Rules of Conduct for Operators of Retirement Villages

Retirement Villages Amendment Regulation 2019

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Introduction

The NSW Government is continuing to reform the retirement villages industry with the introduction of Rules of Conduct for operators of Retirement villages (the Rules).

On 15 December 2017, the NSW Government received the Final Report of the Inquiry into the NSW retirement village sector (‘the Greiner Report’). The Greiner Report, having raised concerns around the responsibility of managers and operators in retirement villages, led to the NSW Government amending NSW retirement village legislation - namely the *Retirement Villages Amendment Act 2018 (*The Amendment Act) and the *Retirement Villages Regulation 2017* (the Regulation). It is intended that the Rules will be captured in the Regulation.

The Rules have been developed in consultation with key stakeholders.

NSW Fair Trading is seeking feedback on the matters that will be included in the Rules. This feedback will be used to assist in finalising the Rules and incorporating them into the Regulation. The Government intends to publish the final Rules of Conduct prior to 1 July 2019.

## Have your say

We invite you to read this paper and provide comments. You may wish to comment on only one or two matters of particular interest, or all of the issues raised.

We prefer to receive submissions by the online form provided, or by email; requesting that any documents provided to us are produced in an ‘accessible’ format. Accessibility is about making documents available to as broad an audience as possible, including people who may have some form of impairment and may be using assistive technology, such as screen readers. Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

If you do not wish for your submission or any part of your submission to be published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information, for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009)*.

## How to lodge your submission

You can provide a submission by email to policy@finance.nsw.gov.au, by using the online form on the Have your say page for this consultation, or by post to the following address:

Retirement Village Rules of Conduct Review

Regulatory Policy, BRD

Department of Finance, Services and Innovation

2-24 Rawson Place

HAYMARKET NSW 2000

Submissions close **5pm Friday 7 June 2019**.

## Next steps

Once the consultation period has closed, feedback will be analysed and all potential options assessed. More information about the progress of the implementation of the retirement village reforms will be made available on Fair Trading’s website at [fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au).

Rules of Conduct

The Rules contain a number of principle-based requirements for operators that are aimed at enshrining a minimum standard of behaviour. The Rules ensure that residents can be assured of a minimum standard of procedures, behaviour and conduct from any operator, across all NSW villages, industry-wide. This is to be achieved by ensuring that operators:

* have sound knowledge of legislation;
* act in the best interests of all residents;
* act with skill, care and diligence;
* are honest and professional; and
* respect confidential information.

The Rules also contain more specific requirements surrounding issues identified within the Greiner Report. These aim to provide the retirement village industry with a clear foundation of practices and processes deemed necessary for the effective functioning of a village. They include establishing and documenting processes to mitigate elder abuse, manage conflicts of interest as well as the handling of disputes and complaints.

Section 83B of the Amendment Act allows the regulations to prescribe Rules of Conduct for operators in connection with the management or operation of retirement villages. All rules are consistent with Section 83B of the Act.

Matters covered by the principal Act (*Retirement Villages Act 1999)* or Regulation (*Retirement Villages Regulation 2017)* are not the subject of this consultation process.

Submissions are welcome on any aspect of the Rules whether addressed in this paper or not. All the questions do not need to be addressed. Responses should take into consideration the potential impact on operators, staff or residents of the retirement village.

To guide you through the draft Regulation, the following sections of this document correspond to sections of the Rules of Conduct. They seek to explain and discuss the impact and rationale behind each section and the area of conduct to which they relate.

Note: This paper should be read in conjunction with the *Retirement Villages Amendment (Rules of Conduct for Operators) Regulation 2019 –* the Rules of Conduct.

## Part 2 – Standards of Conduct

## Knowledge of legislation

In NSW, retirement village legislation explicitly details the requirements, processes and obligations that managers and operators must abide by. This Rule makes it clear that operators must have knowledge and an understanding of the legislation that applies to retirement villages.

This includes industry specific legislation (i.e. *Retirement Villages Act 1999*, *Retirement Villages Regulation 2017* and *Strata Schemes Management Act 2015*), fundamental business legislation (*Corporations Act 2001, Work Health and Safety Act 2011*)as well as any other legislation that may be necessary for the operator to exercise the functions of their role.

