



Interim Regulatory Impact Statement: Retirement Villages Act 2003 Review – Unfair Contract Terms in Occupation Right Agreements

Decision sought	<p>Analysis produced to inform Cabinet decisions on changes to the Retirement Villages Act 2003 to create a new regulatory power to address issues with potentially unfair contract terms in occupation right agreements.</p> <p>This is an interim RIS until the policy for the regulations is agreed upon by the Minister. Therefore, some of the analysis is high level and indicative only.</p>
Agency responsible	Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development
Proposing Ministers	Hon Tama Potaka, Associate Minister of Housing
Date finalised	07/11/2025

The Minister is proposing to address potentially unfair contract terms in occupation right agreements (ORAs) by amending the Retirement Villages Act 2003 (the Act) to create a new regulation making power to enable regulations to prescribe terms which are prohibited from being included in retirement village ORAs.

The purpose of this new regulatory power is to improve consumer protections for retirement village residents against unfair contract terms being included into ORAs.

Summary: Problem definition and options

What is the policy problem?

There is evidence that retirement village ORAs contain unfair contract terms. Residents have very limited negotiating power over the terms in ORAs, as ORAs are likely to be standard form consumer contracts. This usually means that residents cannot negotiate to have unfair terms removed. Under the Fair Trading Act 1986 only the Commerce Commission can apply to the courts for a declaration that a contract term in an ORA is unfair, so residents have limited legal avenues for recourse against unfair contract terms in their ORAs. Therefore, non-regulatory action would be insufficient to address the problem.

In 2023-24 the Commerce Commission investigated the retirement village sector, looking at complaints relating to potentially unfair ORA terms. It expressed a preliminary view that 38

terms across six operators' ORAs were potentially unfair (only a court can decide if a breach of the Fair Trading Act has occurred).

The Commerce Commission wrote letters to six operators, setting out its preliminary views on the fairness of terms in their ORAs, and inviting them to respond. Some operators subsequently amended their ORA terms to address the Commerce Commission's concerns. Not all the terms the Commerce Commission identified as potentially unfair have been addressed by operators. Some operators considered the terms met the statutory test for fairness as they were reasonably necessary to protect legitimate interests of the operators.

Consumer protection groups, resident advocates, residents and residents' families have raised concerns for many years over potentially unfair contract terms in ORAs, and residents' lack of direct legal recourse to remove or address such terms. Residents can make complaints to the Commerce Commission, s 9(2)(g)(i)

Some of the terms that were investigated are addressed by other workstreams in the review of the Act such as terms relating to maintaining operator owned chattels and fixtures, and charging of weekly fees after ORA termination (see accompanying Regulatory Impact Statements). This Regulatory Impact Statement covers the policy approach for any unfair terms not captured by other workstreams.

A specific issue identified with ORAs is overly broad privacy authorisations for accessing residents' personal health information. These terms give operators a broad right to collect this information from health agencies. The Office of the Privacy Commissioner has advised that the broad and ongoing nature of these authorisation clauses, and the power imbalance between residents and operators, raises privacy concerns.

What is the policy objective?

The overarching objectives of the review of the Act are to ensure adequate consumer protections, a balance between the rights and responsibilities of residents and operators of retirement villages, the on-going viability of the retirement village sector, and clarity on the rights and responsibilities of residents and operators.

For ORAs, the key objectives are to strengthen consumer protection and increase fairness for residents.

What policy options have been considered, including any alternatives to regulation?

Residents have little ability to address unfair contract terms in their ORAs

Option 1: Maintain the status quo. The Commerce Commission may decide to seek a declaration from the courts that certain ORA terms it has identified and written to operators about, but have not been addressed by operators, are unfair.

Option 2: Create a new power in the Act or in regulations to empower a government body to declare specific ORA terms unfair.

Option 3 (preferred): Create a regulation making power in the Act to prescribe in regulations, a list of terms that would be prohibited from being included into ORAs.

Option 4: Amend the Fair Trading Act to allow any person to seek a court declaration that a contract term in an ORA is unfair.

Option 5 (preferred): Develop guidance for the retirement village sector to assist with privacy obligations when dealing with residents' personal information (with input from the Office of the Privacy Commissioner).

What consultation has been undertaken?

In 2023, the Ministry consulted on a discussion document containing proposals for reforming the Act. The discussion document included the proposal to create a new power in the Act to empower a government body to declare specific ORA terms unfair (**option 2** in this interim RIS).

A majority of submissions were in favour of this option. Retirement village residents, families of residents and consumer protection bodies were most supportive of this option, as they believed residents needed more options for recourse against unfair contract terms.

Retirement village operators and the Retirement Villages Association (RVA) submitted against this option, based on concerns about a regulatory body being given powers to alter contracts, which they believed should remain with the courts. They also claimed that the current protections in the Fair Trading Act are sufficient.

Submitters were also asked if they thought there were any ORA terms that breached a resident's privacy. Responses were mixed, but a majority were unsure.

Options 3, 4 and 5 were developed after consultation, as a result of further policy analysis.

