



Regulatory impact statement

Executive summary

1. The regulatory impact assessment presents options to develop a new Retirement Villages Code of Practice as required by the Retirement Villages Act 2003 (the Act). The assessment considers accepting an industry drafted Code of Practice (which was the process in 2004), developing a Minister's Code of Practice or amending the Act to replace the Code of Practice (deemed a regulation under the Regulations (Disallowance) Act 1989) with a Retirement Villages (Code of Minimum Standards) Regulation 2008. Developing an industry Code of Practice is not a recommended option.

Adequacy statement

2. The Department of Building and Housing confirms that the principles of the Code of Good Regulatory Practice and the regulatory impact analysis requirements have been complied with.
3. The Department of Building and Housing considers the regulatory impact statement is adequate. The statement was circulated with the Cabinet paper for departmental consultation.

Status quo and Problem

4. The Retirement Villages Act 2003 (the Act) requires the promulgation of a Code of Practice on which all occupation right agreements¹ should be based. The purpose of the Code of Practice is to provide a national minimum standard so that intending residents can make an informed choice when deciding on which (if any type of) retirement village they move into. For residents who already live in a retirement village, the Code of Practice provides additional information that may not have been provided at the time the contract was signed. Furthermore, if the Code of Practice provides more favourable terms and conditions than the residents' existing contracts, the resident can enforce the Code of Practice as the contract.
5. Government published the Retirement Villages Code of Practice 2006 in the New Zealand Gazette on the 25 September 2006 with an enforcement date of 25 September 2007 in accordance with section 89 of the Act.
6. The Retirement Villages Association of New Zealand Inc (the Association) as the original authors of the Code of Practice initiated a judicial review in September 2007 challenging the process that the Minister for Building and Construction used to approve the Code of Practice 2006.
7. In December 2007 Justice Simon France declared the Code of Practice 2006 invalid. This means that there is no Code of Practice in force and a new

¹ The contract between operators and residents

Code of Practice has to be developed. Without a valid Code of Practice, status quo is not an option.

8. The problem is two-fold:
 - i reinstating the full consumer protection that the Code of Practice gives to residents as soon as possible
 - ii identifying the best pathway to reinstate the Code of Practice.

Objectives

9. The purpose of the Retirement Villages Act 2003 was to:
 - i protect the interests of residents and intending residents in retirement villages
 - ii enable the development of retirement villages under a legal framework readily understandable by residents, intending residents and operators
 - iii promote understanding of the financial and occupancy interests of residents and intending residents
 - iv provide an industry-focused regulatory and monitoring regime
 - v provide external oversight of the conditions of entry to, and continuing operations of retirement villages
 - vi introduce requirements and processes necessary to give effect to the regulatory and monitoring regime already described
 - vii provide security and protect residents' rights in retirement villages.

Alternative options

'Accept' an industry drafted Code of Practice (as set out in the current Act)

10. The Act allows for a retirement village, group of retirement villages or representative body of retirement villages to prepare and present a Code of Practice to the Minister. On receiving the industry Code of Practice, the Minister must pass this Code of Practice to the Retirement Commissioner to engage in a round of consultation and recommendations. Once the Minister has received the Retirement Commissioner's recommendations the Minister can approve the Code of Practice. However, the Minister can only make amendments to the industry Code of Practice after receiving explicit agreement from industry. Quite simply, industry can stop the Minister from incorporating any comments resulting from the public consultation. This gives industry the power of veto.
11. The now invalid Code of Practice was developed by industry and it is unlikely that residents and other interested parties in the Act would accept a second industry Code of Practice given that the original one was subject to judicial review.
12. An industry Code of Practice is not a viable option.

Realistic options

13. Cabinet colleagues are being asked to advise the Minister for Building and Construction on which of the two realistic options offer the best chance of the early institution of a Code of Practice providing consumer protection to residents.
14. It should be noted that the costs of developing a new Code of Practice will be recovered from the registration fees that operators pay to the Registrar of Retirement Villages. There are no additional costs to the Crown for developing a Code of Practice, but the Retirement Commission will need additional funding to conduct the statutory consultation (estimated to be \$50,000).

Option 1 – Minister’s Code of Practice (as set out in the current Act)

15. The Minister may develop a Code of Practice if no Code of Practice acceptable to the Minister has been received by 1 January 2005. By developing a Minister’s Code of Practice, the Minister has greater control of the process. As with the alternative option outlined above, the Minister is still required to consult widely, including requesting the Retirement Commissioner to undertake public consultation. However, once the results of the public consultations (both the Retirement Commissioner’s and Minister’s) have been analysed, the Minister does not have to negotiate privately with any industry group before reaching a decision. The cost/benefit analysis is set out in Table 1.

