

**Investigation into Department of Health oversight of  
Mentone Gardens, a Supported Residential Service**

**April 2015**

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# Letter to the Legislative Council and the Legislative Assembly

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To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report into an *Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service*.



Deborah Glass OBE

**Ombudsman**

14 April 2015



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# Foreword

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In September 2013, 'Mentone Gardens', which was home to 39 elderly residents, many of them over 90, went into liquidation. Many of those residents had put up large sums of money – amounting to over \$4,500,000 – to secure their accommodation and care. Information from the liquidator is that their money has disappeared, the insolvency having been caused by 'misappropriation of funds'.

Mentone Gardens was a 'Supported Residential Service' – a privately operated facility registered with, and therefore regulated by, the Department of Health. Mentone Gardens had been registered since 1991.

In 2014 I received a complaint from a former resident of Mentone Gardens, which prompted me to make enquiries about the then Department of Health's oversight of the facility. Those enquiries raised serious concerns, as a result of which I launched a formal investigation in September 2014. Following the announcement of my investigation a further 17 former residents and family members approached my office with similar complaints.

The accounts of the residents and their families were painfully similar. Many had been given assurances by the proprietor that their 'bonds' were refundable and would be held in trust. It was only after the facility went into receivership that they discovered that nothing had been held in trust. Families had been reassured that the facility was registered with a government department, but when they complained to the department after the facility went into liquidation, the department denied any responsibility.

My investigation has uncovered a different story.

The department's own files expose such a litany of failings in its oversight of Mentone Gardens, that it is difficult to see how it complied with even the most benign of regulatory environments. The company had not produced proper financial records for its entire 25-year history. The department received numerous complaints about the way Mentone Gardens handled fees but no substantive action was taken; the department considered it had no mandate to investigate these matters.

I do not criticise the department for not knowing that one of the proprietors had been convicted of fraud in 1958, as this did not show up on a criminal records check. But Mentone Gardens was prosecuted twice by the department itself, in 1995 and 2000, for breaches of care provisions. Despite this, registration was renewed nine times from 1998, even when the proprietor failed to disclose the 1995 and 2000 convictions in statutory declarations. Registration was also renewed even though the falseness of the proprietor's statements would have been apparent from the department's own files, as was the failure to pay the outstanding legal costs of the prosecutions. There is no evidence that anyone in the department considered the implications of this failure on the facility's financial capacity.

The department claims, with some justification, that the issues are 'complex' and contentious. The legal and regulatory situation over this period was not straightforward. There was, until July 2012, no legislative requirement for SRS proprietors to even have a trust account.

Under the previous legislation, however, in registering an SRS, the department did have to consider whether the proprietor was a 'fit and proper person' with the financial capacity to provide the service. The repeated breaches, lies, patterns of complaints and persistent non-compliance should have raised the loudest of alarm bells. Yet the failure to comply did not result in escalation, but the issue of another compliance notice.

The effect of these failings was that elderly people requiring care lost substantial personal funds as a result of the collapse of Mentone Gardens. These people did not understand or manage the risk of paying all or a substantial portion of their life savings to a private company. They were given comfort that the facility was subject to State Government oversight.

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During this investigation I met many of the surviving residents and their families. I have included some of their quotes in this report. Their stories were heartbreaking – many had sold their family homes to pay for their care, and the impact of their losses was not only monetary. The residents, many of them already frail, lost their dignity, their independence and their peace of mind. For their families, the loss was exacerbated by the bureaucratic stonewalling of departmental representatives as they tried to find answers. They told me they felt betrayed, hurt and let down by the system.

It is not the role of the Ombudsman to award compensation, and matters involving financial loss are usually left to the courts. But the department's failures are so egregious, its administrative actions so unreasonable and unjust, and the impact of those failings on such a vulnerable group so severe, that I am recommending that the government make an ex gratia payment, in the interests of justice, to those affected.

I am mindful that governments should not make ex gratia payments lightly. They involve public money and need careful consideration on behalf of the community as a whole. In this case, the failings emerging during the investigation were so disturbing that I wrote to the responsible Minister on 5 December 2014, to alert the government to my concerns and the likelihood that I would be recommending an ex gratia payment. I advised that I was consulting the Minister in advance of the final report as I was aware that it would require detailed consideration, and I was conscious of the impact of delay on this group of very elderly people. As the government has had four months to consider the matter, I am recommending that payments be made by 30 June 2015, subject to the provision of the necessary evidence by those who suffered loss.