Are the preferred options in the Cabinet paper the same as preferred option in the RIS?

Yes.

Summary: Minister's preferred option in the Cabinet paper

Costs

Outline the key monetised and non-monetised costs, where those costs fall (e.g. what people or organisations, or environments), and the nature of those impacts (e.g. direct or indirect)

Amending the Act to create a new regulatory power to prohibit terms from being included in ORAs

We consider that there will be some minor and ongoing compliance costs for operators, who will likely need to review and amend their ORAs, to remove any prohibited terms.

There may be some additional operational costs to operators created by removing some terms from their ORAs. There is a small chance that some of these costs may be passed onto residents. Some of these terms may create a financial benefit which will no longer be available to operators if the term is prohibited. We cannot at this stage complete a more comprehensive analysis of what these costs would be, ahead of developing the policy for the regulations.

Developing sector guidance on best privacy practices

There may be some minor compliance costs for operators, who may need to review and amend their ORAs to comply with any new privacy guidance.

Benefits

Outline the key monetised and non-monetised benefits, where those benefits fall (e.g. what people or organisations, or environments), and the nature of those impacts (e.g. direct or indirect)

Amending the Act to create a new regulatory power to prohibit terms from being included in ORAs

Prescribing a list of prohibited ORA terms will strengthen consumer protections for retirement village residents and provide a higher degree of certainty for both residents and operators compared with relying on the Commerce Commission to seek court declarations that terms in an ORA are unfair under the Fair Trading Act.

Residents may benefit, financially or otherwise, from unfair terms in their ORAs being prohibited by regulation. However, as referred to in the costs section above, a comprehensive analysis of these benefits cannot be completed until the policy for the regulations is developed.

Developing sector guidance on best privacy practises

Issuing new guidance on the handling of residents' personal and health information will strengthen consumer protection. Residents could be more confident that their private information is only being used for the purposes stated in their ORAs, that are consistent with the Privacy Act.

Balance of benefits and costs

Does the RIS indicate that the benefits of the Minister's preferred option are likely to outweigh the costs?

We consider that the proposed changes are proportionate and cost-effective responses to the issues of unfair contract terms, with no impact on the viability of the sector.

Implementation

How will the proposal be implemented, who will implement it, and what are the risks?

Regulations to prescribe terms prohibited from being included into ORAs will be developed after an amendment bill to the Act is passed. s 9(2)(f)(iv)

Regulations made under the Act will be reviewed as needed, as part of the Ministry's ongoing regulatory stewardship responsibilities, which will provide opportunities for future amendments in response to new issues arising.

The Ministry will develop sector specific guidance on best privacy practices for operators (with input from the Office of the Privacy Commissioner) after the amendment bill to the Act has passed.

Limitations and Constraints on Analysis

This is an interim RIS on the proposal to create a new regulatory power in the Act. A full analysis cannot be carried out at this time, in advance of specific policy decisions as to which terms the regulations will prohibit as unfair.

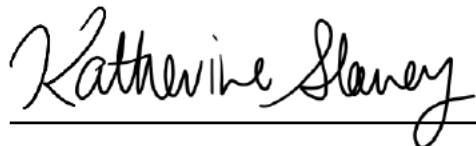
Therefore, the costs and benefits described are general and indicative, based on creating a new regulatory power in primary legislation. More detailed costs and benefits will be identified as part of a full RIS that will be prepared as part of the policy development process for the specific regulations under the new power.

I have read the Regulatory Impact Statement and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.

**Signed by the responsible
Manager**

Katherine Slaney

Acting Policy Manager, Housing
and Rental Markets



Date: 07/11/2025

Quality Assurance Statement

Reviewing Agency: Ministry of Housing and Urban Development

QA rating: Meets

Panel Comment:

The Panel considers this RIS meets the quality assurance criteria well. While acknowledging its interim status, the RIS presents a comprehensive picture of the context and issues, backed up with examples and good explanations of the interrelationships between other parts of the broader review. The qualitative assessment was appropriate given the nature of benefits and costs, and the consultation and feedback helped to refine options, which were clearly explained and comparable.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The retirement villages sector is governed by the Retirement Villages Act 2003

1. Retirement villages are governed by the Retirement Villages Act 2003 (the Act), the Code of Practice 2008 and regulations. Two key purposes of the Act are to protect the interests of residents and intending residents, and enable retirement villages to develop under a simple legal framework that is easy to understand.
2. The Act requires the operator and resident to enter into a detailed occupation right agreement (ORA) setting out each party's rights and obligations. The Act requires terms that must be included in an ORA, and these are prescribed in more detail in the Retirement Villages (General) Regulations 2006 and the Retirement Villages Code of Practice 2008.
3. ORAs can cover a variety of different ownership and occupation arrangements, including licences to occupy, unit titles and cross-leases. Licences to occupy are the dominant tenure model in the retirement village sector, with approximately 95 percent of retirement village units being sold under this model. Under a licence to occupy, residents buy the exclusive right to live in their unit until termination of the ORA, but do not have ownership of the property or the land.
4. Retirement villages legislation is being reviewed to ensure it remains fit for purpose, provides adequate consumer protections and an effective balance between the rights and responsibilities of residents and operators of retirement villages.
5. The initial intention of the legislation was to provide a framework for retirement living options in a then-nascent industry. The industry has grown in scope and complexity since 2003 when the Act was introduced and projections are for further significant growth. An estimated 53,400 residents now live in 470 retirement villages across New Zealand. This equates to 14 percent of the 383,000 New Zealanders aged over 75. The number of residents in retirement villages is expected to increase to 77,494 residents by 2033, and to 112,624 residents by 2048.¹