Costs to government

16. Potentially the decision to develop a Minister’s Code of Practice as well as the process that the Minister follows can both be legally challenged. There is a requirement by the Act that both the Minister and Retirement Commissioner conduct consultations with the same groups of stakeholder leading to both duplication of effort and cost, as well as confusing stakeholders. Industry could try and submit its own Code of Practice in an attempt to ‘force’ the Minister to ‘accept’ an industry Code of Practice. It is much harder to amend a Code of Practice under the Act, as any proposed amendment needs support of industry.

Benefits to government

17. The process to develop a Minister’s Code of Practice is set out in the current Act. The Minister is better able to control the process and the content of the Code of Practice. There is the potential to complete the process by July/August 2008 with the Code of Practice coming into effect 12 months later.

Option 2 – Amend the Act and create a Retirement Villages (Code of Minimum Standards) Regulation

18. An amendment to the Act would repeal the sections that create a Code of Practice and replace the section with an empowering provision for regulations.
19. This would enable the Minister to work with Cabinet colleagues to create a Code of Minimum Standards. One of the main benefits of this option is that it

clarifies who is responsible for the Code of Minimum Standards. The regulation-making process is set out in Cabinet guidelines and retains the public consultation requirement.

20. It is estimated that the Code of Minimum Standards can be developed within 12 weeks, once an Amendment Act is passed. Timing remains a critical issue in developing a Code of Minimum Standards. The cost/benefit analysis is set out in Table 2.

Risks to government

21. Legislation is not without risk – both in terms of timing and the political process. To guarantee that the Amendment Act is passed in this session, the Amendment Act requires a Priority 1 rating in the current legislative session. The actual cost of making regulations is lower than conducting public consultations – especially as there will only be one agency conducting a consultation under this option. There is still a risk of judicial review, as well as a review by the Regulations Review Committee. Although there is a risk of judicial review, the risk is lower under this option.

Benefits to government

22. Under this option, the process is much clearer, and the decision-making authority is clearly defined. Furthermore, this option offers more control over the content of regulation and enables a much clearer timeframe for development. It is easier to make amendments to a regulation in comparison to the Code of Practice as set out in Option 1.

Table 1: Costs and benefits of Option 1 Minister’s Code of Practice

Government	
Costs	Benefits
<ul style="list-style-type: none"> • Potential legal challenge by the Association, either on the decision-making process leading to the Minister’s decision, or to the process that was followed during the Code of Practice development phase (litigation costs \$50,000). • Two consultations would need to be undertaken – one by the Retirement Commissioner and one by the Minister (estimated to be \$50,000 per consultation). • There is the potential that industry submits its own Code of Practice, so that two Codes of Practice have to be consulted on. 	<ul style="list-style-type: none"> • The process is set out in the Act and there is no need to make any amendments. • Greater Ministerial control over the process. • More control over the content of the Code of Practice. • This option could be completed by July/August 2008 with the Code of Practice coming into force 12 months later.

Industry/Sector	
Costs	Benefits
<ul style="list-style-type: none"> • Will lose the 'power' to negotiate the final version of the Code of Practice. • Profits could be affected by changing the nature of existing contracts.² • Could lose the trust of existing residents if residents suspect that operators are making excessive profits from them, making retirement villages less attractive to intending residents. 	<ul style="list-style-type: none"> • Industry submits its own Code of Practice forcing Government to consult on two Codes of Practice. • An exemption option for operators is retained and some operators may be granted an exemption to some parts of the Code of Practice. • The creation of a minimum standard will create a platform and overall industry standards could rise.
Residents/Society	
Costs	Benefits
<ul style="list-style-type: none"> • Operators may change their charging structure to 'recoup' losses from residents. 	<ul style="list-style-type: none"> • A Code of Practice will help consumers make more informed and better choices. • Some residents will gain better contractual rights under a Code of Practice (could be up to \$40,000 better off per resident). • The full consumer protection offered by the Act will be reinstated and is less likely to be changed to meet industry demands.

Table 2: Costs and benefits of Option 2 – Amend the Act and create a Retirement Villages (Code of Minimum Standards) Regulation.