Residents expect operators to be aware of their legislative requirements. This Rule seeks to safeguard residents and provide them with greater peace of mind that the operator of their village understands their legal obligations and are operating, complying and interacting with residents to the full requirements of the law

By ensuring that operators have knowledge of legislation that is relevant to the operation and management of a village, the Report’s recommendation can be implemented to its fullest intent.

The Greiner Report recommended that managers of retirement villages should have an acceptable level of knowledge of matters related to the management of a retirement village. Further, a skills and knowledge gap was identified amongst operators and management, including a lack of relevant legislative knowledge.

**Are there any other knowledge requirements for operators managing retirement villages that should be listed in the Rules?**

## Operator to act in best interest of all residents

This section of the Rules is intended to improve resident outcomes and services by ensuring that operators fairly consider and weight the interests of all residents when exercising their functions within the village.

Retirement villages serve a valuable role within communities, and it is important that they continue to do so. With the number of residents in villages anticipated to increase in the coming years due to an ageing population, operators must consider the unique needs and interests of all their residents.

This section seeks to reaffirm industry standards through the inclusion of operator requirements to respect residents and the ageing process, and to conduct themselves in a manner that would improve services for, and best support, residents.

The Greiner Report advocated for the inclusion of provisions within the Rules that cover the expected conduct and responsiveness of operators. It further identified a skill and knowledge gap, specifically relating to age-appropriate communication with the elderly. This was found to be a likely contributor to lack of trust between residents and the operator.

## Honesty, fairness and professionalism

Residents should be able to feel secure in their retirement village, with expectations that operators are acting honestly and fairly. This Rule aims to provide residents with protection against harassment and discourages operators from employing high pressure tactics or providing misleading information.

This section of the Rules seeks to address these concerns and the concerns residents voiced during the Greiner Inquiry by establishing a single standard of professionalism and honesty for industry operators.

A lack of professionalism can be a contributing factor in internal disputes. If residents are hesitant to trust that operators can undertake their role effectively, they are more likely to question their decision making and ability to competently operate a village.

The Greiner Report found that satisfaction varies with the degree of honesty, diligence and fairness in NSW retirement villages. Generally, residents are able to enjoy the benefits that retirement villages provide. However, they feel that more can be done to improve the consumer experience in the sector.

**Do the Rules of Conduct clearly specify how an operator should conduct themselves towards residents? If not, can you provide further suggestions?**

## Confidentiality

This section of the Rules sets out the obligations and expectations of operators to behave ethically and act with care when handling information provided by residents to operators and their staff. It seeks to reinforce operators’ commitment to respecting the privacy of residents by requiring operators to ensure all staff members treat information in a professional manner and not distribute confidential information outside the requirements of their role.

**Are the confidentiality requirements on operators when handling residents’ information appropriate? If not, what other requirements should be included?**

## Strategies for mitigating elder abuse

The Greiner Report broadly advocated for the inclusion of an elder abuse mitigation strategy within the Rules of Conduct. The [NSW Government Ageing Strategy 2016-2020](https://www.facs.nsw.gov.au/download?file=382829) defines elder abuse as a single, or repeated act, or lack of action, occurring within a relationship where there is an expectation of trust, and which causes harm or distress to an older person. This definition has been adopted for the purposes of the Rules of Conduct.

Under the proposed requirements outlined in this section of the Rules, an elder abuse mitigation strategy must be prepared for the retirement village and copies must be posted on the village notice board and made readily available to residents.

The operator is also required to make residents and members of staff aware of the elder abuse mitigation strategy and their responsibilities under the strategy. These requirements seek to improve the industry’s response to elder abuse, through increased awareness and provision of better information (including specific examples) ensuring an effective response when events occur.

Under the new requirements, operators will need to provide staff and residents with accessible resources, skills and information on how to handle an allegation or case of abuse, or effectively support the victim. This reinforces the importance of elder abuse mitigation within retirement villages and the role that operators play in communicating and educating their staff and residents on important issues.

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**Is it reasonable to require an operator to prepare a mitigation strategy to address elder abuse and be responsible for staff and residents’ awareness?**

**Are the current requirements for the Elder Abuse Strategy sufficient? If not, what else should be included?**

## External selling agents

This section of the Rules requires the operator to provide an external selling agent with any information and assistance necessary to facilitate the sale of the resident’s premises. This requirement is subject to the operator receiving a request from the external selling agent and confirming that the agent has been engaged by the resident. Once a request has been received, operators must provide the required information to the agent within five working days.