Only the Commerce Commission can challenge unfair contract terms under the Fair Trading Act 1986

6. Under the Fair Trading Act, only the Commerce Commission is able to apply to the courts to seek a declaration that a term in an ORA is an unfair contract term. Individual residents and consumer bodies can make complaints about potentially unfair contract terms to the Commerce Commission, however they cannot make an application themselves for a declaration.

¹ According to the New Zealand retirement villages white paper produced by JLL, August 2024.

7. For a term to be considered unfair under the Fair Trading Act, the court must be satisfied that the term; would cause a significant imbalance to the parties' rights and responsibilities under the contract; is not reasonably necessary to protect the legitimate interests of the advantaged party; and would cause detriment to a party if relied on or enforced.
8. s 9(2)(g)(i)
[REDACTED]
9. When reaching their preliminary findings as a result of their 2023/24 investigation, the Commerce Commission wrote to the retirement village operators in whose ORAs they found potentially unfair contract terms, reminding them of their obligations under the Fair Trading Act. s 9(2)(g)(i)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The Commerce Commission launched an investigation under the Fair Trading Act 1986 into unfair contract terms in ORAs

10. The Commerce Commission launched an investigation into a complaint it received in late 2022 from the Retirement Village Residents' Association (RVR) about issues under the Fair Trading Act relating to potentially unfair terms. The Commerce Commission reviewed terms in six ORAs for compliance with the unfair contract term provisions in the Fair Trading Act.
11. The Commerce Commission came to a preliminary view that 38 terms it considered could give rise to unfairness. In January 2024 the Commerce Commission wrote a letter to each of the six operators that set out their views and invited operators to explain why a term that the Commerce Commission had identified as potentially unfair, was reasonably necessary in order to protect their legitimate interests.
12. All six operators responded to the Commerce Commission outlining terms they were prepared to amend to address the Commerce Commission's fairness concerns, and terms they considered protected their legitimate interests. Some operators wrote that they would wait for the outcome of the legislative review before amending their terms.

Retirement village residents have limited recourse against unfair contract terms in ORAs

13. Although residents are required under the Act to obtain legal advice before signing an ORA, they have very little negotiating power over the terms.
14. Consumer protection and resident advocate groups such as Consumer NZ and the RVR, residents and residents' families have raised concerns for many years over potentially unfair contract terms in ORAs, and residents' lack of recourse to remove or address such terms.
15. In 2020 the Retirement Commission published the White paper: Retirement villages legislative framework: Assessment and options for change, seeking submissions on the effectiveness of the legislative framework and how it balances the interests of operators and residents.

16. The Retirement Commission received over 3,000 submissions on the White Paper. In its subsequent submissions summary and recommendations report in 2021, the Retirement Commission highlighted issues and concerns with the retirement villages regime, many related to consumer protection. The Retirement Commission called for the government to undertake a full review of the legislative framework.

What is the policy problem or opportunity?

17. Despite the requirement to obtain independent legal advice, residents have little negotiating power when signing an ORA. ORAs can be long, complex and legalistic documents, which can make it difficult for an advising lawyer to recognise and then advise the resident about the potentially unfair or privacy breaching term. Together, these factors contribute to a power imbalance between residents and operators.

Residents have little ability to address unfair contract terms in their ORAs

18. Because of the power imbalance between residents and operators, and the current law in the Fair Trading Act, restricting residents' ability to seek court declarations that a term in their ORA is an unfair contract term, residents have limited legal avenues for recourse against unfair contract terms.
19. The review of the Act provides the opportunity to create a regulation making power, to prohibit ORA terms that are unfair. This would apply to the whole sector, not just to specific non-complying operators as is currently the case if a court declares that a contract term is unfair.
20. s 9(2)(g)(i) [REDACTED]
[REDACTED] Even if an ORA term was declared an unfair contract term, the declaration would only apply to the particular term in question and to the parties to the application, not to the wider sector. This would mean that only the operator concerned would be unable to enforce or rely on that term.
21. s 9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
22. Some of the terms the Commerce Commission investigated will be addressed through other workstreams of this review. For example, obligations relating to maintaining and repairing operator owned chattels and fixtures are assessed in the chattels and fixtures RIS.

