the Commission has approved seven people to act as dispute panel members. They hold a variety of qualifications and expertise relevant to the role. All except one have legal qualifications. All have mediation, arbitration and/or dispute resolution qualifications and experience. Other tribunal experience panel members have includes the Tenancy Tribunal, Disputes Tribunal, Social Security Appeal Authority, Complaints Review Tribunal, Mental Health Review Tribunal, Building Disputes Tribunal and Weathertight Homes Resolution Service. Most panel members have practical experience in the legal issues involved in the purchase and sale of retirement villages. Some have extensive experience in the resolution of property and construction disputes. One panel member has specific legal experience in working with older people, being appointed by the court to act for the elderly under the Personal and Property Rights Act.

Operator appoints the panel

The operator appoints the dispute panel, and in doing so has a duty to secure the panel's independence.⁹ The panel members themselves must also disclose any interests they have in relation to the operator or resident.¹⁰ Furthermore, the operator must consult the other parties to the dispute before making an appointment.¹¹ These are very important provisions, because being not only free of conflict of interest, but also being **seen** to have no conflict of interest, is critical for the panel's credibility as an impartial decision-maker. However, the

⁹ Retirement Villages Act 2003, section 62.

¹⁰ Retirement Villages Act 2003, section 61.

¹¹ Retirement Villages Act 2003, section 60(2).

appointment of the panel by the operator is one of the most contentious aspects of the process according to residents (see section 5 below).

From information provided by panellists and residents, it appears that residents are generally consulted over selection of the panellist and in two cases the resident chose the panellist. However, those residents commented that they had very little information or knowledge about the panellists, on which to base their choice. As one said, “I didn’t really know who to choose, it was sticking a pin in a piece of paper”.

Use of panellists

Table 4.10 shows the variation in use of panellists. Not all panellists have been equally involved in dispute panels. Three panellists have been used in the majority of disputes. The highest number of disputes that a panellist has been used for is 14. One panellist has not been used at all.

Table 4.10: Number of Times Panellists have been Used

Panellist	Number of Disputes*	Number withdrawn**
A	14	6
B	10	1
C	8	3
D	2	0
E	2	2
F	2	2
G	0	0

*The number of disputes sums to more than 23 because some disputes had three member panels.

**The number of withdrawn disputes sums to more than 9 because some disputes had three member panels.

Reasons those interviewed put forward on the variation in use of panellists included:

- A tendency for panellists who have been used before to be chosen again because they have a higher profile through the published decisions and are perceived to be familiar with the process.
- A tendency for panellists who have found in favour of operators to be selected more often (see section 4.14 below).
- Location of panellists. The three most frequently used panellists have been used in all six Auckland disputes, and also in the eight disputes in areas adjacent to Auckland: Northland, Waikato and Bay of Plenty.
- A preference of women residents for a woman panellist (although only one of the women panellists has been used more than twice).

4.9 Before the Hearing

The regulations state that the panellist must consult parties prior to the hearing on matters including procedure, issues in dispute, evidence and whether the applicant wishes to withdraw the dispute. These discussions can take place at a face-to-face meeting or by teleconference.

Procedural matters cover whether the parties wish to have a hearing or not, and the time and venue of the hearing. Generally parties have agreed to a hearing, although in three disputes parties agreed not to have a hearing. Instead the decision was made on the basis of written submissions to the panel by the parties.

Prior to the hearing, the issues in dispute are identified. Panellists seem to exert considerable effort to clarify the issues in dispute. This process includes identifying the nature and specifics of the complaint, identifying relevant matters and setting aside irrelevant matters. The remedies or solutions sought are also identified. Through those discussions, some issues in the dispute notice are resolved or eliminated. Panellists talked about exploring the issues:

I say ‘what are the issues’, peeling away the personality stuff and grievance feeling. What actually are you wanting? What is the actual problem? Then the operator gets clear guidance about what needs to be resolved and how.

I spent 4-5 hours [before the hearing]. This did reduce the number of issues.

It took a long time to work out what their argument was. It was genuine but mistaken, a flawed argument.

Efforts made by panellists to clarify the issues in dispute and the remedies sought have included:

- Holding several pre-hearing meetings or teleconferences.
- Writing memos to the parties setting out the cases and inviting the parties to comment. One panellist stated to the parties that his own comments made in efforts to clarify issues were not to be viewed as a final decision, but as notes to assist discussion.
- Requesting that the parties circulate information about matters identified in the pre-hearing discussions in order to clarify their issues.

Residents differed in their experiences and views of the pre-hearing communications. Three were dissatisfied. One, who had two teleconferences, said that it was hard to hear and there was no chance to speak as the lawyers dominated the process. Nor was the venue for the hearing discussed with the resident. That person did not appear to have gained a clear idea of how the hearing would be conducted, despite the teleconferences. Another also said that the pre-hearing meeting was primarily for the lawyers to discuss the dispute and “I never really had a chance to say my piece”.

A third resident considered that the use of teleconferencing put residents at a disadvantage (compared to meeting face-to-face) and did not fit with the intent of the Act. The resident also considered that procedural matters were not adequately addressed in the pre-hearing conferences, and thought that the panellist’s focus on discussing the issues in dispute prior to the hearing pre-judged the outcome of the case. Furthermore, the panel member expressed a preference for a resolution without the need for a hearing, which the resident thought removed their right to be heard.

In summary, residents' dissatisfaction with the pre-hearing communication revolved around:

- Inherent difficulties in communicating through a teleconference format. It appears that panellists use teleconferences to speed up the process, however some residents do not find that format helps them.
- Lawyers dominating the discussion.
- A focus on discussing issues in dispute.
- Inadequate discussion of procedural matters.

4.10 Withdrawn Disputes

The pre-hearing stage is the time that the panel must ascertain whether the applicant wishes to withdraw the dispute.¹² In all, nine disputes were withdrawn. Of those panellists that have heard a dispute, all except one have had at least one dispute withdrawn.

Some panellists go to considerable lengths to try to resolve the dispute prior to the hearing, if at all possible. They explained how, without presenting any pre-determined view about the outcome of the case, they ensured applicants understood where their case stood and encouraged them to consider other alternatives to a hearing. For example, in one dispute, the panellist insisted that if the applicants wished to pursue the complaint both parties had to take legal advice. It seems that the applicants took legal advice and then withdrew the dispute. Panellists commented:

People are entitled to know at the outset what chance they have of succeeding ... people are entitled to work out what's going to happen and by having the conversation things become clear. The [family member] went away, thought about it and withdrew. It's getting everyone on the same page.

They get their heads together and resolve it ... pushing their hand and the matter gets dealt with ... the dispute notice is an incentive to get an agreed settlement.

I know some people think it's pre-determination but really it's getting people to understand, especially on some of the stuff I do in valuation, what the outcomes are and why. Sometimes once they understand they can move on.

I bent over backwards to stop it getting to a hearing.

In one instance, the panellist raised the possibility of withdrawing, since the respondent (operator) was prepared to seek other resolution options. However, the residents were advised that even if they withdrew the dispute, the operator would seek costs against them, so they considered it necessary to go ahead with the dispute. One resident said:

¹² Retirement Villages (Disputes Panel) Regulations 2006 section 13 (1)(a).

Yes, did consider withdrawing but the operator said if we withdrew, they would still pursue costs. If the costs had been accepted to lie where they fell, then the residents would have seriously considered withdrawing.

Table 4.11 shows there are some differences in the issues in dispute that were withdrawn, compared to disputes that went to a decision, however the most common issue in both was about resale matters. Withdrawn disputes covered: resale of the unit; fee setting and fee increases; validity of termination of a resident’s ORA; promised services and facilities; village manager’s conduct towards resident; and treatment of GST in village charges.

Table 4.11: Dispute Issues: Decisions and Withdrawn Disputes

Issue*	Decision	Withdrawn
Resale matters including marketing, valuation, length of sale, refurbishment, on-going charges and exit payments	8	3
Fees setting, amount and increases	0	2
Validity of termination of ORA	1	1
Resident’s behaviour	1	1
Conduct of manager towards resident	1	1
Residents’ expectations around the provision of promised facilities and services	1	1
Repairs and maintenance to resident’s dwelling	2	0
Treatment of GST in fees and charges	0	1
Compliance with regulations regarding village bank account	1	0
Provision of information about village expenditure and budgets	1	0
Consultation with residents about changes in communal and personal spaces	1	0

*Issues sum to more than 23 because some disputes concern more than one issue.

Withdrawing the dispute notice can happen at any point after it is issued. The shortest time between issuing the dispute notice and withdrawal was two months. The longest time was 15 months (the hearing was adjourned to see if a settlement could be reached).

Reasons panellists gave for disputes being withdrawn included:

- The resident’s realisation that their dispute was not going to succeed.
- Parties realising that the legal and other costs of the process were going to be considerable.
- Parties coming to an understanding about the issues in dispute and seeing a way for resolution without the need for a hearing.
- The dispute being ‘out of time’ after the dispute notice was issued.

Withdrawn disputes may or may not have been resolved. Files indicate that four of the nine withdrawn disputes were ‘settled’ and one was not settled. No data were available on whether or not any other withdrawn disputes were successfully resolved.

Residents who withdrew one dispute that was reported as ‘settled’ said that they did not feel satisfied that all their issues had been resolved, although they accepted that the matter was

settled as far as the dispute process was concerned. One commented “I felt we got done on the settlement but we were completely worn out”.

Another group of residents who withdrew their dispute did not see it as settled. They stated that they saw no likelihood of their case being successful and therefore pursuing the dispute would be time consuming and futile. They also considered that the problems that lay behind the dispute would persist because of the operator’s “failure to meaningfully consult.”

4.11 At the Hearing

Most hearings were held at the village concerned. This was generally done as a convenience to the residents and operator and so that other residents could attend. One hearing was held at a venue away from the village as that was preferred by the residents for reasons of privacy and a neutral venue. Some hearings incorporated facilities to assist those with mobility and hearing impairment. Generally residents were satisfied with the venue for the hearing, although one person found that the hearing was in premises where part way through a choir started practising, making it hard to hear proceedings.

Residents/residents representatives were very negative about their experience of the hearing. Generally they found it much more difficult than operators to understand and use the hearing process. They were confused about whether they were able to speak, or to ask questions of witnesses.

Some were very positive about the panel member(s) while others were critical. These views were not based on whether they had lost or won the dispute. Positive comments included:

Excellent ... we felt lucky to have got the one we did.

Very good, excellent. Very fair, very clear ... spoke in terms I could understand, even though I lost.

Fortunate in the choice of the panel member who did endeavour to bring some ‘balance of power’, but despite best efforts, the legalities, the legal language and processes required were (sometimes) beyond our capabilities.

In three disputes the residents were not happy with the panellist. They felt that the panellist allowed the operator more time to speak than the resident and did not allow the resident to ask questions. They commented:

[the panellist] aided and abetted the operator.

[the panellist] let the witness for the operator speak at great length ... I thought it was run on a looser format than a court. But any time I wanted to say something I wasn’t permitted.

I could only have a say if the right questions were asked. It wasn't pleasant at all. I felt that we weren't allowed to present all the information.

Operators were generally pleased with the panellist, and for them the way that the panellist conducted the process was the most positive aspect of their experience:

I found the process very good, in the manner of how it worked ... it was about the interpretation of the contract, it wasn't 'he said, she said'. It was tidy, clean because the panel member was good, clear, set out the process, communicated on all the milestones, communicated the timelines and parameters.

A lot comes down to the panel. They have to be able to work through things in a methodical logical fashion. Getting to the nub of the issue is a real art.

The panel member was great. Not formal, helped the residents through their evidence.

Some operators were concerned about the negative impacts of the process on residents involved in the dispute:

I don't think it served the operator well and it definitely didn't serve the resident very well.

You have to have a process that respects the fact that residents are older, they don't have lawyers, they are a bit vulnerable, the panel has to spend the time to find out what it's all about.

The operator has the commercial resources ... they're operating in that space all the time, whereas for a resident it would be pretty difficult.

Panellists were particularly aware of how the process can be daunting for residents and identified the conduct and 'people skills' of the panellist as the most important factors in ensuring a resident-friendly process. They felt there was sufficient flexibility in the process, which does not require court protocols, to help make it more comfortable and engaging for residents, for example by:

- Using a venue preferred by the resident.
- Seating the parties around a table in a less adversarial way than in a court room.
- Explaining procedures and legal terminology in ways that residents can understand.
- Ensuring that the operator and operator's legal representative behave respectfully towards the resident.

4.12 Duration of Disputes

This section considers the time taken to get a decision. Two types of data show the duration of the dispute:

- Time elapsed since the dispute notice to decision, or withdrawal of the dispute notice.

- Time elapsed since complaint lodged to decision, or withdrawal of the dispute notice.

Time between the dispute notice and decision or withdrawal

Table 4.12 shows elapsed times between the dispute notice and the decision or withdrawal of the dispute notice. The shortest time between the dispute notice and the decision was two months, while the longest time was 25 months. The mean was 7.5 months, the median was 5 months and the mode was 4 months (the smallest mode).

The shortest time between the dispute notice and the withdrawal of the dispute notice was two months, while the longest time was 15 months. The mean was 6.5 months, the median was 5.5 months and the mode was 4 months.

Table 4.12: Time between Dispute Notice and Decision or Withdrawal

Duration	Decision Issued (n=14)	Withdrawn (n=9)
0-6 months	9	5
7-11 months	3	2
12-23 months	1	1
2 years or more	1	0
Not known	0	1

Both operators and residents expressed concern about delays in the time between a dispute notice and hearing. Delays do not seem to be caused by panellists spending a long time coming to their decision. Although there is no requirement under the Act for a panel to issue a decision within a certain timeframe, the time lapse between the hearing and the decision has generally been less than one month, although decisions on costs can take longer. The shortest time between the hearing and the decision was four days.

It appears that most delays were related to the need to define and clarify the nature of issues in dispute. In some disputes this took considerable time through pre-hearing meetings and exchanges of written communication between the parties. In a couple of cases delay was unavoidable because of illness. One case was delayed because of proceedings in the high court about whether the dispute should be heard in the high court rather than by a dispute panel. The high court decision was that the dispute panel should deal with the dispute. Once that panel conducted a hearing, the decision followed within two months.

Another reason for delay in one withdrawn case was the need for the panellist to correctly identify the 23 applicants and ensure that each acknowledged their two representatives were able to make binding decisions on their behalf. The panellist achieved clarity around representation by requiring applicants to sign a party identification and agency document. Other panellists who dealt with several resident applicants in one dispute noted a need to spend time clarifying issues with all applicants and ensuring that all received information.