Under the Act, residents can engage the services of an external selling agent when exiting from a retirement village. This section aims to restore parity by ensuring residents can exercise this right without being unfairly disadvantaged by uncooperative operators, who may have a monopoly of access to relevant information.

The Greiner Report noted that operators may not always cooperate with residents when they have engaged the services of an external selling agent to sell their residence. This section seeks to support residents’ ability to effectively employ an alternative agent (to the operator) when selling their residence.

**Is there any specific information, operators should be required to provide or grant access to, to facilitate the sale of a premise by external selling agents?**

## Part 3 – Representations in marketing retirement villages

Part 3 of the Rules addresses the importance of ensuring that marketing materials and supporting claims are accurate and create realistic expectations for residents and prospective residents. It places restrictions on operators to prevent them from making any marketing representations to residents and prospective residents in a disingenuous manner, through deceptive practices or misleading information.

The marketing of retirement village living is very influential and formative in shaping the expectations and decisions made by residents and prospective residents. This section of the Rules seeks to limit the ability of operators to unfairly influence resident expectations and simultaneously improves the quality and consistency of the information that is provided to residents and prospective residents.

The Rules also require disclaimer statements to be included in promotional material for specific residences and retirement villages generally, depending on the length of the marketing material. These statements are in relation to the payment of departure fees and the impact of capital gains received by residents. The disclaimer statements aim to better inform prospective residents as to the financial repercussions of their choices, leading to more informed consumer decision making.

The requirements for promotional materials are broken into two key sections:

* Clause 13 pertains to **generic village promotional materials**. The 100-word limit is designed to ensure the more informative materials are captured, such as brochures, pamphlets and websites, whereas small-scale advertisements such as digital banner ads, invites to events, fundraising slogans, are excluded.
* Clause 14 pertains to **promotional materials for specific residences** (i.e. individual units within a village). The 50-word limit is designed for this particular type of marketing, as most residence specific advertisements exceed this word limit. Additionally, it ensures that digital banner ads and other small-scale promotional material are not captured.

The requirements for these statements to be included within promotional materials stems from the Greiner Report’s findings that residents believe many of the marketing activities conducted by operators were not being done in a fair and honest manner. The word limit condition was chosen to capture the relevant marketing types, without creating onerous restrictions on non-relevant channels and mediums that operators use. A list of marketing materials was considered too prescriptive and would quickly become outdated. The word limit was considered the most effective way to capture future technologies and changing marketing methods.

**Is it reasonable to include the proposed statements in promotional material? If not, why?**

**Are the proposed word counts a suitable method for determining which materials should include the proposed statements? If not, what is an alternative method to capture the right marketing material?**

## Part 4 – Conflicts of interest

This section of the Rules addresses how operators identify and manage conflicts of interest and establishes consistency across the industry. It aims to promote transparency, prevent fraud and increase the standard of ethical conduct throughout the industry.

Under the proposed Rule, operators will be required to ensure that they and their staff avoid conflicts of interest where possible and disclose any conflicts of interest to residents by written notice. It imposes a duty on the operator to manage and resolve the conflict in an appropriate manner.

Conflicts of interest, when left undisclosed, can become a source of tension within a retirement village. Villages and operators who are perceived to, or act on their personal interests when making a decision or carrying out their functions in retirement villages, are more likely to come into conflict with residents. This, in turn, often leads to increases in complaints and disputes. Part 4 of the Rules seeks to reinforce to operators the importance of impartiality and transparency when carrying out their role within their retirement village.

This section does not signify that all conflicts of interest are inherently negative or are against the interests of residents, however, it requires operators to be transparent and share the information with the residents.

**Should any of the requirements be removed or new requirements added to the Rules of Conduct, in order to better manage conflicts of interest? Why/why not?**

## Part 5 – Complaint handling and dispute resolution scheme

## Complaint handling

This section of the Rules requires operators to document and maintain a complaint handling process and ensure staff are aware of the process and receive training in effective complaint handling. Additionally, all records of complaints must be kept by the operator for a period of five years.