Government	
Costs	Benefits
<ul style="list-style-type: none"> • Time on the legislative programme – amending the Act. • Costs of making regulations. • Parliamentary Counsel Office drafting time. • This option is the lowest risk in terms of judicial review (saving at least \$50,000). 	<ul style="list-style-type: none"> • Clarification of the decision-making process. • Cabinet collective responsibility – easier for other Ministers with an interest in the Act to be kept fully informed. • More control over the process to develop regulations. • More control over the content of the regulations. • This option allows for a better timeframe in developing and implementing regulations.

² At the time of the proposed variation to the Code of Practice, industry estimated that the refurbishment clause would cost \$122m over 5 years. Officials dispute this figure based on the lack of factual evidence that accompanied the industry submission. Department analysis is attached at Appendix Two.

Industry/Sector	
Costs	Benefits
<ul style="list-style-type: none"> • Will lose the 'power' to negotiate the final version of the Code. • Will lose the right to draft a Code, thus losing the right to control the content. • Could affect profits by changing the nature of existing contracts. • Residents could take out more disputes if operators do not comply with the regulations (A dispute can cost the operator \$10,000). 	<ul style="list-style-type: none"> • An exemption option for operators will be retained under this amendment. Some operators may be able to be granted an exemption to some parts of the regulation. • The creation of a minimum standard will create a platform and overall industry standards could rise.
Residents/Society	
Costs	Benefits
<ul style="list-style-type: none"> • Operators may change their charging structure to 'recoup' losses from residents. 	<ul style="list-style-type: none"> • A Code of Minimum Standards will help consumers make more informed and better choices. • Some residents will gain better contractual rights under a Code of Minimum Standards (could be up to \$40,000 better off per resident). • The full consumer protections offered by the Act will be reinstated and are less likely to be changed to meet industry demands.

Implementation and review

Option 1 – Minister's Code of Practice

23. This option can be started almost immediately. Officials in the Department of Building and Housing have been reviewing the invalid Code of Practice, making proposed changes not only taking into account the judgment but also other issues raised by residents, operators and statutory supervisors.
24. The process is set out in section 89 of the Act and once this process is met and the Minister makes a decision, the Code of Practice notification can be placed in the New Zealand Gazette. There is provision within the Act to periodically review the Code of Practice.

Option 2 – Amend the Act and create a Retirement Villages (Code of Minimum Standards) Regulation

25. This option has a longer lead time, although officials in the Department of Building and Housing advise that the Amendment Bill proposal will be relatively straightforward in terms of drafting.
26. The Parliamentary process and timetable is difficult to predict, but once it is completed, up to a further six months will be needed to complete the process.

Consultation

27. The Department of the Prime Minister in Cabinet, Economic Development, Office for Senior Citizens (Social Development), Veteran's Affairs (New Zealand Defence Force), Retirement Commissioner, Health, Justice and Treasury were consulted on this paper.
28. The Retirement Commissioner supports amending the Act as proposed in Option 2. It is the Commissioner's view that there is little to be gained from a further round of consultation on a Code of Practice as the two rounds of consultation the Commission has already run on the Code of Practice have fairly canvassed the issues. The Retirement Commissioner believes the key issue is to end the uncertainty for residents and operators caused by the current situation.

Department analysis of the Retirement Villages Association (the Association) estimated refurbishment costs on industry

1. To reach the figure of \$122 million, the Association surveyed its members to ascertain the cost of refurbishment charged to residents. The lowest charge was \$2,523 and the highest charge \$13,000. The mean average was \$9,477.
2. The Association then calculated the cost to operators by the number of residential units in member villages (12,953) multiplied by the mean average (\$9,477). The calculation equals \$122 million.
3. The figure was given over five years as the average length of tenure for men in retirement villages is 4.07 years and for women 6.05 years.
4. The Department received further information from the Association that confirms not all of the member villages charge refurbishment costs and that only 159 member villages have reported they charge refurbishment fees. This is the equivalent of 9,776 residential units, of which 6,890 residential units are occupied.
5. The Department estimates that 82% of the existing contracts in villages where refurbishment is charged pre-date 25 September 2006, which means that only 18% of residents would be able to enforce the 'less fair wear and tear' refurbishment clause in their existing contract. The calculations are shown in the table below:

	Lowest charge \$2,523	Mean charge \$9,477	Highest charge \$13,000
All contracts with full refurbishment (total costs)	\$17,383,470	\$65,296,530	\$89,570,000
Cost to industry where fair wear and tear is enforced	\$3,193,880	\$11,996,989	\$16,456,775
'Saving' to industry	\$14,189,590	\$53,299,541	\$73,113,225