In two instances the delay was seen as unreasonable by residents. In both disputes there was confusion about the correct process to follow. In one, the operator argued that there is no provision for a resident to have a representative lodge the dispute notice. The representative

sought guidance on this point from the Retirement Commissioner, the Retirement Villages Association, the village statutory supervisor and the former Department of Building and Housing, but found it very difficult to get any clarification on the matter. This matter had to be resolved before the dispute process could roll out.¹³ The residents and representative found that this issue increased their frustration and stress.

In the second example, with a 13 month time lapse between lodging the dispute notice and a hearing, there were a number of procedural problems. Delay was in part due to the operator delaying appointment of the dispute panel. Under the Act the operator must appoint a dispute panel within 20 working days.¹⁴ The Registrar of Retirement Villages was made aware of the situation and if the panel had not been convened, this could have resulted in the Registrar using its powers of inspection to ascertain whether the operator was complying with the Act.¹⁵ In this dispute there was also confusion as to whether the dispute should have gone to arbitration, as this was the dispute resolution process set out in the ORA (a contract prior to the introduction of the Act). The resident's representative sought two legal opinions on the correct dispute resolution process and was advised to use arbitration. It was only through contacting arbitrators that the resident's representative was then advised that the dispute should be heard by the Act's dispute panel. The panellist gave an interim ruling eight months after the dispute notice on the panel's jurisdiction to determine the dispute and ruled that the dispute notice procedure should continue.

Time between complaint and decision or withdrawal

Although the Act states that a dispute notice must be given within six months after a complaint was first referred to the village complaints facility, the dispute notice can be given after six months if the parties agree. Also, a dispute notice about disposal of a unit cannot be made before nine months have elapsed.¹⁶ Accordingly, the time lapse between a complaint first being recorded and the dispute notice can be considerable, especially in the case of disputes relating to the disposal of a unit.

There was less data on the date when the complaint was referred to the village complaints facility, so estimates were used in some cases based on file information. For one dispute there was no file information about the complaint history prior to the dispute notice.

Table 4.13 presents the time between when the complaint was made in the village and when the decision was issued or the dispute withdrawn. The shortest time between the complaint and the decision was three months, while the longest time was between five and six years. The shortest time between the complaint and the withdrawal of the dispute was between seven and 11 months, while the longest time was 10 years.

¹³ Any resident's right conferred in Part 4 Dispute Resolution can be exercised by a resident's personal representative – see section 49 of the Act.

¹⁴ Retirement Villages Act 2003, section 59.

¹⁵ Retirement Villages Act 2003, section 97.

¹⁶ Retirement Villages Act 2003, section 57.

Table 4.13: Time between Complaint and Decision or Withdrawal

Duration	Decision Issued (n=14)	Withdrawn (n=9)
0-6 months	2	0
7-11 months	2	2
12-23 months	7	4
2-5 years	2	0
Over 5 years	1	2
Not known	0	1

Impacts of delay

Delays in resolution can have a range of impacts. Just under half of disputes have been about issues concerning the disposal of the unit. Delays in their resolution have financially impacted on residents’ ability to transfer smoothly to higher level care. This can include moving to another retirement village with a higher level of care services, moving within the village into a serviced unit that includes rest home level care fees, or moving into rest home or hospital care. Proceeds of sale of the occupation right are likely to be needed to fund a new occupation right, and will be taken into account in assessing eligibility for the rest home subsidy. Delays can also impact on the settlement of estates.

4.13 Use of Legal Representation

The original policy intent was that users of the dispute process would be able to participate without legal representation. However, both residents and operators who have used the process consider it is important, even necessary to have legal representation. Nevertheless fewer residents/resident representatives than operators used legal representation.

Most operators had legal representation, either their own company lawyer or a lawyer retained for the dispute. Of the 14 disputes with a decision, 12 operators had legal counsel. Of the nine withdrawn disputes, four operators had legal counsel, one did not and it was unclear from the files whether the remaining operators did have legal counsel. Operators commented on why they consider that having legal representation is necessary:

The operator will invest in legal advice because they can’t afford for it just to be a relaxed chat in front of a panel. You have to have a good lawyer and to do it properly.

It’s almost an essential. There’s a lot at stake. You don’t want to use the process lightly. There is a structure that’s quite legalistic. We would never enter a dispute process and wing it on our own. The arguments are technical.

I’m not sure how settlement would have come across without legal representation.

In the 14 disputes with a decision, five residents/resident’s representatives had legal representation. In the 9 withdrawn disputes, five residents/resident’s representatives had legal representation (see Table 4.14).

Table 4.14: Residents’ Use of Legal Representation

Use of Legal Representation	Decision Issued (n=14)	Withdrawn (n=9)
Yes	5	5
No	9	3

Residents/residents’ representatives identified two main reasons for not using legal representation:

- Affordability.
- A belief that the process would allow residents to have their say without needing legal representation.

On the matter of affordability, one resident who had not used a lawyer in the hearing had sought legal advice from their own solicitor and from a Community Law centre prior to lodging the dispute notice. They were not able to spend more money on a lawyer for the hearing. However, they acknowledged they would have benefitted from legal advice in framing the dispute notice and legal representation during the hearing.

Although residents believed the process should allow for self-representation, as two residents explained, they felt ill-equipped to effectively put their case against the operator’s legal counsel. It was not until the hearing said a third resident, that the issues in dispute became clear and he realised that he did not have a case. Another resident commented that the demands of preparing their case and dealing with correspondence were almost overwhelming. The legalistic and adversarial nature of the process was daunting. At the hearing the legal language and processes were difficult to understand, despite assistance from the panellist. At times this resident felt bullied by the operator and legal counsel. In another dispute, one resident recalled, “the operator’s lawyer was quite intimidating, I got really grilled.”

Two residents’ representatives did have lawyers at the hearing, but even so did not find this satisfactory. One person considered that their lawyer was insufficiently knowledgeable about retirement village legislation to represent them effectively. The other person felt they were at a disadvantage because their lawyer did not have the seniority and experience of the operator’s lawyer.

In one dispute the resident and resident’s representative objected to the operator using counsel, particularly senior counsel. The panellist stated that he could not, and did not need to rule on this matter as a party is entitled to use counsel.¹⁷

Panellists differed in their views about the use of legal representation. Some considered that lawyers increase the length of the process, due to the large amounts of material generated, and the ‘over-complication’ of some disputes, while others considered that residents’ lack of legal representation slows the process, because of the need to spend time clarifying issues. Panellists commented that it is difficult for residents to use legal representation because of

¹⁷ Perry Foundation v Waters and Murray 2013.

cost. However they also identified some benefits, including more equitable representation of parties, the resident being able to present a stronger case and facilitating an efficient process. They also pointed out that often the resident expects the panellist to assist them with legal advice, which they cannot do. Panellists commented:

I have seen residents run out of legal advice early on because of costs. Some residents have never thought of using a lawyer and they should have. Lacking legal advice makes it very difficult. I can't raise issues beyond what is on the papers. If they got legal advice they could have developed a more comprehensive case ... it would be ideal if residents could get assistance in preparing their cases. They often miss things out that should be there.

The operator's legal costs have probably been increased in the period where the residents representing themselves and provided information in a form that took longer to comprehend and process than it might have been if they had legal assistance.

Some residents look to the panel for legal advice. You might be able to give them some narrow information but not legal advice ... operators are usually represented so there's a mismatch that you have to deal with. You have to be incredibly even handed and fair ... you've got to be careful that lawyers aren't pulling the wool over the eyes of the other party or that there isn't bullying. Being careful of improper advantage being taken.

Residents often have a lot of trouble explaining the issues, not that it didn't make sense, but they kept adding stuff. Some of it was hard to follow, they didn't have a professional to do their submission. Some can and some can't represent themselves. It depends on individuals ... they kept wanting me to help them. I said, I can explain things for you but I cannot do things for you.

Two panellists cautioned against the process becoming dominated by lawyers and raised the issue of whether the process should be conducted without legal representation. One considered that cases can unnecessarily escalate in time and costs with the involvement of very senior counsel (in one instance a Queen's Counsel). Another panellist considered that the panel is a type of dispute resolution process that is intended to be informal and used without lawyers, however it has been increasingly formalised and routinely involves legal representation. This raises issues of how those who do not wish to, or cannot afford to be legally represented, can participate in a process that is fair and humane.

4.14 Outcomes for Parties

Table 4.15 shows the outcomes of the 14 decisions. Nine of the 14 were fully in favour of the operator. In all, 12 decisions were fully or substantially in favour of the operator. Of the remaining decisions, one was fully in favour of the resident and one was substantially in favour of the resident.

Table 4.15: Outcomes of Decisions (n=14)

Fully in Favour of Operator	Substantially* in Favour of Operator	Substantially* in Favour of Resident/Resident Rep.	Fully in Favour of Resident/Resident Rep
9	3	1	1

*Won on most but not all points.

Why have residents, by and large, not succeeded in their disputes? Some stakeholders expressed concern that there is a pattern of the most frequently used panellists also being associated with decisions made in favour of the operator, and have awarded costs against the resident (see Table 4.16). The dynamics of this pattern are unclear. However, it does tend to fuel a sense that panel appointments may work against residents.

Table 4.16: Number of Times Panellists have been Used, Outcome and Costs

Panellist	Number of Disputes*	Number withdrawn	Found for operator	Found for resident	Costs against operator	Costs against resident
A	14	6	8	0	0	4
B	10	1	9	0	1	5
C	8	3	5	0	0	3
D	2	0	0	2	1	0
E	2	2	0	0	0	0
F	2	2	0	0	0	0
G	0	0	0	0	0	0

*The number of disputes sums to more than 23 because some panels had three members.

Some stakeholders would also see this pattern as reflecting the difficulties residents face in preparing a credible case in what they regard as a very legalistic environment. Certainly, a few decisions suggest that the case brought by the resident was ‘without merit’ in a legal sense. In only two disputes did the panellist note that there was no merit, or not significant merit in the case advanced for the resident. In one of those cases the panellist specifically commented on the courtesy and cooperation of the residents. Furthermore, in interviews several panellists commented on the genuinely held concerns of residents, even though the case might not have merit.

There is no evidence that, despite fears expressed by some operators that they would be subject to vexatious or frivolous disputes, the dispute process is being used in that way. There were two disputes where the operator argued that the resident’s case was frivolous, but in neither case did the panellist accept that argument. In one case the panellist concluded that the issue was important because of general principle and because it was about operator compliance with obligations and accountability to residents for use of residents’ levies. In the other case the panellist concluded that there was sufficient merit in the resident bringing the dispute notice.

Some stakeholders raised the matter of individuals who persistently feel wronged, are perpetually grieved and constantly pursue legal remedies. While panellists did not identify this as a reason why residents lost their cases, two did say that dispute resolution processes

must be able to manage disputatious individuals and to ensure that such cases are adjudicated quickly.

Residents, operators and panellists shared views that often residents' cases do not succeed because of a combination of factors to do with the nature of the case itself and the ability to present a case that is acceptable and convincing within the quasi-legalistic parameters of the panel process. Those factors include:

- An inadequate, mistaken or misinformed understanding on the part of residents or the resident's family about the occupation right contract and the matter in dispute.
- Lack of advice to assist with framing the dispute notice in a way that clearly states the essence of the problem and the remedy sought.
- The remedy sought by the resident cannot be ordered by the panel.
- Lack of assistance to compile evidence and argument that is relevant to the dispute.
- Lack of a skilled person to advocate on the resident's behalf.
- Unfamiliarity with legal terminology, adversarial and legal processes, which puts the resident at a disadvantage when representing themselves.

Residents, operators and panellists talked about these matters:

[the resident] had a genuine concern for himself and his partner ... it was very difficult for him, he presented information that was irrelevant and it was disregarded (operator).

[the contract] was a poorly worded document, it was nothing personal, but it was very personal to them, and probably seen as an attack on their family, rather than a contractual dispute (operator).

I made mistakes ... I didn't have a leg to stand on (resident).

The worst aspect in the dispute was that I was not permitted to amend the wording of the dispute notice, as was therefore denied one of the main elements (resident).

Residents find it confusing to have a strict legal approach. They want more of a mediation arrangement, someone who can talk to them (panellist).

One of the problems is that it's the executors that get into the contractual stuff, often because they just don't know and understand the implications of the contract (panellist).

Appeals

Only one decision has gone to appeal, in the district court. In this dispute the operator was the applicant and the resident was the respondent. The dispute concerned whether or not the valuation for the resident's cottage was binding on both parties. There were also issues around the valuation methodology. The decision was appealed by the resident's relative as by that time the resident had died. The appeal was allowed. In that dispute no hearing had

been held, as agreed between the parties. Instead two teleconferences were held and papers submitted. The judge commented that if a proper hearing had been conducted then other expert valuation evidence could have been called.¹⁸ The court ordered that the matter be sent back to the dispute panel so that a full hearing could be conducted. Eventually the operator and the resident's estate achieved a settlement and the dispute notice was withdrawn before a hearing could occur.¹⁹

Three of the residents/residents' representatives who were interviewed indicated that they had thought about appealing the decision, but could not afford the cost, stress or risk of an appeal. One said that they did not want to repeat a "harrowing experience".

Was there resolution for residents?

For a dispute resolution process to be effective, parties must feel that the issue is settled to their satisfaction.²⁰ Often parties do not consider that the resolution has been effective because it fails to address underlying problems that have been key drivers of the dispute. The dispute may have been settled in a legal or administrative sense, but those problems may not have been able to be resolved within the parameters of the dispute resolution framework.

None of the interviewed residents/residents' representatives felt their issues had been resolved, regardless of whether their dispute had failed, succeeded or had been withdrawn and was deemed to have been settled.

Some disputes involved multiple issues, which may have made the dispute more difficult to resolve, and left residents feeling dissatisfied with the process. Residents also talked about wanting to include other issues in the dispute notice, but being unable to because they were not within the dispute criteria. This feeling of unresolved business was apparent when residents reflected on outcomes:

We got a hall, but the dispute wasn't about a hall, it was about the lack of promised care services.

What was achieved? In the first instance absolutely nothing. The operators continued on their merry way.

There have been a lot of unhappy people when they have left the village because of the old contracts, which were much more favourable to the resident, but have not been treated like that. A lot just walk away and just accept what they get.

¹⁸ CIV-2011-004-002618: *Jacqueline Robinson, Stephanie Loveday v Oceania Village Company Limited*.

¹⁹ See explanation on the Commission for Financial Capability website <http://www.cffc.org.nz/what-we-do/retirement-villages/retirement-village-disputes/dispute-decisions/>

²⁰ Ministry of Business, Innovation and Employment 2014.