23. Other types of terms that the Commerce Commission identified which they considered could be potentially unfair contract terms included:
- Operators being able to unilaterally assess reinstatement work to units following the termination of an ORA that residents must pay for.
 - Operators having the absolute right to carry out further development at the village, with the resident having no right to object or claim compensation for any disruption caused.
 - Entire agreement clauses, where the ORA comprises the whole agreement between the parties, and all previous negotiations, representations and agreements are of no effect.
 - Changes to facilities clauses, where operators have a broad unilateral right to vary the services and facilities offered by the village.
 - Requirements for residents to pay the marketing costs of selling their unit to a new resident, when they have no ownership rights or control over the costs.
 - Obliging residents' family or executor to remove all their possessions from their unit within 7 days of their death.

Some ORA terms may breach residents' privacy

24. Overly broad privacy authorisations for accessing residents' personal health information were also identified by the Commerce Commission as a potentially unfair type of term found in ORAs. These terms give operators a broad right to collect residents' personal health information from health agencies.
25. Operators consider such terms necessary to assess whether residents can remain in their current living situation, or if they need to move into a higher level of care.
26. The Office of the Privacy Commissioner has advised that the broad and ongoing nature of these authorisation clauses, and the power imbalance between residents and operators, raises privacy concerns.

What objectives are sought in relation to the policy problem?

27. The overarching objectives of the review are to ensure:
- adequate consumer protections for residents and intending residents;
 - an effective balance between the rights and responsibilities of residents and operators;
 - the ongoing viability of the sector and its ability to provide a range of retirement housing options and consumer choice; and
 - the rights and responsibilities of residents and operators are clearly and appropriately defined, including where they may differ for different occupancy rights.

28. The objectives of creating a new regulatory power to prohibit certain ORA terms are to:
- support access to justice;
 - strengthen consumer protections; and
 - increase fairness for residents.
29. Prescribing terms to be prohibited from ORAs because they are unfair would also provide a high level of certainty for both residents and operators, as they would apply to the whole sector. Without prescription in regulations, the only way to deal with unfair contract terms in ORAs would be to rely on the Commerce Commission to seek court declarations that would ultimately only be enforceable against the operator(s) that were the subject of the declaration application.
30. Regulations made under the empowering provision will be used to address types of unfair contract terms in ORAs not already covered by other workstreams in the review of the Act.
31. In relation to the privacy concerns identified, the objective is to improve understanding and practices across the retirement village sector. Operators should have a clear understanding of their obligations and follow privacy best practices. Residents should know their rights and be confident that their sensitive personal information is well protected and looked after, is only collected where necessary, and is used in ways that they expect and agree to.

What consultation has been undertaken?

Development of policy proposals

32. The Ministry released a discussion document on options for changes to the Act for public consultation in August 2023, and public submissions were open until 20 November 2023. We received over 11,000 public submissions from a range of people and stakeholder groups, including residents, their families, retirement village operators, lawyers, advocacy groups, and sector associations.² After consultation closed, the feedback from submitters was utilised in further policy analysis.

Responses from stakeholders

33. We received 156 responses to the question of whether any terms that are currently included within ORAs could be considered unfair. Of these responses, 60.3 percent thought that there were unfair terms currently included in ORAs (such as sharing capital losses but not capital gains). 28.8 percent were unsure if there were unfair terms included in ORAs, and 10.9 percent thought that there were not.
34. When asked if a specific power should be included into the Act to declare certain ORA terms to be unfair (to be exercised by the courts or a regulatory body), of 175 responses, 61.7 percent thought that there should, 19.4 percent thought that there should not be, and 18.9 percent weren't sure.

² Over 10,500 submissions were provided via a RVR questionnaire that used a subset of the questions in the discussion paper. The RVR questionnaire did not include questions related to ORA terms so the number of responses is significantly lower than 11,000.

35. We received 161 responses to the question asking if there are any ORA terms that possibly breach a residents' privacy. Responses were mixed, with 24.2 percent saying yes and 19.9 percent saying no. Most submitters were unsure (55.9 percent).

Submissions of peak bodies

36. Of the key stakeholder groups, the RVR was in favour of the Act including a power to declare terms unfair, and thought that a new independent complaints and disputes resolution scheme should hold this power. Failing this, it suggested either the Retirement Commission, or a new Ombudsman style office specific to the retirement village sector could hold the power.
37. The RVR referred to Consumer NZ research on the types of potentially unfair terms that are commonly found in ORAs, including responsibility for the maintenance, repair and replacement of operator owned chattels and fixtures and operators charging residents weekly fees (or a proportion of weekly fees) after a unit is vacated.
38. The RVA was not in favour of the Act including a power to declare terms unfair. It stated that the law determining whether a contract term is unfair is complex and that the Fair Trading Act already contains sufficient provisions to protect against them. It also said that the power to determine if a term is unfair and to alter contracts should remain with the courts, and be exercised with caution. The RVA stated that the Commerce Commission is well resourced to oversee different industry sectors.
39. On the issue of ORA terms that potentially breach residents' privacy, the RVR was concerned that such terms could be contrary to the principles of the Privacy Act 2020, and stated that ORAs should contain a privacy statement. The RVA pointed out that village operators are already subject to the Privacy Act, and so no additional provisions were required in the Act.

Section 2: Assessing options to address the policy problem

What criteria will be used to compare options to the status quo?