Part 5 aims to ensure that residents have an appropriate, well-formed and transparent process to pursue complaints. Ensuring that villages are capable of handling, managing and resolving complaints will help reduce lingering tension.

Additionally, by appropriately managing complaints before they potentially become disputes, this will limit reliance on the dispute resolution process, Fair Trading Mediation and the need for residents to go to the NSW Civil and Administrative Tribunal (NCAT).

The Greiner Inquiry found that conflicts can often be exacerbated within retirement villages. This is due to residents being unable to easily switch service providers (villages), without significant financial repercussions. Residents must then remain in a village wherein there may be significant conflict, tension or dissatisfaction with the operation of the village.

**Are the requirements proposed in the Rules of Conduct suitable for the handling and resolution of complaints? If not, why?**

## Internal Dispute Resolution

This section of the Rules also requires operators to prepare and maintain an internal dispute resolution process. This documented process must be publicly available on the operator’s website and be provided to residents. The inclusion of such a process aims to provide residents with more transparency and ensures that they have access to a pathway to solve their disputes.

It will also allow for NCAT to not be the first, or only, point of escalation for village disputes. Instead, the Tribunal can be reserved for more complex matters that are unable to be resolved internally or through mediation services (either through Fair Trading or third-party services).

The Greiner Report called for the introduction of a mandatory, accessible and independent dispute resolution process, which is appropriate for elderly residents. Within the Report, resident concerns were raised regarding the formality, length and lack of access to affordable legal resources, which often prevented them from progressing disputes. The Rules address these concerns by ensuring that villages have an internal dispute resolution process, which provides for a simple, accessible and cost-effective way for residents to work through disputes.

The Greiner Report further identified that disputes are often exacerbated when there are communication delays within villages, both in terms of acknowledging issues and the time taken to communicate actions. These concerns are addressed by building in timeframes for key steps, ensuring a robust process is in place.

**Are the requirements proposed in the Rules of Conduct suitable for the resolution of disputes? If not, why?**

**Are the maximum timeframes set out within Part 8 regarding the acknowledgment and management of complaints and disputes appropriate?**

**Are the requirements for making the dispute process publicly available achievable/reasonable?**

## Part 6 – Staff training and competencies

Part 6 of the Rules requires operators to consider and plan for the qualifications and minimum performance standards necessary for roles within the retirement village.

Operators will also be required to implement and maintain written guidance, policies and procedures for the selection, training and ongoing supervision of members of staff of the retirement village.

The Greiner Report recommended that village managers should be made to undertake appropriate training and ensure that they have the appropriate level of knowledge and skills to fulfil the functions of their role. The Report found broad support for the need to increase standards and training levels across the sector.

This section of the Rules codifies this recommendation by ensuring that all members of staff are provided with the relevant training, skills and knowledge to effectively undertake their work in the village.

**Are there any further requirements that operators should implement for staff training and competency? If so, what should they be?**

**Are there any specific qualifications that operators or staff should be required to possess?**

Proposed offence provisions

### Offences to be included in the Rules of Conduct

The Rules of Conduct are designed to provide a benchmark for operators. This benchmark improves accountability and supports residents in pursuing concerns when the operator’s actions fall short of the mandated standard.

To support the enforcement of these standards, certain sections of the Rules have been determined as offence provisions. Under the Act (section 83C) penalties can be applied to an operator if they contravene a provision identified in the Rules as an offence.

The following offence provisions have been proposed in the Rules. Penalty units are currently calculated as $110 per unit e.g. 50 penalty units is equivalent to $5,500. The Penalty Infringement Notice amounts are consistent with other offence amounts in the current legislation.