A problem with the enforcement of orders contributed to residents’ feeling the dispute remained unresolved. In two disputes residents were frustrated that certain actions had not been carried out by the operator. They asked whose job is it to monitor what happens to orders, whose job is it to enforce orders, and how would enforcement occur. One panellist also raised this matter, and questioned whether a resident is expected to enforce an order against an operator.

This lack of closure was often not only in relation to the dispute, but it also led some residents to voice other concerns about their village and to feel that, because they had initiated one dispute already, further complaints would not be taken seriously.

We are not getting the health support we used to get, it’s being cut back ... the attraction was that it’s a charitable trust, we believe all their decisions will be based on a Christian ethic but it’s not happening.

There was a lot of bullying during the dispute and it’s still going on ... there’s arguments who is liable for certain repairs, the resident or the operator ... there’s a rift with us being treated worse, they’re against us, we are always in the minority ... any time we make a complaint, we’re told, it’s independent living, you have to suck it up and deal with it.

4.15 Awarding of Costs

The dispute process allows for costs to be awarded to or against any party, the applicant or the respondent. Of the 14 disputes with a decision, seven had costs awarded. Costs were not applied for in six disputes. In one dispute costs were applied for and the decision was that costs would be awarded to neither side.

Table 4.17 shows the number of times an award of costs has been made for or against an applicant or respondent, and whether the party was a resident/resident representative, or an operator.

Table 4.17: Costs Awarded Against Parties (n=7)

Party	Against applicant	Against respondent	Total
Resident/resident representative	4 (of 12 applicants)	1 (of 3 respondents)*	5
Operator	0 (of 2 applicants)	2 (of 12 respondents)	2

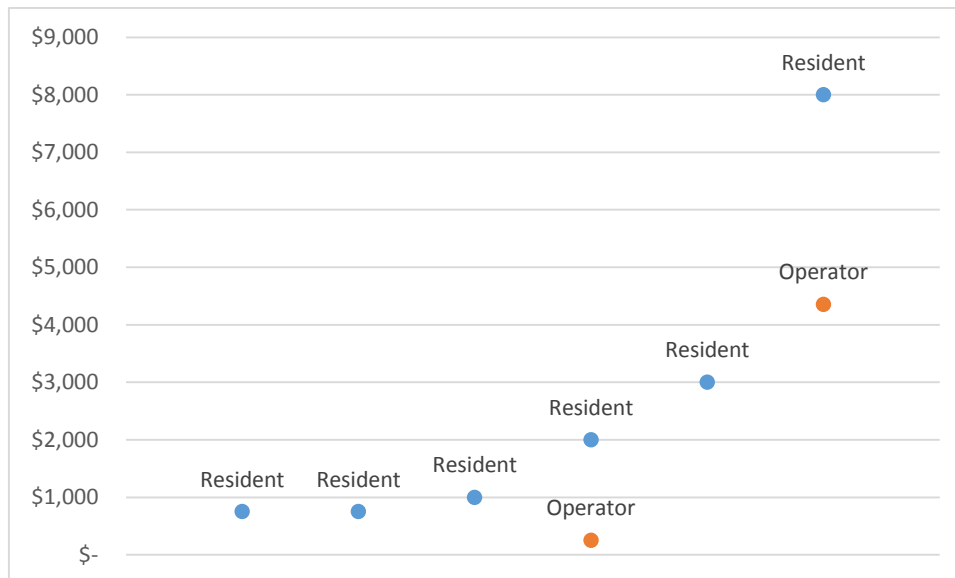
*there were two separate resident/resident representative respondents in one case.

Five residents/resident’s representatives have had costs awarded against them, four applicants and one respondent. That is, one third of the 15 residents/resident’s representatives involved in a dispute have had costs awarded against them.

Of the seven disputes with costs awarded against a party, almost three quarters were awarded against a resident/resident’s representative. Only two operators, both respondents, have had costs awarded against them.

Figure 4.1 shows that the amount of costs awarded against a party ranged from \$250 (against an operator) to \$8,000 (against a resident’s representative).

Figure 4.2: Amount of Costs Awarded Against Parties²¹



Residents/resident’s representatives did not agree with costs being awarded against residents. They felt this was not the intent of the Act, which was established to protect residents. In this respect some residents may confuse the costs of the dispute panel, which is the responsibility of the operator, with the awarding of costs or expenses to or against a party. Because the operator is responsible for the panel costs, some residents appear to think that this exempts a resident from having any costs awarded against them. However, section 74(2) of the Act allows for costs to be awarded and there is nothing in this section or others that precludes costs being awarded against a resident or resident’s representative.

Residents considered that the potential for costs to be awarded against residents made the process unaffordable for residents, many of whom are on fixed incomes, and it could deter them from taking a dispute. Residents said:

I don’t believe it was justified ... Appalled at having to pay costs. ... had to pay it off in instalments over 12 months.

Very very unjust. Just because I spoke up. I was the bad person. I didn’t have a right to put forward my dispute and if I didn’t have that right, what is the purpose of the process?

A couple of operators were also wary of costs being awarded against residents, in case it deterred residents with genuine and valid concerns from using the process. However, in

²¹ The term ‘resident’ includes residents’ representatives. Costs relating to six residents from five disputes are shown as in one dispute two residents each had costs awarded against them.

general, operators saw the potential to award costs against residents as reasonable. Some considered that if the resident lost the dispute, it would also be fair that they contribute to the costs of the dispute. One operator commented:

We felt that they acted to cause us cost. We felt a bit vindicated. It nowhere near covered what we spent. It absolutely has a place. If people come into the process with their eyes open, that residents realise there is a risk of having costs awarded against them. It's important that they know that, that a party can get costs awarded against them. People may then find another way of resolving it without going to a hearing.

One operator distinguished between whether the dispute was being taken by a resident or family member, and had been more willing to apply for costs against a family member than against a resident:

As long as it's fair I don't have an issue with it. We wanted to push for that. I don't think it's unreasonable. We didn't feel we did it in a manner that we were pushing an elderly resident who couldn't help themselves – it was [the resident's family] who were driving it. We would definitely take it on a case-by-case basis.

Panellists commented that they were careful about awarding costs against residents and advised residents in the pre-hearing stage that they could have costs awarded against them:

Be upfront at the preliminary conference, set out that if it doesn't appear on the papers to be a meritorious claim, I would raise that issue with both parties, that there is the potential of costs against either party and they need to be aware of that. You don't pre-determine the case but you raise the issues of potential costs. You must be seen to be even-handed.

As a principle it's fine, it's fair enough ... by their conduct they can make the process long and more expensive. If they are going to drag things out, this has to be controlled.

I do it with a lot of hesitation. I can understand the resident's concern.

One advantage of this is that it may be a desirable and appropriate restraint. In the courts there is a well-understood philosophy about awarding costs. The winning party is entitled to some recompense, but the level of costs should never be such that they deter people going to court ... you wouldn't want costs to be punitive and to prevent people lodging a dispute. But people must realise they can't unnecessarily rack up costs for other parties.

One panellist wondered whether the potential to award costs against a resident is a tool that operators would use to deter residents who have a dispute, and in that case the provision becomes a barrier to residents who need to use the process. Similar comments were made by some residents.

Another potential barrier identified by residents is the use of awarding costs against residents as a mechanism to reimburse the operator for the costs of the panel. The panel may refund all or part of the operator's costs as part of its decision. This appears to have happened in at least one case, where the panellist has commented that, while the operator is obliged to meet the costs of the panel, there may be consideration of recovery of costs in payment to the panel through the order of costs to the operator.²²

Panellists must have regard to or take into account certain matters when deciding whether or not to award costs and expenses.²³ Those are:

- Reasonableness of the costs and expenses.
- The amount or value of the matters in dispute, the relative importance of the matters to the parties and the conduct of the parties.

Panellists have referred to previous panel decisions where the matter of costs has been considered, namely *Perry Foundation v J Waters Estate and H Murray* 2013, *Knebel and Kenward v Metlifecare Kapiti Ltd*; *Perry, Emery, Maunder v Waitakere Group Ltd*; *van der Hulst v Dutch Village Trust*; *AF and C Barnes Family Trust v Anglican Care (Waiapu) Ltd*. Reasons given for awarding costs against a resident or resident's representative have been:²⁴

- The conduct of the resident/resident's representative has unnecessarily added to the costs incurred in the process.
- The resident could have obtained the advice they sought elsewhere – they were using the panel as a source of legal advice.
- The case failing to succeed.
- The case being without merit.
- Failure to heed warnings that the case faced major difficulties.
- Unreasonableness.
- Litigious behaviour.

Panellists are mindful of not deterring residents from bringing disputes for fear of costs being awarded against them, and of the financial imbalances between operators and residents with limited financial resources. In their decisions, two panellists concluded on the matter of costs:

²² See , *E H Maddocks vs Epsom Village Partnership*; *Knebel and Kenward v Metlifecare Kapiti Ltd*; *Perry, Emery, Maunder v Waitakere Group*.

²³ Retirement Villages Act 2003, section 74.

²⁴ *Perry Foundation v J Waters Estate and H Murray* 2013, *Knebel and Kenward v Metlifecare Kapiti Ltd*; *Perry, Emery, Maunder v Waitakere Group*.

“The award for costs against Mr ... is not to be seen as a punishment. It is simply a conclusion reached after all the factors the law requires to be taken into account are considered.”²⁵

“The procedures are certainly there to protect residents of retirement villages and in my view residents should not be discouraged from bringing disputes to a dispute panel from fear of adverse cost awards. That is not to say that disputes should be encouraged.”²⁶

4.16 The Costs of the Panel

The operator is responsible for meeting the costs incurred by the panel. Costs can be considerable as the process involves the panellist’s preparation, one or more pre-hearing conferences, the hearing and preparation of a decision. One hearing took two days and it is common for hearings to take one day. Costs are multiplied where more than one panellist is used. Five of the disputes that issued a decision had three panel members.

Panellists’ charges vary, with rates between \$160-\$350 per hour. Most range between \$300-350 per hour. Some panellists charge less for travel time and at least one indicated that they have not charged for all hours expended. Based on data from operators and panellists, fees for the panel can range from \$9,000-\$20,000. This excludes additional fees for legal advice that the operator may also have.

Operators agreed that the cost of going to dispute is a major incentive to resolve the issue. But they differed on whether the operator should have the responsibility of paying for the panel’s costs. Some considered that it would be fair if the operator and residents shared the costs. Others saw the responsibility as the operator’s, because they have more resources and residents could face a barrier to using the process if they were required to contribute to costs. Operators’ comments included:

It would be fairer if both parties shared costs, but I totally understand that you don’t want to discourage people from making claims and having disputes, that’s the last thing you want.

It can be a bit galling but you can’t really make the residents pay. I do think the operator should pay. It’s the right message. I don’t know how else you would do it. You don’t want to be seen to deny residents having their say. You can’t expect them to share the costs.

It’s probably fair as long as the dispute and time spent are relevant.

The resident should share in the costs of the process, if you were financially responsible for this process, would you push it as far?

²⁵ *Killian v Stonehaven Trust.*

²⁶ *Perry, Emery, Maunder v Waitakere Group Ltd.*

Panellists were in favour of the operator having the responsibility for paying the panel, because it acts as an incentive for the operator to resolve the dispute, and it reduces the financial barrier to the resident using the process. However, panellists were aware that it may appear that the panel has a bias in favour of the operator because it is paid for by them. Panellists explained how they are careful to not only remain impartial, but also be seen to be impartial, by the way that they conducted meetings and communications with the parties, and explaining their role. Two said that if they were approached by the same operator to sit on a panel for another dispute, they would probably say no.

Residents strongly supported the requirement of the operator to pay for panel costs. However, one commented that if the intent of this provision was to encourage the operator to seek a resolution, then it did not appear to work. Some residents also expressed concern that, even though the operator pays for panel costs, there appears to be nothing to stop the operator passing on those costs to residents as a village expense. They talked about feeling were pressured by the operator to drop their dispute, as they were informed they would be causing costs of the process to be passed on to other residents.

4.17 Alternative Dispute Resolution Options

The Act and regulations are silent on alternative dispute resolution options that can or should be used instead of the panel. Although the Code of Practice²⁷ states that operators may offer a mediation service for informal discussions as an alternative to either the complaints or disputes process, this appear to be little understood or used as a viable option.

Residents/residents representatives, operators and panellists held a common concern that there are no obvious dispute resolution options between the complaints process in villages and the dispute panel. It seems that mediation and arbitration are very little used. There is some use of negotiation, usually through the parties' lawyers.

There was a general view among operators and panellists that some types of disputes should not go to a panel, and would be better dealt with outside of a formal adjudication process. There were different views on which disputes are suited to the panel and which disputes should be handled in other ways. Some considered that simple contract matters could more quickly and easily be dealt with through processes such as direct negotiation, while others wanted a contract matter to be adjudicated. For example, in one decision relating to the proceeds of the sale of a property, the panel stated that:

*The deductions that had been made were of relatively minor importance and could have been dealt with speedily by a dispute resolution process, if not even by proper negotiation between the parties.*²⁸

²⁷ See Retirement Villages Code of Practice 2008 Variations included October 2013; pp.33, 34.

²⁸ 2013 Costs Decision: *Perry Foundation v J Waters Estate and H Murray*, 20 December 2013, p.19.

Panellists considered that opportunities for mediation were not being used as much as they could be. Several said they routinely used mediation principles in the panel process to help with clarifying issues and identifying alternative ways of resolving the dispute. There was some interest from operators in mediation to deal with relationship issues as mediation was seen as less formal and involving less cost for parties. On the other hand, there was also a view that mediation is not suitable for all types of disputes, nor effective where one party does not agree to mediation or either party is unwilling to compromise. There must be the option of arbitration or adjudication.

It appears that neither residents nor operators who have used the dispute process are keen to use it again.

I advise people not to go near the process (resident).

It was a good outcome, but expensive. It's definitely not something we would be wanting to do again (operator).

There are operators who have had further disputes and have not used a dispute panel again, but have instead found other ways to manage and resolve a dispute. One operator who had two other similar termination payment issues as the one that went to a dispute panel settled the others through negotiation, which involved coming to an agreed payment price. The operator reported that in both those instances the process was quick, cost effective and an amicable settlement was reached.

4.18 Comparing Stakeholder Perspectives: Issues and Solutions

Previous sections have outlined the experiences and views of residents, operators and panellists as they have journeyed through the dispute resolution process. This section compares their perspectives on the structure, procedures and practices of the process. It explores where their perspectives are similar and where they diverge, so that we can gain insights from those about how to optimise the effectiveness of the dispute resolution process.