I am also concerned to ensure this situation does not arise again. Although no system can entirely prevent fraud and other misconduct, regulatory systems exist to mitigate the risks. The law does now require SRS proprietors to hold bond money in trust and the department has assured me that all currently registered SRS are subject to inspection. These are all positive developments, but more needs to be done. Regulations should be tightened to ensure financial capacity is as important as quality of care. Procedures need to be finalised and implemented. The elderly and their families – potentially, every Victorian – deserve no less.

Deborah Glass  
**Ombudsman**

# Introduction

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1. Mentone Gardens was a 42-bed Supported Residential Service (SRS) registered by the Department of Health (now the Department of Health and Human Services, in either case referred to as the department) for the first time in 1991. Across Victoria 143 SRS care for more than 5000 frail elderly people or people with disabilities or illnesses who cannot live independently.
2. Mentone Gardens was operated by Parklane Assets Pty Ltd (Parklane) until it went into voluntary administration on 12 June 2013 and then into liquidation in September 2013. For much of its 25-year history, Parklane's directors were a married couple. While the man remained a director until his death in January 2014, his wife resigned her directorship in 2011.
3. Despite the proprietor's wife relinquishing her directorship she appears to have had effective control of the day-to-day management of the facility, particularly once the proprietor was admitted to a nursing home. For convenience I refer to them both as the 'proprietor' where it is unclear which individual was involved.
4. As the sector's regulator, the department registered and subsequently monitored the operation of Mentone Gardens subject to the:
  - *Health Services Act 1988* and the *Health Services (Residential Care) Regulations 1991*
  - *Health Services (Supported Residential Services) Regulations 2001*, and then
  - *Supported Residential Services (Private Proprietors) Act 2010* and the *Supported Residential Services (Private Proprietors) Regulations 2012*, which both came into effect on 1 July 2012.
5. Both the current and former Acts required the Secretary of the department to be satisfied that Parklane had the financial capacity to operate Mentone Gardens as an SRS. The legislation provided that the department had an ongoing responsibility to monitor both the standard of care received by residents and the continuing financial capacity of Parklane to operate Mentone Gardens as an SRS.
6. In response to my draft report the department stated:

Financial capacity is currently assessed in points in time – at registration (s15); in conjunction with a registration statement (s36); and in conjunction with the sanction or suspension of admissions or revocation of registration. Under the Health Services Act 1988 it was also required to be assessed at renewal of registration.
7. From 1 July 2012, the new legislation included specific offences for failing to put certain residents' funds into trust accounts and failing to maintain separate records in relation to those funds.
8. These legislative protections, combined with the department's oversight, undoubtedly gave Mentone Gardens' residents and their families considerable reassurance that the deposits and fees they advanced to the proprietor were secure.
9. After Parklane was liquidated I received a complaint about the department's financial oversight of the facility from a former resident, Mr Allan Lorraine. Mr Lorraine's complaint indicated that he and his wife Rosebud lived at Mentone Gardens from October 2009 and lost their \$400,000 'bond' when Parklane collapsed.

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10. According to the liquidator, Parklane owed \$4,570,824.69 to residents when it was liquidated in 2013 with both administrator and liquidator reports stating that Parklane had:
    1. not provided proper financial records for the entire 25-year history of the company
    2. become insolvent through 'misappropriation of funds'
    3. been insolvent for nearly three years prior to entering administration
    4. not kept residents' bonds/deposits in trust accounts
    5. transferred some of the funds that should have been in trust accounts to a related entity of Parklane, and
    6. used some of these funds for trading expenses or to repay bond monies<sup>1</sup>.
  11. The collapse of Parklane had devastating consequences for residents. After I announced my investigation another 17 former residents or their family members approached my office having lost their bonds or deposits. The majority of these residents were over 90 years of age and three of them were centenarians.
  12. The consequences for residents were not limited to financial loss. Residents and their families told my office of the hardship involved in having to relocate to new accommodation, accepting lesser facilities and the general distress associated with the loss of savings accumulated over a lifetime of hard work and frugal living.
  13. After receiving Mr Lorraine's complaint I made initial enquiries with the department regarding its oversight of Mentone Gardens. My enquiries left me sufficiently concerned that I decided to formally investigate the matter. My investigation has confirmed that the department failed in its regulatory role, missing opportunity after opportunity to identify Parklane's precarious financial position.
  14. The department's failures can be split into two categories: matters it should have known if it had been more diligent in its oversight; and matters it was aware of but failed to take necessary action to address.