|  |  |  |  |
| --- | --- | --- | --- |
| **Rule reference** | **Description** | **Maximum penalty in penalty units**  | **Penalty Infringement Notice (PIN)**  |
| Part 2, Clause 10 – Operators must provide information to external selling agents on request | The operator of a retirement village must provide assistance and information to an external selling agent and do so within 5 working days.  | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 3, Clause 11- Operators must not make false or misleading representations | The operator of a retirement village must not make any representations that are false or misleading in a material particular | 100 penalty units for a corporation50 penalty units in any other case | N/A |
| Part 3, Clause 13 – Marketing of retirement villages must include certain information  | The operator of a retirement village must ensure that promotional material for a retirement village, of more than 100 words, includes the statements provided in the Rules. | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 3, Clause 14 – Marketing of units must include certain information | The operator of a retirement village must ensure that promotional material for a specific village premises/residence, of more than 50 words, includes the statements provided in the Rules. | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 4, Clause 18 – Operators must not carry out functions without disclosing conflicts of interest | The operator must ensure staff members do not exercise functions in the management or operation of the retirement village if the staff member has a conflict of interest that has not been disclosed | 100 penalty units for a corporation50 penalty units in any other case | N/A |
| Part 4, Clause 21 – operators must keep records of conflicts of interest | Operator must keep records of the outlined information about any conflicts of interest the operator or any member of staff have for a period of 5 years.  | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 5, Clause 26 – Operator must ensure complaint and internal dispute resolution processes are prepared and maintained. | The operator of a retirement village must ensure that a process for handling complaints is documented and maintained for the retirement village. | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 5, Clause 28 – Operators must keep records of complaints and internal disputes | The operator of a retirement village must keep record of the prescribed information about complaints raised and disputes handled within the village. | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 6, Clause 29 – Operator must prepare and implement policies and procedures | The operator of a retirement village must implement and maintain written policies and procedures for the selection, training and ongoing supervision of members of staff of the village. | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |
| Part 6, Clause 32 – Operator must keep records of staff training and professional developments | The operator of a retirement village must keep a written record of the training and professional development provided to staff for a period of 5 years. | 100 penalty units for a corporation50 penalty units in any other case | $2200 Corporation$1100 other than a corporation |

### External selling agents

### An offence provision will apply to ensure that an operator provides a selling agent the information required to facilitate a sale of a resident’s premises, within five working days of a written request being received.

### Marketing representations

Promotional material for a retirement village that is more than 100 words will need to include statements relevant to departure fees and capital gain. Where the promotional material is related to a specific premise, the limit is 50 words before the statements need to be included. A penalty can be incurred when the statements are not included in the promotional material.

Operators are also prevented from making any false or misleading representations within a material particular.

### Conflicts of interest

An offence provision is attached to ensure operators and staff do not carry out functions in the management or operation of the retirement village where a conflict of interest has not been disclosed. Operators must also retain information about conflicts of interest for a period of five years.

### Complaint and Dispute Resolution

An offence provision is attached to ensure operators have complaint handling and dispute resolution processes in place. The process must adhere to certain timeframes and be made publicly available. Operators must also retain information about complaints and for a period of five years.

### Training and competencies

An offence provision is attached to ensure operators have compliant training policies and procedures in place, which are published for residents to view.

An offence provision is attached to ensure operators maintain a written record of the required training and professional development that staff are provided with.

Summary of questions

* Are there any other knowledge requirements for operators managing retirement villages that should be listed in the Rules?
* Do the Rules of Conduct clearly specify how an operator should conduct themselves towards residents? If not, can you provide further suggestions?
* Are the confidentiality requirements on operators when handling residents’ information appropriate? If not, what other requirements should be included?
* Is it reasonable to require an operator to prepare a mitigation strategy to address elder abuse and be responsible for staff and residents’ awareness?
* Are the current requirements for the Elder Abuse Strategy sufficient? If not, what else should be included?
* Is there any specific information, operators should be required to provide or grant access to, to facilitate the sale of a premise by external selling agents?
* Is it reasonable to include the proposed statements in promotional material? If not, why?
* Are the proposed word counts a suitable method for determining which materials should include the proposed statements? If not, what is an alternative method to capture the right marketing material?
* Should any of the requirements be removed or new requirements added to the Rules of Conduct, in order to better manage conflicts of interest? Why/why not?
* Are the requirements proposed in the Rules of Conduct suitable for the handling and resolution of complaints? If not, why?
* Are the requirements proposed in the Rules of Conduct suitable for the resolution of disputes? If not, why?
* Are the maximum timeframes set out within Part 8 regarding the acknowledgment and management of complaints and disputes appropriate?
* Are the requirements for making the dispute process publicly available achievable/reasonable?
* Are there any further requirements that operators should implement for staff training and competency? If so, what should they be?
* Are there any specific qualifications that operators or staff should be required to possess?