Residents and operators both agree that some sort of formal dispute resolution process is needed to deal with major issues that cannot be dealt with by other means. However, residents, operators and panellists were all in agreement that the current process has some major shortcomings.

Residents/residents representatives were uniformly critical of the process. Their strong view was that it is not user friendly for residents, nor responsive to their needs and situation. They have fewer resources than the operator and this disadvantages them in the process.

Basically it's a traumatic experience ... it's extremely unequal. It's not meant to be a court process but it was turned into a court process ... it's not a process I had any faith in whatsoever.

One has to consider whether the time, effort and effect on one's health was all worth it. Inevitably the answer has to be a resounding no.

It's loaded in favour of the operator.

Incredibly painful ... I felt really hurt ... the only thing that was good was that there were no costs awarded against me ... It was just an expensive nightmare, which just detracted from the real issues at hand.

It's a very very difficult subject to talk about.

Overall, operators were much more positive about the dispute process than residents, inevitably because it was generally a successful outcome for them. The most positive aspect for operators was how the panellist conducted the process. However, they also identified a number of problems. Like residents, most operators considered the overall experience a negative one. Operators were not happy with the costs of the process and the time taken. Several commented that those factors were a powerful incentive to reach resolution outside of the process. Operators commented:

It seemed a significant amount of money to have to pay for a decision in our favour.

We won, but had we rolled over at the start, it wouldn't have cost us much different. Then it took six months of our time ... it was not a happy exercise really.

The panel cost about \$15,000. Then on top was legal advice, about \$10,000. A minimum of \$25,000. You've got to weigh that up, is it worth going to dispute?

The process can be lengthy, time consuming and cumbersome ... being involved in a dispute is a relatively unproductive time ... it's a defensive strategy rather than a proactive use of time to grow and improve the business and to work on ensuring that all our residents are happy. The process itself is a deterrent for operators. It is far preferable for the operator to proactively resolve the issue with the resident.

Several operators raised concerns that the process is unaffordable for small villages. One small operator commented:

We're just a tiny village so the cost was just incredible. There was a lot of frustration around the red tape and the cost factor. It was \$20,000 plus, easily. This could of just about ruined us.

Panellists expressed some discomfort with perceptions that the panel is not independent, because of it being paid for by the operator, and a certain opaqueness around how the operator selects the panellist. Panellists also commented on some disputes which they

consider should not have got to a panel, but should have been dealt with much earlier. Moreover, they were concerned about the extent to which the process is sufficiently flexible to allow them to use a range of dispute resolution tools. They noted little opportunity for panellists' de-briefing, review of cases and collation of learning to improve the process. Panellists commented:

The whole thing is overwhelmed with legalese, what people want is to get a dispute over and done with as quickly as possible and get it sorted ... I would prefer less adjudication and more upfront discussion.

The panel needs to be part of a total dispute resolution framework, the whole spectrum.

There is a level of frustration on the part of the resident, the dispute seems to have gone on for an inordinate amount of time. The parties need encouragement to have their dispute sorted earlier in a med-arb process.

The fundamental thing that makes it unfriendly is the quasi-judicial nature of the process which may suit some disputes where there is a very narrow factual or legal or technical issue ... a different model might make it a whole lot easier ... you're restricted to the evidence put in front of you.

It wouldn't have resolved everything but a really good mediator could have helped to find out and clarify what everyone was asking, and get rid of half the disputes ... the possibility of using mediation is not upfront in the process ... a med-arb model would work well.

Table 4.18 summarises the similarities and differences in the views of residents, operators and panellists. All have concerns about the length of time the process takes, and the lack of alternative dispute resolution options. Residents and panellists share concerns about panel independence and the support and advocacy residents need.

All are concerned about costs, but in different ways. Residents are very critical of costs being awarded against residents. Operators are concerned about the overall costs of the process to them. Both panellists and operators question the need for a three-member panel. This is not only on cost grounds, but also whether that is justified, given the types of cases heard. Then there are issues raised by either residents, operators or panellists, which reflect their specific interests, resources or roles in the process.

Table 4.18: Issues Identified by Residents, Operators and Panellists

Residents	Operators	Panellists
The process does not work smoothly and in a timely way to resolve the dispute	Length of time to get a resolution.	The length of time the process takes The large amounts of material and the 'over-complication' of some disputes
Lack of alternative options for dispute resolution	Lack of alternative options for dispute resolution. Inappropriateness of the process for some types of disputes.	Lack of use of alternative dispute resolution options, which may have dealt with some disputes that should not have got to a panel The extent to which the panel process is sufficiently flexible to allow use of a range of dispute resolution tools
The process is not independent, fair or balanced, with an inherent bias towards the operator		Perceptions that the panel is not independent of the operator
Lack of legal advice and advocacy for residents		Residents' lack of legal advice The quality of legal advice some residents have got Imbalance in legal resources between residents and operators
Strong antipathy towards costs being awarded against residents	The costs of the process for operators Concern about the potential for residents to take vexatious or frivolous disputes	
	Need for a three member panel for a dispute relating to the disposal of a unit?	Need for a three member panel for a dispute relating to the disposal of a unit?
Lack of enforcement of operator compliance with orders		Lack of enforcement of operator compliance with orders
		Little opportunity for panellists' de-briefing, review of cases and collation of learning to improve the process

Lack of information and clarity about: <ul style="list-style-type: none"> • how the dispute process works and how to access it • dispute parties' roles, rights and responsibilities • different roles and responsibilities of the various agencies with a function in relation to the dispute process 		
Underlying issues in dispute remain unresolved		

Suggestions for improvements

Table 4.19 lists the main suggestions residents, operators and panelists made for improving the dispute process. All suggestions are included in the table, although not all are consistent or compatible. Residents' suggestions focus on making the process more user-friendly to residents and visibly independent. Operators made suggestions to improve the affordability and timeliness of the process. Panellists suggested how the process could be made more flexible and responsive to users, and visibly independent. All want alternative dispute resolution options to be available and more frequently used.

Finally, similar suggestions were made by one operator and a few residents, that a working group of representatives from the sector be established to develop options for improving the dispute resolution process.

Table 4.19: Suggested Solutions

Issue	Solution
Panel independence	An independent body allocates panellists to disputes using such criteria as: type of dispute, location, availability.
Legal imbalance between residents and operators	<ul style="list-style-type: none"> • Provide legal advice for residents. • Dispense with legal representation for all parties.
Potential to award costs against residents	<ul style="list-style-type: none"> • Tighten up criteria so that this is done only in exceptional circumstances. • Abolish ability to award costs against residents.
Costs of panel Process is not timely	<ul style="list-style-type: none"> • Establish a set fee for panellists, instead of payment on an hourly rate. • Charge only a lodgment fee (similar to disputes tribunal and tenancy tribunal). • Share panel costs between operator and resident.

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	<ul style="list-style-type: none"> • Abolish requirement for a three member panel. • Ensure operators do not pass on the costs of the dispute panel to residents through village fees.
Lack of information, advice and support for residents to use the dispute process	<ul style="list-style-type: none"> • Provide advocacy and advice support for residents. • Monitor the timeliness and progress of the dispute and step in to expedite it where necessary.
Increase flexibility of current process Alternative dispute resolution options	<ul style="list-style-type: none"> • Adapt the process to allow other dispute resolution models to be used, e.g.: med-arb; investigator/inquisitorial; settlement conference /judge-led mediation. • Promote mediation as an alternative to the dispute panel, both before and during the panel process, • Deal with retirement village disputes in the disputes tribunal or tenancy tribunal.
Underlying issues remain unresolved	<ul style="list-style-type: none"> • Advocacy and advisory service for residents. • Proactive monitoring of and enforcement of panel orders.

5 RESIDENTS' AWARENESS, UNDERSTANDING AND VIEWS

When you come into village you're not going to research if they have a complaints process.

We looked at all the good things a village could offer, and the legal protections are important [but] it's different when you are living in a place, the details are what's unknown.

I knew the Act was in place ... there's been a few surprises, but you can't go in knowing everything ... I've gone to the operator to clarify a few issues.

You don't come here thinking you're going to be involved in conflict.

When intending residents are choosing a village, generally they are not concerned about the existence of a complaints facility or a disputes process. They are aware that there is an Act that provides protections, but they do not envisage the possibility of ever having to use a dispute resolution process. What residents did observe, was that even if one feels well informed about the contract and the village, problems can arise that are not apparent early on.

If problems become complaints or disputes, then residents and operators must know and understand that resolution processes are available. Those processes must be seen to be accessible and fair if they are to contribute to the purpose of the Act, which is to:

- protect the interests of residents and intending residents; and
- enable the development of retirement villages under a legal framework readily understandable by residents, intending residents and operators.

This section presents data on residents' awareness, understanding and views of complaints and disputes. The large majority of those residents who participated in this monitoring project have never been involved in a dispute with their village, and many have not made complaints. None were identified as having used a dispute panel, although some were aware of disputes that have been heard by a panel.

Data was gathered through:

- Focus groups in six locations, including the three areas with the largest numbers of villages: Auckland, Bay of Plenty and Canterbury. Eleven focus groups were held in Auckland (3); Tauranga (2); Hamilton (1); New Plymouth (1); Wellington (1) and Christchurch (3). Four focus groups were organised with the help of the Retirement Village Residents' Association, and included residents from a range of villages within each area. For the seven other focus groups, villages were selected using a case frame to ensure that a mix of different sizes, locations and ownership structures were included. Village managers were contacted to assist with notifying residents of the opportunity to be involved in a focus group. All villages that were approached were happy to host a focus group. In all, 120 residents from 29 villages participated in focus groups.

- Interviews were also conducted with eight other residents who requested an interview.
- The random survey of residents conducted by CRESA for the advice, information and education (AIE) project. In all, 417 residents responded to the survey. Their characteristics are consistent with the overall profile of village residents, in that the majority are in the 75-84 age group, living alone, living in a license to occupy dwelling and have resided in a village for less than 10 years.

Qualitative data from focus groups and interviews was subject to thematic analysis with a focus on:

- The types of complaints and disputes that arise in villages.
- Residents' understanding, experiences and views of the complaints facility in their village.
- Other options within the village for raising concerns.
- The role of the statutory supervisor in dealing with complaints and disputes.
- Residents' views about the formal dispute panel process.
- Residents' views on what works well to prevent disputes.

5.1 Types of Complaints and Disputes

Residents clearly distinguished between a request, a suggestion, an issue, and a complaint.

It is a routine part of village life to make a request. Generally this is about maintenance or repairs that are needed to the dwelling. Many residents said that in their village there is a request form or job sheet that residents fill in to get a job done. Sometimes residents also alert staff to repairs needed to communal facilities (e.g. street light failure) through a similar process. Some residents talked about how after owning their own home and being used to dealing with repairs and maintenance, it was an adjustment to rely on others to manage those matters.

Generally residents thought the repairs request process works well in their village as usually residents are kept informed about the job. It is only when the process is cumbersome, the job seems to take too long, or the resident is dissatisfied with the response, that the request may become a complaint.

As well as request, residents make suggestions. These are not criticisms or complaints, but ideas put forward as ways of improving the village for all. Examples of suggestions that residents have made include:

- An induction forum for new residents to provide them with information and enable them to ask questions that arise during the settling in period.
- Seating in the garden.

Residents defined an issue as a matter where there is some worry or concern, or clarification is needed. Residents often want information about a detail in their contract, or a service provided in the village. Examples of issues were:

- Different fee structures in the village.
- Rises in fees.
- Annual budget for village expenditure.
- Calculation of the deferred management fee.
- Costs associated with transferring to a serviced apartment within the village.
- Ownership of fittings such as heat pumps installed by the resident and whether they are expected to be removed on termination of the ORA. Similarly, on termination of the ORA, what happens about renovations or alterations done by the resident.
- Responsibilities for repairs and maintenance of structural components within the dwelling, such as internal doors and bathroom tiling.
- What is included in core services and what must be paid for separately.
- Reduction in services.
- Policy on the entry age to the village.
- Village development.

Sometimes issues become complaints, especially if communication is poor or there is a lack of consultation about changes. Analysis of dispute cases in section 4 above shows that complaints typically arise through either misunderstanding of contractual agreements between the resident and the operator, or a perception that one of the parties has failed to comply with the contract.

A complaint emerges when a matter is unsatisfactory or unacceptable and has not been able to be resolved over a period of time. Residents are generally reluctant to make complaints, which they see as a formal matter to be undertaken only when a request or issue raised with the manager has not been given consideration.

In the focus groups, residents said:

Things become a complaint when there is a lack of communication with what's happening with the job [repairs]. Then you put it in writing, go and ask personally what's happening.

You ask for something, expecting a reply and it doesn't come. The reply was 'it can't be done', so I wrote down my request. Then I got into trouble because I wrote it down ... I wrote to the statutory supervisor about it.

Raising an issue is so slow. It takes too long to resolve these little issues. It took two years to get some windows fixed. Where is the transition, from when these little issues become a big complaint?

Residents described some complaints as relatively minor and easily addressed, such as complaints about the food in the village restaurant. But there were more serious or on-going matters, to do with changes in village services or increase in fees. Across the focus groups, the most common complaints were about:

- Maintenance of village gardens appears to be a particular area of contention. As several residents observed, the gardens are a major part of what attracted them to the village and any perceived reduction in the standard of maintenance is seen as a reduction in the amenity the village offers.
- Maintenance of village facilities.
- Quality of meals in the village restaurant.
- Repairs and maintenance of the resident's unit, including delays, charges, safety and heating.
- The village 24 hour call system, including site coverage of personal alarms and response times.
- Accessible and barrier-free features in the resident's dwelling and in communal facilities.
- Issues concerning vehicles and parking: speed, access of service vehicles, parking accessible to dwelling and car park hazards.
- Increase in service fees.

Less common complaints included:

- Delays in employing a permanent manager.
- Behaviour of residents.
- Poor lighting in village.
- Accessibility for emergency vehicles.
- Poor signposting of dwelling numbers within village.
- Reduced staffing levels and services.

Occasionally a serious dispute arises. Several examples were provided of those sorts of disputes, none of which residents have taken to a dispute panel. These included:

- Manager's unauthorised entry to property and bullying of resident. This resident sought the help of an external organisation to write a formal letter of complaint to the operator.
- As a consequence of new ownership, a progressive reduction of services in the village and loss of on-site manager. Several residents hired a solicitor to raise concerns with the operator. The statutory supervisor was also involved.
- Examples of on-going disputes between residents in three villages. Statutory supervisors were contacted by residents. Mediation was tried in two cases and was unsuccessful. In the third, the operator continues to try to manage the situation.