40. To deliver against the overarching policy objectives of the Retirement Villages Act review we have assessed all options for addressing unfair contract terms against the following four criteria:
- Improves fairness in ORA contracts
 - Proportionate and cost effective
 - Provides predictability, certainty, and clarity of rights and responsibilities for parties
 - Gives residents access to recourse in a timely manner.

What scope will options be considered within?

41. In September 2024, the Associate Minister of Housing agreed that the scope of the Retirement Villages Act review should cover proposals from the 2023 discussion document that had high levels of support in the sector, and several other areas considered to be high priority issues for residents.
42. There was a strong level of support during consultation for the proposal to establish a new power into the Act to declare certain terms within ORAs to be unfair.
43. Providing additional education and information for residents is not considered to be sufficient as a standalone option, however, education will form part of the implementation package for this work. Because of the identified nature of the issues, that is, the difficulty of identifying and addressing unfair terms in ORAs and the limited existing legal avenues to address them, simply making residents more aware of current rights would not be effective. Organisations like Consumer NZ and RVR have campaigned on the issue of unfair contract terms for many years, with limited impact.
44. Leaving it to the Commerce Commission's discretion to decide whether to seek unfair contract terms declarations through the courts is uncertain. s 9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED] s 9(2)(f)(iv)
[REDACTED]
[REDACTED]
[REDACTED]
45. We considered the following options in relation to the privacy concerns identified:
- Require that all ORAs contain a statement that the Privacy Act 2020 applies to any personal information of residents held by operators and set out operators obligations and resident's rights.
 - Include requirements in the Code of Practice 2008 for villages to develop a privacy policy that meets a minimum level of privacy protection.

46. We did not proceed with these options s 9(2)(h)

What options are being considered?

47. For each of the main issues identified the Ministry has:

- described the various options that have been considered,
- analysed the options against the criteria set out above, and
- outlined in more detail the expected costs, risks and benefits of the preferred option.

48. Options are analysed using the following key:

Key for qualitative judgements:

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
--	much worse than doing nothing/the status quo/counterfactual

49. We have considered five options for addressing potentially unfair contract terms and unfair privacy terms in ORAs. These options are not mutually exclusive, and could be packaged to better achieve our objectives in combination.

Option One – Maintain Status Quo

50. Operators would continue to draft their ORAs according to the current requirements set out in the Act, regulations, and the code of practice. The Commerce Commission considers retirement village ORAs are likely to be standard form consumer contracts as defined in the Fair Trading Act. This is because ORAs are not subject to effective negotiation between the resident and residents effectively have to take or leave the ORA in the form presented to them by the operator.
51. There would be no terms prohibited under regulations, and no regulatory body that would be able to declare ORA terms to be unfair (the Commerce Commission cannot unilaterally make any declarations, it must make an application to the court under the Fair Trading Act).
52. Residents would be unable to directly seek court declarations that contract terms in an ORA are unfair, and any decision to seek a declaration under the Fair Trading Act would be dependent on the Commerce Commission.

Option Two – Create a new power in the Act or in regulations that would allow a court or regulatory body to declare certain terms to be unfair contract terms

- 53. This option would create a specific power in the Act that would allow for certain terms to be declared unfair. This power would be held by either the courts or a regulatory body with relevant expertise, who could declare terms to be unfair, and therefore unable to be enforced or relied upon.
- 54. To give effect to such a power using a regulatory body, a new regulatory entity would need to be established, with the necessary regulatory expertise. This body/team would use the criteria set out in the Fair Trading Act to determine whether or not a contract term in an ORA is unfair.³ If a term is found to be unfair, then it cannot be enforced.

Option Three - Create a new regulation making power in the Act to enable regulations to be made which prescribe terms that would be prohibited from being included in ORAs (preferred)

- 55. Under this option, the Act would be amended to empower new regulations to be made, that prescribe a list of terms that are prohibited from being included in ORAs.
- 56. The regulations to prohibit terms would focus on the intent and the effect of terms in ORAs, rather than their specific wording. The aim of this approach is to prevent operators attempting to evade the regulations by making small or technical amendments to the wording of their ORA terms.
- 57. The list could include types of terms that are considered to be unfair, but this would not need to be exhaustive and would not prevent the Commerce Commission from going to court to seek a declaration that a term not already prohibited under these regulations is unfair under the Fair Trading Act.
- 58. s 9(2)(f)(iv)
[REDACTED]
[REDACTED]
[REDACTED]
- 59. This option would align with comparable retirement village regimes in New South Wales, Victoria and Australian Capital Territory, all of which use regulations to prescribe matters prohibited from retirement village contracts. Victoria also assigns a financial penalty for contravening terms prohibited in their regulations.

Option Four - Amend the Fair Trading Act to allow any person other than the Commerce Commission to seek court declarations that a contract term in a retirement village ORA is unfair

- 60. Currently, only the Commerce Commission can seek a declaration from the courts that a term in a standard form contract is unfair under the provisions of the Fair Trading Act.