Residents identified issues between residents as one of the most difficult and stressful to raise as complaints and to resolve. While conflict between residents did not arise often, residents who had experienced this had mixed views on the effectiveness of the operator in dealing with the matter. Some were critical of how it had been handled, while others talked about the operator's efforts to resolve the matter.

5.2 Village Complaints Facility

Operators are required to have a complaints facility. This is a written policy and procedure within the village to deal with complaints, which must be made known to residents. The Code of Practice provides guidelines about what the complaints procedure must contain.

In the residents’ survey completed for the AIE research, 11.8 percent reported that they have made or had to deal with a complaint within the last two years. Among those residents, 6.7 percent had sought advice about a complaint relating to their village operator, manager or staff and 4.6 percent had sought advice about a complaint relating to another resident.

The survey found that the large majority of residents (84 percent) know about their village complaints facility. However, 6 percent said their village did not have a complaints process and 10 percent did not know whether there was a process. Of those 350 residents who reported knowing about the process, 38.9 percent reported that it had been explained to them individually and face-to-face, while over half (54.6 percent) reported that the process had been explained to them at a meeting. Of course, some would have had the process explained to them in both ways. In addition, just over 21 percent reported that the process had not been explained in those ways. However they could have been advised of the process in some other way (Table 5.1).

Table 5.1: How the Complaints Process was Explained (n=350*)

	Residents	% Residents
Face-to-face individually	136	38.9
As part of a group at operator/resident meetings	191	54.6
Neither of these	74	21.1

* multiple response table

Those surveyed were also asked how copies of the complaints process were made available. The most common method was in paper form (59.1 percent of respondents), followed by copies posted on a noticeboard or displayed in a common area (41.4 percent). Again, residents may be able to access a copy of the procedure in more than one way (Table 5.2).

Table 5.2: Where Copies of the Process can be Found (n=350*)

Copies are available:	Residents	% Residents
In paper form	207	59.1
On the village website	31	8.9
Posted on noticeboards or displayed in common areas	145	41.4
Not available in any of these locations	39	11.1
Unsure	57	16.3

* multiple response table

In the focus groups, most people were aware that their village has a complaints facility and know how to find information about it. In many villages residents have their own copy of the complaints policy and procedure in their resident’s handbook or information pack. But some residents reported that in their village residents do not receive a copy of the complaints procedure. There were also a few who had “never heard” of the procedure. Two relatively new residents said they would like to have the procedure explained to them. A few had looked for the information on their village’s procedure and had found that they could view

the policy but not have a copy of it. Some residents suggested that the village manager or residents' committee should occasionally remind residents that there is a complaints facility.

Satisfaction with the complaints facility differed from village to village. Those who thought their village facility works very well talked about processes that include:

- Open access to the manager.
- Acknowledgement that the complaint has been received and an indication of the timeframe for dealing with it.
- Prompt and relevant response.
- A process that is easy to follow and a form that is easy to fill in.
- It is not compulsory for a complaint to be made in written form, although it may be written down by the manager for the resident.
- There are multiple ways in which residents can raise issues and seek a response; they are not limited to making a complaint.

Comments included:

If we have any problem we go straight to the manager. Or we can go through the resident's committee and they go to the manager. It works well.

I do refer to the booklet occasionally, it's all in there.

Excellent ... very good – nothing's perfect ... it seems to work ... the system is good.

We are very satisfied with the way complaints are handled. They are very professional. Sort it out to the satisfaction of everybody.

Criticisms residents had concerned:

- Too long a delay before being informed about progress with their complaint.
- Long delays in requests being addressed.
- No response to their complaint.
- Difficulty in using the prescribed process for various reasons:
 - Lack of awareness about the process and how to access it.
 - Lack of clarity about the process.
 - Process could not deal with issues raised.
 - Information is not in a format suitable for someone with vision impairment.

Comments included:

I'm aware of the 20 days response, you would like to get a reply in that time, and would hope it wouldn't take that long. They should acknowledge receiving a complaint within a day or two.

I'm concerned the requirements around the process are not done.

[the complaints form] doesn't ask the right questions. It didn't fit the concern I had.

Generally management doesn't conduct the process according to the code of practice. Management is not au fait with it, for example they don't take action until a long time after the complaint. Or they refuse to talk about it.

Residents also talked about management responses that appeared to disparage or discourage their genuine concern. Common examples were manager's responses that asserted that an action would result in costs to residents; or that any complaint implied the resident is unable to function at the level of independence expected in the village.

If you have a request, the first response is, 'it will cost you, you have to pay for it.' So you will go away.

Transparency is a key issue and also intimidation. Those are the two key words. They say, 'we're going to put a cost on to the fees for the time that has been wasted in meeting on these details'.

The response is, 'but you moved in here to live independently', implying that if you complain you are acting dependently and can't cope, rather than I'm raising something about the contract.

Several residents expressed reluctance to raise issues or to complain for fear of a negative reaction, either from management, staff or from other residents. Others also talked about feeling that it is left up to residents to point out problems.

It may not be good for you down the track, I'm concerned how my wife will be treated after I'm gone.

We feel vulnerable if we stand up.

We are fighting for things that we would expect as part of our contract.

Myriads of complaints come to the committee. Most are resolved. Some are bubbling away but residents are too frightened to raise it. A committee member will go on behalf of management.

I don't want to be seen as a stirrer but I think I have a genuine concern.

They have raised concerns and they don't like the way they have been treated.

5.3 Other Options for Raising Concerns

Those residents who were complimentary about the complaints procedures in their villages also reported that their village has multiple avenues that assist residents to express their views and raise issues. Often these options were preferred to the complaints facility, which appears to be used only if other options fail. These options are common across villages and include:

- The manager's 'open door' policy, which encourages residents to approach the manager if they wish to raise a matter.
- A staff member with a dedicated role to deal with residents' concerns.
- Occasional informal sessions conducted by the manager with groups of residents. This is a practice in larger villages.
- The manager meets regularly with residents, for example, monthly meetings. The residents' survey showed that almost half of residents (42 percent) attend meetings monthly or more frequently.
- Residents can raise issues with the residents' committee, which will discuss them with the manager.
- A maintenance and repairs log for residents to report anything in their dwelling or village that needs attention.

One village has almoners, who have a pastoral care role. This role was started by the residents' committee. Residents are able to talk to the almoners in confidence about any matters of concern. While they can be used by any resident, they are of particular benefit to those living alone, with no family nearby or few connections outside of the village. With the permission of the resident, the almoner may raise a matter with the manager.

Residents in two independently owned villages reported favourably that at least one of the directors or owners regularly visits the village or is on site most days and available to residents. This was in contrast to some residents in other villages who were critical of a lack of on-site staff.

Residents' committees

In the residents' survey, 77 percent reported that they live in a village that has a residents' committee. Of those residents, 97 percent believe that a residents committee is important in ensuring issues within their village are addressed.

Residents in the focus groups broadly agreed that the residents' committee is an important avenue for residents to raise issues and make complaints. There are various ways in which residents committees undertake that role. Generally, committees invite the village manager to its meetings to discuss issues and share information. A committee may step in if a resident is not satisfied with how the manager has responded to their complaint. Some committees deal directly with management on issues that the committee considers affects village

residents as a whole. Often committees have at least one committee member to advise residents on how to make a complaint and if necessary to accompany them to make a complaint to their manager. It is common for committees to make a judgement about the issues they will pursue with management, and also to advise the individual resident about the merit or otherwise of their complaint.

Both committee members and other residents consider that residents' committees perform important advocacy and liaison roles:

Not everyone feels able to speak up. This is where the committee can help to bring concerns to the manager's attention.

Lots of residents don't feel confident to raise matters directly with management. A lot don't read information and are not aware.

It's not that they're scared, it's just not something they do [complain] and they need a bit of help.

Despite the important role of residents committees, some residents pointed out that it is sometimes difficult to recruit committee members, especially in villages with mainly older residents.

A few residents raised the possibility of conflict between a resident and the residents committee. They asked, if a resident does not feel they would get a fair hearing from either their manager or the residents committee, then what alternatives are there for a resident to make a complaint?

5.4 The Statutory Supervisor

Statutory supervisors are an important external point of contact for residents seeking resolution to a complaint. Residents were asked whether they had contacted their statutory supervisor about an issue or complaint they have had.

Residents had different views about how easy it is to raise issues with their statutory supervisor. Some found their statutory supervisor very approachable at meetings and at other times. They talked about their statutory supervisor making time after the residents' meeting to meet with residents individually.

We wrote to the statutory supervisor about an issue ... it does help. We have a very good relationship.

If it doesn't work out you can go to the statutory supervisor. We called them in the morning and it was fixed in the afternoon.

However, most of those who had contacted their statutory supervisor with a complaint did not find it helped them. They did not regard the statutory supervisor as independent from the operator, or the statutory supervisor did not appear to have a role in helping to resolve

complaints. Some residents also commented that their manager has told them that any contact in addition to a contracted number of meetings with residents is charged for.

Residents commented:

They have no teeth ... no they are not useful, they said they can't do anything ... the delay and payment is an additional barrier.

We had an ongoing complaint and wanted to know whether the statutory supervisor would be involved in assisting. We were told that there would be a charge for the statutory supervisor coming to talk to the village.

We went through the complaints process and the manager referred it to the statutory supervisor but it didn't really fit his role.

It's not impartial ... it feels like a conflict of interest, especially if you have a complaint with the operator.

Residents noted that they seek help with their complaints, not only from the statutory supervisor, but also from their solicitor, the Retirement Commissioner, Grey Power, the CAB and Age Concern.

5.5 The Dispute Panel: Issues and Solutions

There's nothing wrong with the Act or the Code of Residents Rights. It's the implementation and operation of it and the lack of oversight on operators' compliance.

We don't want to take a dispute, we're too old. The whole process is hostile. We can't afford to hire a solicitor ... it is very costly and you are on a hiding to nothing.

We don't want to get into a huge kerfuffle and a huge process. It needs to be simple. A quick resolution if at all possible.

The panel needs to be independent and very careful to see that one party doesn't get bullied by the other.

There should be more of a mediation process, where the two sides can sit down ... [one dispute] should never have gone to a panel, it should have gone to mediation.

In the residents' survey, one percent of residents reported that they have had a complaint that was adjudicated by a dispute panel. However, on further investigation it was clear that those residents had gone through some sort of complaints process, but not to a panel. This highlights some confusion about the nature of dispute resolution processes available to residents.

While most participants in the focus groups are aware of complaints procedures in their villages, most are not aware of the dispute resolution process set out in the Act. Those who are aware of that process tend to know of others who have used it, or have found out about it because they have thought about using it themselves.

Residents who were aware of the dispute process in the Act were highly critical of it. There was a strong perception that the panel is not independent from the operator, because the operator pays for and appoints the panellist. Residents considered that the process is not user-friendly for residents. There is little support to help residents through the process and an inherent imbalance, with the process favouring operators because of their greater resources to hire legal representation. The approach is considered too adversarial and there is a lack of alternative processes for resolving the dispute.

There was general support for the operator paying the costs of the panel. This was thought to be a good way of encouraging operators to resolve disputes and avoid the need to use a panel.

There were mixed views about the potential for the resident to have costs awarded against them. There was some disquiet, because of the disparity between the typical financial situation of a resident vis a vis an operator. There was also a view that residents should be clearly informed about the potential for costs to be awarded against them. On balance residents thought that awarding costs is part of the dispute process and it is something that a resident would weigh up in deciding whether to take a dispute.

Residents considered that the two most important changes needed are to ensure the independence and neutrality of the panel, and to establish a user-friendly process for residents. Table 5.3 summarises issues and solutions identified by residents.

Table 5.3: Residents’ Issues and Solutions

Issue	Solution
Panel independence	The choice of the panellist should be made by an impartial third party
The process is not user friendly for residents; it is adversarial; costly; time consuming; residents do not have the resources to hire legal representation; residents do not have enough information or knowledge to be able to make an informed choice of panel; there is nothing to stop the operator passing on the costs of the panel to all residents through fees	More information to residents about dispute resolution options Residents’ advocate or ombudsman Run the process without legal representation for parties Professional development for panellists
Lack of alternative dispute resolution options	Establish and promote alternative dispute resolution options Expand the tenancy tribunal to include retirement village disputes

	Establish a retirement village sector ‘visitor’ similar to a university visitor, which would have an advisory role in dispute resolution
Family members lack information about the dispute resolution process	Ensure that family members understand the process as they may be involved in taking a dispute on behalf of their parents, or when their parents have passed away
Lack of operator compliance	Establish a mandatory audit of retirement village compliance with the Act

5.6 Preventing Disputes

According to residents, good communication, provision of relevant information and appropriate consultation are critical factors in resolving complaints and preventing issues escalating into disputes. Residents emphasised the crucial role of the village manager in communicating effectively. They described good management practices including: being available, listening to residents, being proactive in asking residents for feedback, giving a prompt response about a complaint, treating residents with respect and taking concerns seriously. But examples were also given of intimidating and patronising behaviour, including ‘talking down’ to residents and discouraging residents from asking questions. As residents commented:

It all comes down to the manager. Their ability to resolve the issue. A very capable, caring efficient management and you don’t need to go any further.

Any complaint, you immediately contact the manager and her door is open and she’s always telling us that.

Good management is absolutely vital. The current manager is absolutely excellent ... prepared to sit down, takes a reasonable attitude and does something about it ... walks around the village ... there to help.

The Code of Practice sets out clear guidelines for meetings with residents, information provision, communication policies and procedures and consultation requirements. Residents have a right to be consulted about a number of matters that will, or may, have a material impact on residents’ occupancy or their ability to pay for services and facilities in the retirement village, including: proposed rules or changes to existing rules; proposed changes to services and benefits; changes in charges; costs of maintenance and periodic upgrading; changes in policies, procedures, and systems; and the safety or personal security system in the village.

Consultation is not just provision of information. The Code of Practice states that the operator must approach consultation with an open mind, and the matter should not be decided before consultation has been completed. The operator should also report back to residents after a consultation about the decision made, and with reasons. Consultation is not

about veto. The operator does not have to agree with residents' views or to act on the advice provided, and must be able to weigh up residents' advice with the need to manage the retirement village effectively for the benefit of all residents.

Residents reported considerable variation in communication, information provision and consultation across the villages. Some villages, as reported above, have an array of opportunities for residents to meet face to face with management to receive information and express their views. Managers have an open-door policy and are seen regularly around the village. It is also very common for villages to put out regular newsletters to keep residents informed, and some villages survey residents annually to ask for their feedback on a range of subjects.

In contrast, some residents considered that there is little opportunity in their village to raise concerns or express their views.

They treat us like mushrooms, keep us in the dark ...

It's almost like an institution, back to school type of thing.

Basically we are told it's going to happen. We are not often asked.

Examples were given of changes that residents considered they should have been consulted about, but were not. These included:

- Changing the discounted fee for a single person living in a unit to charging single people the same as a couple.
- A reduction in the operating hours of the personal security system that was done without consultation or adequate information being given about how the changes would affect residents.
- Village development. Tensions and issues can arise concerning the proposal for development, as well as the potential disruption or impacts of the development work. Residents are in a special situation with regard to village developments. While a member of the public, or persons affected by the development such as neighbours, would be able to use statutory channels for objecting to consents being granted for the development if it requires public notification or limited notification, this public right does not generally apply to residents in a village. This is because the consent authority must disregard any effects of the activity on persons who own or occupy the land where the activity will occur.²⁹

²⁹ Resource Management Act 1991 section 95D.

Residents gave two examples of what they saw as poor consultation:

Nothing was put in place to deal with it. We had some very upset and anxious people. We were just being notified about the change [to the personal security system]. We did know things were to change, but it was the process, the way they had gone about it ... We tackled them on their poor communication.

There was a meeting about [the development]. The set-up of the meeting was 'them and us', even the way they sat. The information was not appropriate, it was more appropriate for future buyers ... we were confronted with a situation that we felt threatened about. There are probably a lot of good things about the development but there have been some concerns. The information could have been presented in a way more sympathetic to the hearers ... there was no satisfactory explanation of how they would cater for more people and how it would affect use of the library, dining room and other facilities.

In two villages that had undergone considerable development, residents talked favourably about management actions that not only informed residents, but also gave them opportunities to express their views and discuss matters of concern. These include:

- At the early stage, provision of detailed plans and other information about the development for residents to comment on.
- Feedback sought through various channels including meetings and in written form.
- During the construction phase, weekly meetings with the project manager to review the previous week and preview the coming week's work.

In one village that had sustained major earthquake damage to some residents' dwellings and communal areas, residents were very complimentary about how they were kept informed and consulted about options throughout the emergency response, repairs and rebuild processes.

It was a general view that **how** residents are communicated with and engaged, is as important as the outcome:

If you go through a process and it's fair then that's good.

It's as much about the process, about how an issue is handled, and people feel they are listened to, as about the result.

Residents' suggestions for good practice to prevent disputes

- There is prompt attention to routine service requests.
- Efforts are made to resolve complaints quickly.
- There is regular and relevant communication and information provision.
- Consultation is sincere.
- Multiple avenues are available for residents to raise concerns.
- Residents can raise a matter confidentially.
- Residents can have a support person to help them make a complaint.
- The residents committee gives advice and support to residents to help them with their concerns.
- There is information for families to help them understand the ORA, residents' rights and responsibilities and how the village operates.

6 OPERATOR'S HANDLING OF COMPLAINTS AND DISPUTES

Data was gathered from operators through:

- Four focus groups held in Whangarei, Auckland, New Plymouth and Christchurch. The focus groups were held immediately after regional managers' meetings organised by the Retirement Villages Association, as a way of accessing a range of villages. In all, 29 managers from 19 villages participated. Those included villages of different sizes and ownership structures.
- Interviews were also conducted with three other operators.
- The villages survey conducted by CRESA for the AIE project. In all, 102 operators completed the survey. They comprised corporate operators (31.4 percent), independent for-profit (32.4 percent), charitable (25.5 percent) and other or not stated (10.8 percent).

Qualitative data from focus groups and interviews was subject to thematic analysis with a focus on:

- The types of complaints and disputes that arise in villages.
- How the complaints facility in their village operates.
- Other options within the village for raising concerns.
- The role of the statutory supervisor in dealing with complaints and disputes.
- Operators' views about the formal dispute panel process.
- Operators' views on what works well to prevent disputes.

6.1 Types of Complaints and Disputes

Managers ask, when is it a complaint? The answer is, when it has the potential to grow. To rear its head, treat it as a complaint. It doesn't have to be a written complaint.

In the focus groups, most managers considered that any issue could have the potential to become a complaint and should be managed with that in mind. One manager considered that only "when they fill in the form it's a complaint", but this was very much a minority view. Generally managers treat seriously and act on expressions of concern and offer to write the issues residents raise on a complaints form, if they wish. One corporate operator has a policy of writing down issues as that triggers the process requiring a response and follow-up. Such practices are proactive. They do not put the onus on the resident to say they have a complaint. The reluctance of some residents to complain is well understood by some managers:

We are aware that residents can feel intimidated about raising an issue. Sometimes you hear it from a family member that their parent doesn't want to complain for fear of getting punished. You need to acknowledge the issues, acknowledge how they are feeling, if they are distressed.

A lot of older people don't want to create waves. They will talk about their concerns amongst friends but not necessarily to the manager.

The complaints that operators receive vary widely. By far the most common complaints are about maintenance of village gardens and the standard of food in the village restaurant (these were also noted by residents). Other complaints concern a range of issues, including: behaviour of other residents; behaviour of the manager, staff or contractors towards the resident; invasion of the resident's privacy; maintenance of the exterior of residents' dwellings; and the amount of service fees and items contained in service fees. In addition, managers field complaints from family members about termination matters.

Managers noted that some causes of disputes are disappearing, such as old contracts with ambiguous provisions around termination. Some managers identified other changes to the nature of disputes that may be emerging or may become more common in future. Those changes are both in the characteristics of the parties to the dispute and the issues in dispute. Examples include:

- Service quality and charges around serviced apartments and in-home care.
- Length of time for re-sale of a property is dependent on the local housing market. It may become a problem if demand drops, the supply of village units increase, or there is a recession.
- Dealing with complainants with cognitive impairment or mental health issues.
- Dealing with parties with enduring power of attorney and trusts that have an interest in the ORA.

6.2 Village Complaints Facility

Managers commented that it is common practice for a copy of the complaint policy and procedures to be given to intending residents and in each resident's information pack/handbook. It is also common for copies of the policy and/or complaints forms to be available in communal areas such as the reception, on noticeboards, in the lounge or library.

Managers varied in their impressions of how many complaints they receive, and in part this reflects what they count as complaints. What is more important than numbers is that issues or complaints are dealt with satisfactorily for both parties. Managers were of the view that the large majority of complaints are relatively minor and are able to be dealt with quickly and easily within the village. Often the matter is dealt with by clarifying a village rule, an operational practice or something in the ORA. Sometimes the manager acknowledges fault and remedies the problem.

Managers talked about five challenging areas in handling complaints:

- ***Resident-to-resident complaints.*** These issues can be disruptive for the village. One manager spoke of a dispute between residents where attempts were made to resolve it for four years. Another manager spoke of on-going incidents of bullying between

residents and queried where to go for help with this issue. Other managers also pointed to a lack of guidance in dealing with resident-to-resident conflict. Some managers have sought advice from Age Concern about those disputes. A few managers reported that they always use an independent person to mediate in resident-to-resident disputes. Although termination of a resident's contract may be used, managers commented that this is reluctantly used and only as a last resort.

- ***Complaints from residents with cognitive impairment or a mental health condition.*** While this is not a common issue, it raises special challenges for the operator. The resident may have limited insight into their part in the issue and have difficulties in articulating their concerns. They may be impulsive, agitated and stressed, and their behaviour may be upsetting to other residents. In general, managers are not well equipped to understand and manage those complaints.
- ***In-home care complaints.*** Some residents receive in-home care through a DHB approved provider, or they receive rest-home level care in their unit. Those care services are managed and administered under health legislation, not the Retirement Villages Act, and they are subject to different complaint and dispute procedures. Managers in villages where residents make a complaint about those services explained that there is often considerable confusion among residents, the resident's family and even in some cases, village staff, about the appropriate complaints facility to use. Usually it falls to the village manager to work with the resident, their family and the care provider to sort out the complaint, although the village has no responsibility for the service provided, nor responsibility for dealing with the complaint.
- ***Resident's transition to residential care.*** If an individual needs assessment for residential care, there can be potential for the resident, their family or other residents to make a complaint about how the operator is treating the resident. There are also potential complaints and disputes around the termination of the ORA, particularly if it is an old contract with some ambiguities around conditions of termination, or there is delay in re-sale.
- ***Residents with persistent complaints.*** While very few instances were reported, it can be distressing for the resident who does not feel listened to, difficult to manage and disruptive in the village. Some operators made suggestions about how to manage persistent complaints.
 - Try to find out the underlying problem, it may not be the issue that is presented.
 - Bring in help to resolve the complaint. This may include mediation, counselling for the resident, or professional or technical advice on the issue.
 - As appropriate advise other residents what is being done to resolve the complaint, but be aware of confidentially issues.

6.3 Other Options for Raising Concerns

The villages survey found that 81 percent of operators have informal meetings with residents. In the focus groups, managers reported that they hold regular informal meetings with residents such as a weekly morning tea, where information is given and issues can be raised. Monthly residents' meetings are also typically used as discussion forums. Managers emphasised that being available and being seen in the village so that residents can "come and have a chat" is a crucial channel for residents to raise issues. Managers also said that while they have suggestions boxes, these are very rarely used by residents.

In general, managers indicated they value residents' committees and see them as a forum to identify and discuss issues. Managers often use the committee as a source of advice, or a barometer to gauge the views of residents about matters. Managers were clear though that the responsibility for dealing with complaints rests with the village manager. Also, they do not want residents' committees to be perceived as a gatekeeper between residents and the manager. While committees may have a useful role in supporting residents, managers prefer to talk directly with residents about their concerns.

Some managers with an older population in their village (average age in the mid-80s) noted that it can be difficult to establish and maintain a functioning residents' committee because residents are not interested in serving on a committee.

6.4 The Dispute Panel: Issues and Solutions

Very few of the managers who participated in the focus groups and interviews have had any involvement with the formal dispute process. However, they were aware of the experiences of other operators.

The main concern they raised was about the costs of the process. Some felt that costs are a deterrent to the operator serving a dispute notice on a resident, and forces them to settle. There was also some concern about the time the process takes, which is frustrating, not only for the operator, but also for the resident.

The potential for frivolous or unreasonable disputes brought by a resident was also discussed. There did not appear to be a widespread understanding among managers about the provisions in the Act for dealing with a frivolous or vexatious dispute.

Managers said that they would be extremely reluctant to initiate a dispute as an applicant, not only because of the costs, but also because of the reputational damage and the disruption to other residents in the village. A few operators gave examples of disputes within their village that could have ended at dispute panel, however, the operator chose not to escalate the matter.

Suggestions for improvement

A few managers new to the sector had very little knowledge about the dispute process set out in the Act and suggested that simple diagrams setting out key steps and decision points in complaints handling, as well as the disputes process would be helpful, not only so they could ensure they were following good practice, but also so that they could advise residents correctly.

The main suggestion operators made was to establish a step prior to the panel for parties to go to mediation or other means of resolution.

There was some support for free adjudication rather than the operator paying for the costs of the panel, but this view was tempered by others who were concerned that a free process would result in a loss of legal expertise of panel members, or encourage parties to use the panel for disputes that should be resolved outside of the panel process.

There was some support for residents sharing in the costs of the panel as a way of reducing the possibility of frivolous or vexatious disputes.

6.5 Preventing Disputes

Village managers see their own role as critical to the successful resolution of complaints and prevention of disputes. Generally managers want to identify residents' concerns and complaints, and deal with them quickly so that they do not become disputes. Some managers specifically talked about residents needing to be encouraged to talk about their concerns:

You deal with the issue at the coalface, up front. I would never leave the village at night with a complaint hanging over it. It's a big thing for an older person.

Recognise that they want to be heard. They've got a voice. There's a sense of loss of control when they've moved from their own patch. It's an expression of their independence.

Listen to them. Often they have trouble articulating. Really listen and investigate. Even if they can't articulate it, there's always something behind it. Often their behaviour is because of something else, so it's getting to the real issues. It's often multi-faceted.

The resident wants the ability to talk to the manager, to get it off their chest.

Managers have a strong sense of areas of potential conflict that need to be managed so that complaints do not arise. One such area is village developments. One manager commented:

There are two schools of thought. One is, the operator has a clear idea of what they want to do and they will not seek any input from residents. The other approach is they want input from residents, this is their home, I say to them, you won't get everything you want, or you can have everything you want, but someone has to pay for it!

Practices used to inform, consult and involve residents in village developments include:

- Providing information about intentions to residents very early and getting their feedback.
- Providing information to families about the development.
- Making detailed design plans available to residents.
- During development, scheduling regular meetings between residents and the project manager.
- Arranging for resident tours of the development at stages throughout the development.
- Involving residents in choosing the colour scheme and furnishings of new communal or care facilities.
- Drawing on residents' professional skills and expertise, in a paid or voluntary capacity to provide advice or undertake specific tasks relating to the development.
- For residents who are particularly adversely affected, e.g. by noise or construction vehicles, provide a compensatory gift voucher.
- Involving residents in management of an aspect of the new facility. Examples given were a shop, residents' lounge and bar.

Like residents, managers identified emergency events as presenting major risks of complaints and disputes. A few villages had experienced earthquake or flooding and had put in place specific measures to help residents through those events. These measures also helped to minimise complaints. These included:

- Appointing a dedicated staff member to work with residents and their families to address needs.
- Dealing with residents' needs as soon as possible.
- Providing all residents with frequent updates, not just those residents directly affected.
- Routinely providing information to residents' families as well as residents.
- Being especially considerate about residents' requests concerning their belongings, which may be damaged, inaccessible for long periods, or needing to be stored temporarily.
- Providing temporary housing where required as quickly as possible.
- Ensuring workmen turn up on time to do residents' repairs.
- Taking care to complete repairs to a high standard to minimise future problems of dwelling condition or performance.
- Providing residents with compensatory vouchers to acknowledge disruption and stress.

Manager's suggestions for good practices to prevent disputes

- Treat the resident with respect and compassion and take their complaint seriously.
- The village manager must be available to residents to discuss their concerns.
- Thoroughly and impartially investigate complaints.
- Thoroughly document complaints, efforts made to resolve them and the outcome.
- Deal with complaints quickly, and if resolution takes time, keep the resident fully informed. Acknowledge the complaint and the response in writing.
- Continuously seek informal feedback from residents.
- Give residents accurate and up-to-date information about what is happening or proposed in the village.
- Provide mentoring, training and professional support to managers to improve how they manage and resolve complaints.
- Talk with the family as appropriate, particularly if that would support the resident and clarify an issue in dispute.
- Make strenuous attempts to resolve the complaint 'in-house' if at all possible.
- Monitor the number and nature of complaints.
- Treat complaints as an opportunity to improve services.