³ Section 46J of the Fair Trading Act 1986

61. An exception to this was made in 2023, when the Fair Trading Act was amended by the Grocery Industry Competition Act 2023 to allow any person to seek a court declaration that a term in a standard form grocery supply contract is an unfair term. The aim of the Grocery Industry Competition Act is to promote the interests of grocery consumers and to promote a fairer trading environment among competitors in the New Zealand grocery industry.
62. Under this option, a similar amendment would be made in relation to the retirement village sector, to allow any person to seek a court declaration that a contract term in an ORA is unfair, and therefore cannot be enforced.
63. This would allow individual residents or consumer protection organisations acting on behalf of residents to seek declarations that ORA terms are unfair, creating a new avenue for residents to seek recourse against unfair terms, reducing reliance on the Commerce Commission for seeking unfair contract term declarations.
64. This option would allow for individuals to seek recourse for themselves, but unlike option 2, the power to alter a contract by declaring the contract term to be unfair would remain with the courts.

Option Five - develop guidance for the retirement village sector to assist with compliance with privacy obligations when dealing with residents' personal information (preferred)

65. The Ministry would work to develop sector specific privacy guidance (consulting the Office of the Privacy Commissioner), to help operators understand and uphold their privacy obligations (e.g. for requesting and handling residents' personal information), and residents to understand and exercise their privacy rights.

How do the options compare to the status quo?

Criteria	Option 1: Status Quo	Option 2: Include a power in the Act to allow for terms to be declared unfair by a court or regulatory body	Option 3: Include a regulation making power in the Act to prescribe terms prohibited in ORAs	Option 4: Amend the Fair Trading Act to allow people other than the Commerce Commission to seek declarations that retirement village ORA terms are unfair	Option 5: Develop guidance for the retirement village sector to assist with compliance with privacy obligations when dealing with residents' personal information
Improve fairness in ORA contracts	0	<p>+</p> <p>Would provide a statutory process to identify/prohibit unfair terms.</p>	<p>++</p> <p>Would provide a clear list in regulations of terms that are prohibited in ORAs. This would apply proactively across the whole retirement villages sector.</p>	<p>+</p> <p>Cases would need to be taken to court to seek declarations that a term is unfair. Any declaration would only apply to the parties involved, but may have a ripple effect across contract terms used by other operators.</p>	<p>+</p> <p>Would provide practical guidance specific to the retirement villages sector to help operators understand and uphold privacy obligations, and to residents to better understand their privacy rights. This would only help to address unfair terms and practices relating to privacy.</p>
Proportionate and cost effective	0	<p>--</p> <p>Would require a new regulatory body/team to be established, with necessary legal and regulatory expertise. Once established, process of identifying and prohibiting</p>	<p>-</p> <p>Cost to make and enforce regulations and ongoing costs of regulatory stewardship. Small upfront compliance costs for operators, potential costs resulting from prohibited</p>	<p>0</p> <p>Cost of implementation would be low for government, but courts may see caseloads increase marginally. Cost and time of taking cases to court would be a barrier for many potential applicants. Advocacy bodies like the RVR and Consumer NZ may take cases on behalf of residents.</p>	<p>+</p> <p>Some costs involved in developing guidance. Operators may incur some costs adjusting their ORAs, and with ongoing compliance with new guidance.</p>

		terms may be resource intensive.	terms, risk of unintended consequences (e.g. dampening sector innovation).		
Provide predictability, certainty, and clarity of rights and responsibilities for parties	0	+ Clarity of changes would increase overtime as assessment of terms progresses. Potential for challenge as power could be considered quasi-judicial, and this may create uncertainty.	+ Would provide a clear, upfront list of prohibited terms that can be easily referred to. Regulations would apply proactively across the sector to all villages. However, the process of articulating unfair terms and setting the parameters for these may not be straightforward.	+ Clarity over what ORA terms are considered unfair would occur overtime as applications are determined. Expands an existing process to consider and determine unfair terms, thus leveraging existing frameworks and legal precedents. However, parties could face uncertainty regarding applicability across the sector (i.e. not just for the specific contract that a case is about)	+ Practical guidance would provide greater clarity for operators on how to comply with privacy obligations, and for residents knowing their rights, within the specific context of the retirement village sector.
Residents' access to recourse in a timely manner	0	0 Some uncertainty likely in terms of timeframes residents can expect for resolution. New body/team would need to prioritise its resources to determine which terms to assess.	+ Regulations would prevent unfair terms in most ORAs in the first place. Would also include mechanisms to make contravening ORAs voidable.	-- Provides a pathway for residents to seek declarations. However, navigating the Court system likely to be take time and be costly.	+ While this option itself does not provide new access to recourse, increased information and clarity on existing obligations and complaints pathways is expected to improve access to recourse against privacy breaching terms.