7 STATUTORY SUPERVISORS' VIEWS

Statutory supervisors cover practically all registered villages.³⁰ Eleven statutory supervisors from the five statutory supervisor companies that provide services to retirement villages were interviewed. Qualitative data from interviews was subject to thematic analysis with a focus on:

- The types of complaints that statutory supervisors receive.
- Their role in resolving complaints and disputes that arise in villages.
- Factors that put villages at risk of complaints and disputes.
- Views about the formal dispute panel process.
- What works well to prevent disputes.

7.1 Types of Complaints

Many [complaints] are minor but nevertheless important to the resident. They range from a complaint about a 19 cent charge on a phone bill, to issues around the budget and increase in fees.

A lot of the complaints are day-to-day issues about the running of the village, delays in maintenance, the state of the gardens. If the operator doesn't get on top of this, it can lead to a complaint to us.

The scale of complaints are not huge, but the ones that come to our attention have reached a stage of significance.

Statutory supervisors report a total of 92 complaints received over the calendar year 2014. Most complaints were made by individual residents, although some residents' committees made complaints. A few complaints were made by residents' families, or by a resident's representative, such as a solicitor. Only one complaint was made by an operator. The large majority of complaints were resolved within the village, or with involvement of the head office in some cases where villages are part of a corporate entity.

Table 7.1 show the wide range of residents' complaints received by statutory supervisors in 2014.

³⁰ Except the very few village with an exemption from having a statutory supervisor.

Table 7.1 Range of Complaints from Residents Received by Statutory Supervisors

Common complaints	Less common complaints
<ul style="list-style-type: none"> • Maintenance and repairs to the individual dwelling. • Maintenance and repairs of communal grounds and facilities. • Standard, quality or changes in services and facilities. • Amount of service fees and budget, and increases to service fees. • Inadequate consultation over village development, changes in service fees, changes to community facilities. • Resident-to-resident issues: nuisance behaviour, interference to 'quiet enjoyment' or intimidation by other residents. • Contract breaches (unspecified). 	<ul style="list-style-type: none"> • Replacement of fixtures and fittings in dwelling (e.g. carpet, curtains). • Inadequate heating in dwelling. • An increase in village entry age and the resulting change in older age profile of the village. • Interactions/relationship between village manager or other staff and resident. • Slow response to activation of personal alarm. • Lack of accessible features in communal facilities. • Termination fees. • Calculation of deferred management fee. • Appointment of new village manager. • Access to resident's personal file. • Technical accounting issue. • The price paid for the licence to occupy the dwelling. • What items are included in chattels and fixtures. • The manner of presentation of the village's financial statement.

Statutory supervisors have noticed that some causes of disputes are disappearing, such as old contracts with ambiguous provisions around termination. The introduction of fixed fees with set increases, and the inclusion of refurbishment costs in the deferred management fee have eliminated other significant causes of complaints. Statutory supervisors identified other changes that may impact on the profile of future disputes:

- The next generation of baby boomers will be much more demanding customers. They will have high expectations about the quality and standard of service, communal facilities, and dwelling amenities provided. Some statutory supervisors think that expectations are already increasing, as residents pay considerable sums for their dwellings, and are purchasing a lifestyle.
- As villages grow older and need upgrading, disputes may emerge around the quality of the village built environment, maintenance expenditure and the length of time taken to sell individual units.

7.2 Role in Resolving Complaints and Disputes

They are generally unresolved things that haven't been fixed in the unit. The manager hasn't been front and centre. We ask, what's the process that has gone on? And we will check on the process.

Sometimes a resident will call me before going to the manager just to check out whether their concern is reasonable. By the time you get to this point, the issue has usually escalated a bit.

Sometimes a resident rings up and says, 'I have a problem, am I over-reacting?' My advice is no, if it's bothering you, do something about it, and if it bothers you, it might also bother other residents and you raising the issue might help others who have the same concern.

Although the large majority of complaints are resolved within the village, often resolution has involved input from the statutory supervisor. Residents tend to contact their statutory supervisor when they regard the issue as serious, and it has not been adequately addressed. Typically, statutory supervisors are contacted by residents when:

- The resident is seeking information or clarification on a matter.
- The operator has not responded to the resident's complaint.
- The resident is dissatisfied with the operator's response.
- The resident is uncomfortable talking directly to their village manager about an issue.

When contacted, statutory supervisors will ascertain whether the resident has raised their complaint with the village manager. This is for two reasons. Firstly, because managers have the responsibility for handling and resolving complaints, which is clearly set out in the Act and Code of Practice. Secondly, the resident must give the manager the opportunity to resolve the matter. However, if the resident is uncomfortable talking directly to their village manager about an issue, generally the statutory supervisor will raise it with the manager on the resident's behalf.

Statutory supervisors will also ascertain:

- Whether the resident has seen the village complaints policy and procedure and followed it. The statutory supervisor may give the resident advice on how the complaints process works and their options for making a complaint.
- Whether the operator has responded to the resident's complaint within the required timeframe and correctly followed the complaints procedure set out in the Code of Practice.
- Whether the complaint relates only to that individual or whether other residents are affected as well, for example a service issue or contract issue.
- That the operator is treating the resident in an appropriate and professional manner.

- After receiving the resident's complaint, the statutory supervisor will follow up with both the resident and operator, to ascertain what has happened to resolve the issue.

Statutory supervisors are aware that residents can be confused about the role of the statutory supervisor. That confusion colours residents' expectations of what the statutory supervisor can or should do in dealing with complaints. Statutory supervisors are careful to explain to residents that their role is to represent the interests of residents as a whole, and that an individual resident's interests may differ from those collective interests of all residents. Residents often see the statutory supervisor as a residents' advocate. However, statutory supervisors do not regard themselves as uncritical advocates for residents, but as an impartial body. Nevertheless, the role includes legal requirements and powers that the statutory supervisor can use to ask the operator for information and to give the operator directions on various matters. Statutory supervisors also explain to residents that, while they can advise on the meaning of the Act and the Code of Practice in relation to the resident's complaint, they cannot give legal advice, although some residents expect this to happen.

Most of the statutory supervisors interviewed have been involved in informal mediation between a resident and operator. Mediation has been for technical issues, as well as for situations where the relationship between the resident and the manager has broken down. Statutory supervisors considered that mediation has benefits, in that it will often help in clarifying the issues in dispute, identify similarities and differences in the resident's and operator's positions, and assist in identifying solutions. However, statutory supervisors were also aware of some reluctance on the part of both residents and operators to using mediation because of the possibility of expenditure without a resolution, and the lack of a binding outcome for the parties.

Statutory supervisors are aware that residents consider the costs associated with the statutory supervisor a disincentive for residents to contact them. While statutory supervisors generally do not charge for advice given to residents over the phone, there is generally a charge for additional visits over and above what is contracted with the operator.

7.3 Villages at Risk of Complaints and Disputes

Statutory supervisors considered that there are no types of villages that are more at risk of complaints and disputes than others. They receive complaints from villages of all sizes and ownership structures. But in their view there are some factors that increase the risk of complaints and disputes for any village. These are:

- Poor governance. The board has an insufficient mix of skills to provide appropriate governance and leadership. Governors have poor understanding of their role, responsibilities and obligations.
- Inadequate financial, management and operational systems.
- An inadequate complaints facility that does not meet the requirements of the Act.
- Poor implementation of complaints processes. This can include inadequate resources devoted to handling complaints.

- An aversion to getting professional help when required.
- Lack of a customer service philosophy and practices.
- Poor communications ethic, processes and practices.
- Village development, which can create uncertainty, disruption and stress if it is not managed well.
- New villages may be vulnerable to complaints during the period when management systems and staffing are bedding in.

Statutory supervisors raised the personalities and behaviours of residents as factors that may put a village at risk of complaints and disputes. For example, in close living environments and communal spaces some residents do not respect other residents' boundaries and privacy and this is a source of conflict. Statutory supervisors also identified a few instances of resident-to-resident bullying. In those situations the whole village is potentially affected and complaints are inevitable. There are also persistent complainers, although in the view of statutory supervisors there are only a handful of residents across the country who would fall into that category.

7.4 The Dispute Panel: Issues and Solutions

Few of the statutory supervisors have had involvement with a dispute dealt with by a dispute panel. But their general knowledge of the sector and experience in dealing with operators and residents gives them an insight into the process.

Statutory supervisors see the value in the dispute panel as an independent body that can make an impartial judgement. They believe it is necessary for the sector to have an independent body where parties can take serious disputes. However, they also considered that most issues should be resolved without recourse to a panel.

Generally statutory supervisors agreed that the operator should be responsible for paying for the costs of the panel. This requirement is seen as an incentive for the operator to resolve the dispute. They also agreed that the potential for a panel to award costs against a resident was fair, as residents, like operators, have a duty to use the process responsibly and not for frivolous or vexatious purposes, although consideration would need to be given to the resident's ability to pay.

Most statutory supervisors considered the dispute panel is costly for parties, particularly so for the operator. The requirement of a three person panel for some types of disputes increases the expense. Some considered that the costs of the process are disproportionate to the size and scale of the problems that come for adjudication.

Most statutory supervisors also considered that there is a lack of alternative processes for resolving disputes. There is no clear step between the internal village process and the formality of the panel. Some statutory supervisors suggested that the Code of Practice pays insufficient attention to mediation as an alternative to the dispute panel.

Some statutory supervisors also identified other shortcomings of the dispute process:

- A perception among residents that the panel is not independent from the operator.
- Residents do not have enough information or knowledge about the dispute process.
- The process is daunting and difficult for residents.
- An overly-legalistic approach makes the process cumbersome and does not result in simple solutions.
- Some panel decisions do not seem to make sense in terms of the day-to-day management of a village and it is unclear how they contribute to improved management.

The main suggestion for improvement was for the establishment of an intermediate step between the internal village process and the dispute panel. All considered that there needs to be greater promotion and use of alternative dispute resolution. A couple of statutory supervisors suggested that residents need to receive more information about complaints and disputes processes.

7.5 Preventing Disputes

When a resident comes to a village this is probably the most complex transaction they have ever done in their life, and they won't have experienced anything like it. It's loaded with jargon and technical terms.

Statutory supervisors were unanimous in identifying the operator's and manager's communication practices as critical for successfully managing complaints and disputes. Managers and residents interact within the legal framework regulating retirement villages, the potentially complex nature of ORAs, voluminous documentation such as disclosure statements, and village rules regulating behaviour. With such diverse and multi-layered information it is understandable that residents may misconstrue contractual matters, or the respective roles, rights and responsibilities of the operator, the village manager, residents as a collective entity and individual residents. All residents need information that is clear and understandable, however, their information needs are diverse. While many residents have the skills to handle complex information, some residents are not financially literate, are unfamiliar with legal terms or have cognitive impairment. Consequently, the way that operators and managers communicate about matters relating to the running of the village, their day-to-day communication with residents, and responses to individual residents who raise issues or make a complaint, are all important.

Statutory supervisors commented on poor consultation practices. Although operators are aware of consultation requirements as set out in the Code of Practice, there is little exemplary practice. Common shortcomings identified by statutory supervisors include:

- Some operators are not routinely consulting residents about matters that require consultation, such as fee increases and village development.
- Not providing sufficient opportunities for resident to have their say on a proposal.

- A lack of or inadequate information provided to residents on a proposal.
- No serious consideration of residents' comments.
- No feedback to residents on how their comments have been considered.

A few statutory supervisors also observed that some residents do not understand what consultation means. It does not mean that residents have a veto over the operator's proposal. While the operator must not decide a matter before consultation is completed, and must consider residents' advice with an open mind, the operator has a number of matters to balance in decision-making, including the individual and collective residents' interests; the need to be able to manage; and prudent financial practice.

Statutory supervisors' comments about operators' communication and consultation shortcomings are presented here in some detail because they formed such a strong narrative in the interviews.

I truly believe in communication and engagement at the operational level, if you don't get that, things don't get sorted, it's a recipe for disaster. If managers haven't understood the issues, or given enough weight to them, then there will be problems.

We are continually reminding operators that they have to consult with residents ... There's a huge variation among operators. Some have an attitude that they will do the bare minimum while some almost over consult. There is no consistency around good practice. Good consultation is not that common.

A lot of issues arise out of poor communication, poor engagement, poor relationships between manager and residents.

The main issue is communication. Some operators believe that if they don't tell the residents anything, the resident won't ask the question. They tend not to communicate with residents or fob them off with an inadequate explanation. Those situations tend to unravel pretty quickly ... some operators are proactive and nip things in the bud.

The main driver of complaints is lack of communication between the manager and resident. You see it very quickly when you go to the village ... if you are confronted with a shopping list of trivial stuff, you know there's poor communication and if residents want to talk to you after the meeting and if the same issues come up repeatedly year after year, then you know there's poor information.

Some operators are paternalistic, they attract issues, it's part of the culture of the organisation. The operator's attitude is, 'these are my units, these are my gardens'. They don't consult, they don't communicate, they issue edicts. They treat residents like children and it gets their backs up and they push back. It's not a lot of operators, but there are some. And it's not solely related to any size or type of village.

The operator needs to properly disclose. We had this problem, the statutory supervisor was called in and a series of meetings were held with residents. There had not been proper disclosure. Families were getting upset as well. The operator had complied with the Code of Practice but not in the spirit of proper consultation.

Statutory supervisors' suggestions for good practices to prevent disputes

- Good governance, financial, management and operational systems.
- Strong communications and consultation practices.
- Strong customer service ethic and practices.
- Deal with complaints in a timely manner.
- Adequate resourcing of the complaints process.
- Well-functioning residents' committees can help both residents and village managers to deal with complaints.

8 LAWYERS' VIEWS

Data was gathered from lawyers who work with older people and are knowledgeable about the retirement village sector through:

- Interviews with ten lawyers, three of whom had been involved in a dispute that went to a dispute panel. Four of those mainly act for operators, five mainly act for residents and one has acted for both operators and residents. They work in Whangarei, Auckland, Tauranga, Rotorua and Christchurch.
- The lawyers survey for the AIE project, with 102 lawyers who have provided advice regarding retirement village residency within the last two years.

This section focuses on:

- The importance of good information and advice for preparing intending residents for village living and reducing the potential for complaints.
- The lawyer's role in resolving complaints and disputes that arise in villages.
- Views about the formal dispute panel process.
- What works well to prevent disputes.

8.1 Advice and Information

I advise the client that the process exists, and tell them they really don't want to be going there! I tell them that what the panel deals with is very tightly defined, and there may be costs associated with taking a dispute. I advise them that if they have a complaint they go straight to their manager, raise it early and raise it in a reasonable way. I would consider that to be a compulsory part of my talk with them before they sign their agreement.

One of the principles of effective housing dispute resolution is improved public awareness of housing rights and responsibilities to prevent housing problems arising.³¹ In regard to retirement villages, this principle suggests that the provision of information and advice not only to intending residents and residents, but also to their families is an important factor in minimising the potential for complaints and disputes arising from poor understanding of the resident's contract and other village documentation. Raising general public awareness and understanding of retirement villages would also help in reducing the potential for disputes. Both surveyed and interviewed lawyers were of the view that involvement of family members at the decision-making stage, if that is the wish of the intending resident, was an important factor in avoiding later disputes arising out of misunderstanding about the ORA or Disclosure Statement.

Lawyers have a key statutory role in advising intending residents about their contract with the village so that they understand the nature and implications of those contractual arrangements. The lawyers survey shows that intending residents typically arrive at their

³¹ The Law Commission 2008.

lawyer's office having made up their mind to live in a particular village and having made an application. They come with a very limited understanding of essential documentation and of village living. Only 4 percent of lawyers reported that intending residents have read and understood the ORA and Disclosure Statement. Furthermore, 34 percent of lawyers considered that, in general, intending residents have not read the ORA and Disclosure Statement. A minority of lawyers reported that residents had usually considered some of the fundamentals, such as their ability to terminate residence (14 percent of lawyers); the implications of continued residence or costs if their partner requires care in their unit or a rest home (23 percent of lawyers) or the affordability of the village if their financial circumstances change (27 percent of lawyers).

One third of surveyed lawyers make a point of not only advising on contractual matters, but also explore with intending residents a range of aspects of retirement village living and the extent to which the lifestyle fits current and future needs. Many of these aspects of daily village living are also areas that can potentially generate complaints due to the resident's lack of knowledge about their ORA, the nature of services provided, or what they can and can't do.

Both surveyed and interviewed lawyers reported in detail about the range of information they provide to the intending resident. For example lawyers routinely provide advice on:

- Village rules and obligations as a resident, especially rules about pets, noise, having family and friends to stay and where washing can be hung to dry. One lawyer noted that often the rules about pets are not made clear to residents, particularly if their main contact with the village has been through a sales person.
- The operator's and resident's obligations with respect to repairs and maintenance of the dwelling. Lawyers noted that it is often not apparent whose responsibility it is to pay for repairs or replace some items.
- Any operator restriction on the resident's choice of utilities companies.
- How service fees are set, what is in core fees and what services have additional charges.
- Implications of the contract if the resident wishes to move out of the village. Lawyers considered that, while not many residents want to move out of villages, it is not uncommon. Overall, 46 percent of surveyed lawyers reported that they have had a client wanting to leave a village, for a wide variety of reasons, not just moving into residential care.
- Exit payment, exit costs and conditions.
- Re-sale statistics and market factors that might impact on re-sale times.
- Costs and conditions of transferring within the village.
- Costs and conditions of transferring to residential care.
- Future development of the village.
- Living in a communal environment.

For residents to be well informed and knowledgeable about the implications of village living, it is not only important for them to be able to access information. That information must be easily read, accurate, comprehensive and relevant. Surveyed lawyers considered that the areas where information could be most improved were:

- access to DHB funding for in-home support (71 percent of lawyers);
- projections of future costs (54.2 percent of lawyers)
- inclusions in monthly fees and ‘pay as you go’ charges (49.5 percent of lawyers)
- maintenance provision (39.3 percent of lawyers)
- key occupation right agreement conditions (38.3 percent of lawyers).

The areas of information deficit that lawyers raised have also figured in complaints. Lawyers commented about the quality of information available for residents.

Generally there is plenty of information available, but despite the intention that it be in an easily understandable form, the volume of it makes it very difficult for many clients to take it all in. I find they are often overwhelmed with information before I see them.

Some villages have excellent documentation and some incorrectly or inadequately complete documents that do not have up to date details about disposals, or do not match registered documentation.

The documents need to be simplified and in plain English so that older people can read them easily. All the occupation license / agreements are too long and complicated (with too many cross references) for most older people to get to grips with themselves.

I say pretty firmly, look beyond the ‘beautiffulness’ of it and look at the service and how it’s delivered. Often people are paying big money. When it’s family who are kind of making the decision, and the older person has a resistance to needing some care, there’s a feeling that the more glossy it is, the better it is. But it’s not a very reliable indicator.

[the disclosure statement] It’s an appalling document! It’s not tailored for the older person. It’s longer than the ORA. It should be a one or two pager. The key bits in it are the termination process and payout, and the complaints procedure ... it’s just too unwieldy.

The provision of information to intending residents as to the financial strength of the operator is important and is lacking at present. There ought to be some information provided by every village operator in an agreed format which lay people can understand, which speaks about its financial standing. I find that intending residents are simply trusting that “all will be well”.

8.2 Role in Resolving Complaints and Disputes

In the lawyers' survey, 20 lawyers (19 percent) reported that they have been asked by a village resident to advise on, represent or mediate in a complaint or dispute between a resident or resident's family and an operator. The majority of those lawyers had only been involved in one complaint or dispute in the previous year, although one lawyer had been involved in three. Only one dispute, concerning delays in re-sale of a unit, had been taken to a dispute panel.

The interviewed lawyers said that they have dealt with few complaints from village residents. However, those few complaints can emerge at any stage of residence, from prior to signing the ORA, to termination, and can cover a wide range of issues. Theirs is largely an advisory role, although sometimes the lawyer becomes involved in informal mediation between the operator and resident. Often the lawyer provides advice that explains legal and contractual matters, such as how the ORA applies in a particular situation. The lawyer can also help parties to clarify the issue in dispute and come to a solution.

The list of complaints that lawyers have received are very similar to the range of complaints identified by statutory supervisors, residents and operators, and include:

- A new dwelling that was purchased off plans did not meet expectations.
- Ambiguity in the contract about what happens on termination, about alterations to the dwelling made by the resident and fixtures added by the resident such as heat pumps.
- Replacement of a fixture in the dwelling.
- Expectations about promised services which have not been provided.
- Amount of increase in service fee.
- Disruption and inconvenience due to village development.
- Behaviour issues between residents, and between residents and staff.
- Resident injured through using a communal facility.
- Leaky building problems.
- Change of village ownership.
- On termination of the ORA: refurbishment costs, the amount of DMF.
- Delay in re-sale of the dwelling.
- Complaints about the complaints process not being followed.

Surveyed lawyers noted that two reasons why residents came to them wanting to move out of a retirement village were to do with conflict with management and conflict with other residents. While these were not the most common reasons why residents wanted to move, it nevertheless indicates that complaints and disputes can have a major impact on a resident's satisfaction with the village.

8.3 Views about the Dispute Panel

Interviewed lawyers were asked for their views about the dispute panel, and their comments were very similar to those of other stakeholders. Key points were:

- The panel needs to be more accessible and user-friendly for older people. Residents sometimes have difficulties in framing the dispute notice to accurately describe the issue in dispute and the remedy they seek. However, one lawyer thought that the dispute process already has user-friendly aspects for residents as they can have a support person, and the panellist assists the resident through the process.
- The panel is being used for some types of disputes that would be more suited to mediation or other dispute resolution processes. One lawyer considered that the panel should be used only for disputes relating to legal or technical matters. There was general support for mediation to be used more and to be better integrated into the current process. The point was also made that both parties have to agree to engage in mediation, and if mediation is not successful, it does attract additional costs and the parties may still take the dispute to a panel.
- Several lawyers considered that there is a potential imbalance and unfairness because legal advice is expensive and operators are more able to afford legal advice than residents.
- While there was some support for an advocacy service for residents, questions were raised about how this would be paid for, and whether there are existing organisations that could provide such a service.
- One lawyer considered that the panel should operate similarly to the disputes tribunal or tenancy tribunal, i.e. a low cost mechanism for both parties with a low lodgement fee. However, two lawyers argued that this may reduce the use of legally qualified decision-makers, and the correct legal outcome must be maintained otherwise there would be a risk of appeal.
- Several lawyers considered that the process could be simplified as it has become ‘overly legalistic’. One suggested that the process operate without any legal representation for parties.

8.4 Preventing Disputes

Interviewed lawyers considered that relevant, accurate and clear information to intending residents, residents and their families is important for dispute prevention. Lawyers pointed out that intending residents and residents have very diverse information needs. Some are proactive in finding out what they need to know, have a good understanding of their ORA, as well as their own and their operator’s rights and responsibilities. Others rely largely on family members or their lawyer to advise them. Surveyed lawyers identified problems with overly-complex information that is routinely provided in the sector and acknowledged that many intending residents need information in a simplified and summarised form. Lawyers themselves appear to perform an important role in clarifying, simplifying and summarising key information for intending residents.

The second issue raised was around the communication and consultation practices of operators. Some areas of poor communication were identified, such as inadequate consultation over changes in services. The information available to residents about the village complaints facility appears to be adequate – only 15 percent of surveyed lawyers said that it could be improved.

Lawyers' suggestions for good practices to prevent disputes

- Simple, easy-to-understand summary information covering the key aspects of ORAs and disclosure statements, targeted to answering intending residents' common questions.
- Continue to standardise ORAs and terminology across the sector.
- Multiple channels for provision of information to older people, who are not necessarily connected to the internet and like to receive information in written form.
- Sound management systems.
- Good practice in communication and consultation.
- A complaints facility that is designed for older people, particularly those who are most vulnerable.
- Good village practices in dealing with complaints: express concern and genuinely acknowledge the complaint; if at fault, apologise; work on a speedy resolution; fix up the problem so that it doesn't happen again – this may require a new or improved policy or procedure.
- Active residents' committees.
- Provide family members of intending residents and residents with information.
- A willingness of both residents and operators to seek legal advice.

References

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- The Law Commission, 2008, *Housing: Proportionate Dispute Resolution* Law Com No.309 London, The Law Commission.

Appendix A: Key Terms

Applicant – a person who gives a dispute notice under section 52 of the Retirement Villages Act.

Complaint – in this report, ‘complaint’ refers to an issue or matter that a resident brings to the attention of the operator for resolution.

Complaints facility – the procedure within a village that the operator has for dealing with residents’ complaints. The procedure must be written down and a copy must be made available to residents and intending residents on request. The complaints facility is required by the Retirement Villages Act (section 51) and what it must contain is described in the Retirement Village Code of Practice.

Dispute – in this report, ‘dispute’ refers to an issue or matter that is the subject of a dispute resolution process.

Dispute Notice – a written notice about the dispute issued by the applicant to the respondent. The notice identifies the issues for which a decision is sought, the person/s that the notice is made in relation to, the grounds for the dispute, and efforts that have been made to resolve the dispute. See section 56 of the Retirement Villages Act. A template for the notice is set out in Form 1 of the Retirement Villages (Disputes Panel) Regulations 2006.

Dispute Panel – up to three people appointed from a list compiled and approved by the Commission of Financial Capability to hear a dispute. The panel issues a decision. The decision can be appealed by a party to the dispute. See section 59 of the Retirement Villages Act.

Panellist – a member of the dispute panel.

Respondent – the person who is given a dispute notice under section 52 of the Retirement Villages Act.

Statutory Supervisor – a person appointed under section 38 of the Retirement Villages Act to monitor the financial position of the village. The statutory supervisor has certain powers that he/she may exercise if he/she believes that the financial position of the village, the security of interests of the residents or the management of the village is inadequate. See sections 42-43 of the Act.

Appendix B: TEMPLATE FOR DISPUTE CASES WITH A DECISION

Title		
Applicant	<input type="checkbox"/> ₁ Resident <input type="checkbox"/> ₂ Former resident <input type="checkbox"/> ₃ Resident relative	<input type="checkbox"/> ₄ Operator <input type="checkbox"/> ₅ Other
Respondent	<input type="checkbox"/> ₁ Resident <input type="checkbox"/> ₂ Former resident <input type="checkbox"/> ₃ Resident relative	<input type="checkbox"/> ₄ Operator <input type="checkbox"/> ₅ Other
Name of retirement village	<input type="checkbox"/> ₁ Corporate <input type="checkbox"/> ₂ Independent	<input type="checkbox"/> ₃ Not-for-profit <input type="checkbox"/> ₄ Other
Location		
Dispute panel member(s)		
Assigned Year		
File of dispute notice date		
Hearing date		Decision date
Issues in dispute		
Resident legal advisor at hearing?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No	
What happened at the pre-hearing meeting		

RETIREMENT VILLAGES ACT 2003 MONITORING PROJECT: REPORT 2 – THE PRACTICE, EXPERIENCE AND VIEWS OF DISPUTE RESOLUTION

Duration of complaint (pre hearing)	
Identified contextual circumstances	
Outcome / ruling for applicant	
Outcome / ruling for respondent	
Appeal?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No
Order?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No
Did the applicant seek costs?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No Amount
Did the respondent seek costs?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No Amount
Resident ordered to pay costs?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No Amount
Jurisdiction to determine dispute	Issues in: Issues out:
Other rulings referred to	
Party involved in other dispute	
Other comment	

Appendix C: TEMPLATE FOR WITHDRAWN DISPUTE CASES

Title		
Applicant	<input type="checkbox"/> ₁ Resident <input type="checkbox"/> ₂ Former resident <input type="checkbox"/> ₃ Resident relative	<input type="checkbox"/> ₄ Operator <input type="checkbox"/> ₅ Other
Respondent	<input type="checkbox"/> ₁ Resident <input type="checkbox"/> ₂ Former resident <input type="checkbox"/> ₃ Resident relative	<input type="checkbox"/> ₄ Operator <input type="checkbox"/> ₅ Other
Name of retirement village	<input type="checkbox"/> ₁ Corporate <input type="checkbox"/> ₂ Independent	<input type="checkbox"/> ₃ Not-for-profit <input type="checkbox"/> ₄ Other
Location		
Assigned Year		
File of dispute notice date		
Hearing date		Decision date
Dispute panel member(s)		
Issues in dispute		
Resident legal advisor?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No	
Duration of complaint (pre formal process)		
Was the dispute resolved?	<input type="checkbox"/> ₁ Yes <input type="checkbox"/> ₂ No	

RETIREMENT VILLAGES ACT 2003 MONITORING PROJECT: REPORT 2 – THE PRACTICE, EXPERIENCE AND VIEWS OF DISPUTE RESOLUTION

How was the dispute resolved?	
If dispute was not resolved, or still in train, what happened?	
Identified contextual circumstances	
Outcome / ruling for applicant	
Outcome / ruling for respondent	
Party involved in other dispute	
Other comment	