Overall Assessment	0	0 This option would cost the most to establish as it would require a new regulatory body/team to be established, but it would not provide the most clarity, predictability and fairness.	+ 3 This option provides certainty and clarity across the sector, with medium compliance costs expected along with some possible downstream costs from the removal of ORA terms that operators currently derive a financial benefit from.	0 This option would create a new legal avenue for people to seek recourse. However, cost and time is likely to be a barrier for many, and benefits may be limited due to declarations only binding parties involved in each case.	+ 4 This option provides increased clarity to both residents and operators on privacy rights. It is expected to improve overall compliance and ultimately consumer protection to residents.
---------------------------	----------	--	---	---	---

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

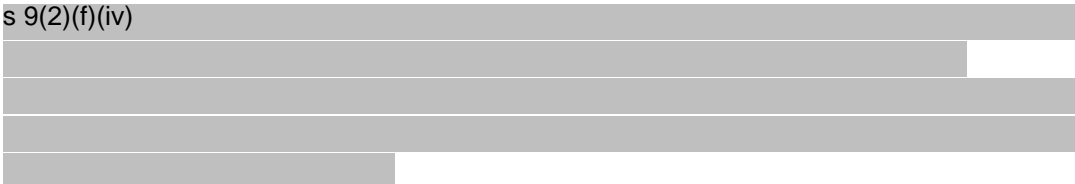
Regulatory power to prohibit ORA terms and developing privacy guidance for the retirement village sector

66. We consider that Option 3, a new regulation making power in the Act to prescribe a list of terms that would be prohibited from being included in ORAs, is the best option to address of the problem of unfair contract terms, meet our policy objectives and deliver the highest benefit for the lowest cost. Alongside this, we also recommend progressing option 5, to develop guidance for the sector on privacy rights and obligations.

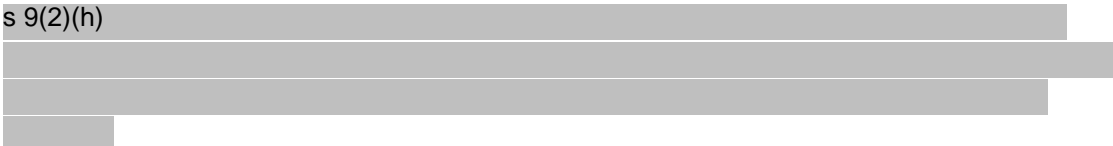
67. These options in combination would provide certainty for both residents and operators, and clarity on their rights and responsibilities. Regulations would apply across the sector in a consistent manner and without residents needing to pursue costly litigation if their only recourse was pursuing unfair contract term declarations under the Fair Trading Act (as under option 4).

68. These options would be a cost-effective way to support access to justice and strengthen consumer protection and fairness for residents. We consider the costs of implementing the options to be relatively low in proportion to the expected benefits. There may be some compliance costs for operators, particularly in the initial stage after the regulations come into effect, as they would likely need to review and adjust their ORAs and business practices to ensure compliance.


69. s 9(2)(f)(iv)



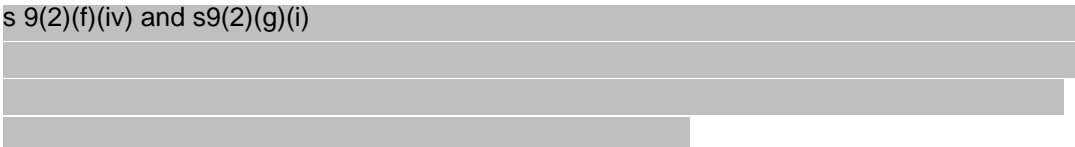
68. s 9(2)(h)



69. s 9(2)(f)(iv)



70. s 9(2)(f)(iv) and s9(2)(g)(i)



71. Under option 3, the prescribed list of prohibited terms would not be exhaustive, and the Commerce Commission would still be able to seek court declarations that ORA terms not included in these regulations are unfair contract terms under the Fair Trading Act. This mitigates the risk that new unfair terms come to light after the regulations have been made, and would provide an alternative avenue to address unfair terms in ORAs during the time it would take to amend the regulations.
72. The benefit of using regulations to prohibit unfair terms compared to primary legislation, is that they are easier to amend over time compared to primary legislation, and have a broad application across the sector to all operators, rather than applying in a piecemeal way as the other options would.
73. There may be further flow on costs and benefits to impacted parties, stemming from the required removal of any terms that are prohibited in regulation. Operators may derive a financial benefit (and residents a financial cost) from some terms currently in their ORAs that may be subject to future regulation. Therefore, prohibiting these terms may cause a financial cost to operators and a commensurate benefit to residents. It is possible that operators pass on any costs to residents.
74. s 9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
75. In the event of civil penalty being issued, under the new proposed penalty, the court could issue a penalty of up to \$20,000 for an individual, or \$50,000 for a body corporate, per term that contravenes the regulations. These penalties are proportionate to the harm caused by a breach.
76. Regulations prohibiting types of terms would be prospective with a consistent application across the sector, whereas seeking court declarations under option 4 would be more reactive and piecemeal, as any resulting declaration would only apply to the parties involved in the proceeding.
77. At this stage a full analysis of the estimated costs and benefits cannot be undertaken. This will be carried out when a full RIS is completed after policy proposals on the regulations are completed.

Privacy guidance

78. We also recommend developing sector specific guidance on best privacy practices for village operators, with input from the Office of the Privacy Commissioner. s 9(2)(f)(iv) [REDACTED]
[REDACTED]
[REDACTED] However, we also consider that developing guidance alongside any regulations is necessary to provide clarity to the sector as to how existing obligations under the Privacy Act apply to retirement village residents.

Is the Minister's preferred option in the Cabinet paper the same as the agency's preferred option in the RIS?

79. Yes .

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Retirement village operators	Village operators would need to review their ORAs to comply with regulations. Operators may bear some cost due to the terms that are prohibited.	Low	Low (can't know full extent of costs until full RIS is completed for proposed regulations)
Retirement village residents	Residents may incur some cost from these regulations (if operators incur costs and pass these on).	Low	Low
s 9(2)(f)(iv)			
Total monetised costs	<i>No data</i>	<i>No data</i>	<i>No data</i>
Non-monetised costs		Low	Medium
Additional benefits of the preferred option compared to taking no action			
Operators	Regulations and privacy guidance will help to create a more level playing field between reputable operators and less reputable ones.	Low	Low (as above, will have better understanding when full RIS is complete)
Residents	Terms that were imposing costs on residents will be prohibited, potentially saving costs for residents.	Medium	Low
Total monetised benefits	<i>No data</i>	<i>No data</i>	<i>No data</i>
Non-monetised benefits		Medium	Low

80. Because this is an interim RIS on proposals to create a new regulatory power, rather than on the regulations themselves (which will come in the future), we cannot provide specific estimates as to costs and benefits resulting from these regulations.
81. When regulations are being developed after the amendment bill has passed, a more comprehensive cost-benefit analysis will be carried out on regulatory proposals to make certain types of terms prohibited.

Section 3: Delivering an option

How will the proposal be implemented?

Amending the Act to create a new regulatory power to prohibit terms from being included into ORAs

82. s 9(2)(f)(iv) [REDACTED]
83. [REDACTED]
84. [REDACTED]
85. Under section 97 of the Act, the Registrar has the power to inspect documents that are relevant to a retirement village, for the purposes of ascertaining whether an operator has complied with the Act, and whether the Registrar should exercise any of their powers under the Act.
86. If complaints are made to the Commerce Commission about unfair contract terms that are prohibited by regulations, the Commerce Commission can refer these complaints to the Registrar for further consideration, if they consider the matter is within the Registrar's jurisdiction.

Developing sector specific guidance with input from the Office of the Privacy Commissioner

87. [REDACTED]

How will the proposal be monitored, evaluated, and reviewed?

Ministry of Housing and Urban Development

88. The Ministry, as lead policy agency responsible for the Retirement Villages Act, has an ongoing regulatory stewardship role. The Ministry maintains relationships with sector stakeholders, such as the RVA, which represents operators, and the RVR which represents residents. Officials are in regular correspondence with representatives of these organisations and will consider any concerns they raise.

89. As part of the Ministry's ongoing regulatory stewardship responsibility, the Ministry will listen to feedback from the sector on regulations made under the Act to prohibit ORA terms, and periodically review them as needed.
90. After the new retirement village sector privacy guidance has been published, the Ministry will continue to monitor feedback from stakeholders, to assess if the guidance has been helpful in improving privacy practices.

Retirement Commission

91. The Retirement Commission holds responsibility under the Act for monitoring the effects of the legislative framework for retirement villages to ensure it remains effective. The Retirement Commission has run an independent monitoring programme since 2008, with an annual investigation and report into different aspects of the sector produced each year.
92. The Retirement Commission currently receives biannual information from retirement village operators regarding any formal complaints they have received from residents. These reports allow the Retirement Commission to monitor trends and concerns in the sector.
93. The Retirement Commission will be able to use its current monitoring framework to investigate and monitor the effects of legislative changes, and will consider establishing benchmarks to better understand the impacts on the sector.

Commerce Commission

94. As an independent Crown Entity, the Commerce Commission enforces laws relating to fair trading, competition, consumer credit contracts and economic regulation. Although the Commerce Commission cannot investigate breaches of the Act, it can investigate breaches of the Fair Trading Act.
95. The Commerce Commission recently investigated potentially unfair contract terms in a range of retirement village ORAs. The Ministry will continue to work with the Commerce Commission on issues as required.

Office of the Privacy Commissioner

96. The Office of the Privacy Commissioner enforces the Privacy Act 2020 and associated codes such as the Health Information Privacy Code 2020. Retirement village operators handle personal health information belonging to their residents, and must comply with the Privacy Act when doing so.
97. In relation to the privacy issues identified, the Office of the Privacy Commissioner will continue to perform its usual role. The Office of the Privacy Commissioner is an independent Crown Entity, whose function is to regulate the Privacy Act to ensure that agencies, businesses and organisations are aware of what rules they need to follow. They also help individuals whose privacy has been breached and educate New Zealanders about their privacy rights.
98. The Office of the Privacy Commissioner receives public inquiries and complaints, investigates privacy breaches, and conducts proactive oversight activities like audits and reviews of specific sectors.