**M**y concern is the health and wellbeing of my grandmother whose health has deteriorated dramatically since her life savings were stolen.

**Grandson of former resident**

**S**ince being advised that her life savings are no longer, she has been forced to move to another facility and suffers the indignity each day that she is now fully dependent on other people's money ... she is 96 years of age and dreads waking each day as she resents being what she considers to be a burden on society.

**Granddaughter of former resident**

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<sup>1</sup> Points 1-3 from liquidator's report; points 4-6 from administrator's report.

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15. Between 1991 and 2013 the department continued to renew the registration of Mentone Gardens despite:
- having prosecuted it on two occasions for breaches of regulatory standards
  - a Magistrate describing the proprietor's conduct as 'appalling' on one of those occasions
  - numerous failures to meet standards regarding:
    - administration of medication
    - record keeping
    - notifying next of kin
    - privacy
    - quality of care
  - receiving multiple complaints about how Parklane was administering bonds and delaying their repayment
  - knowing the proprietor had made false statements in renewal applications, and
  - knowing that Parklane had failed to repay legal costs awarded against it.
16. As became clear subsequently, the department also failed to identify:
- the insolvent state of the company for a period of nearly three years
  - Parklane being in substantial rental arrears, and
  - that one of the proprietors had been admitted to an aged care facility, which may have indicated incapacity.
17. The department also failed to appropriately collect and analyse complaint data regarding Mentone Gardens, which could have offered it insights into both financial capacity and whether the proprietor was fit and proper to provide the service.
18. During my investigation I also become aware of several issues with the department's approach to the general regulation of SRS that required rectification. These include:
- the failure to take enforcement action and address non-compliance by SRS facilities; for example, failure to issue infringement notices despite legislation providing for this since 1991
  - policies, procedures and guidelines that are incomplete or unclear
  - failure to analyse complaint data and respond to systemic issues, and
  - inadequate training of departmental staff involved in the regulation of SRS.
- ## Investigation scope and methodology
19. This investigation report addresses the following:
- the context of the aged care and SRS sectors and where Mentone Gardens was placed in this
  - the legislative obligations of the department
  - the history of the department's dealings with Mentone Gardens
  - the failings of the department in protecting the residents of Mentone Gardens
  - the department's actions since the collapse of Mentone Gardens.
20. This report sets out my opinions in relation to the department's oversight of Mentone Gardens in the following key areas:
- monitoring, compliance and enforcement activities
  - registration as an SRS

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- the transitional period between royal assent to the new *Supported Residential Services (Private Proprietors) Act* in 2010 and its commencement on 1 July 2012.
21. My investigation focussed on the role of the department in overseeing Mentone Gardens, and more broadly, the SRS sector. It examined the department's legislative role and responsibilities, specifically:
- compliance with its statutory obligations, established policies and procedures
  - processes regarding registration and renewal of registration for SRS providers
  - complaint handling regarding concerns raised with the department about Mentone Gardens
  - compliance and enforcement action in relation to breaches of the legislation by Mentone Gardens.
22. Investigation officers:
- analysed departmental policies, procedures and records related to the registration and regulation of Mentone Gardens
  - met with complainants, family members and departmental officers
  - interviewed current and former departmental staff including regional staff
  - interviewed the liquidator
  - examined departmental emails
  - summonsed documentation held by third parties.
23. This report includes adverse comments about the proprietor and the department. In accordance with section 25A(3) of the *Ombudsman Act 1973* I advise that any other people who are identifiable, or may be identifiable from the information in this report, are not the subject of any adverse comment or opinion and:
- I am satisfied that it is necessary or desirable in the public interest that the information that identifies or may identify those persons be included in this report; and
  - I am satisfied that identifying them will not cause unreasonable damage to their reputations, safety or wellbeing.
24. A copy of the draft report was provided to the department on 19 March 2015. The department's response is attached at Appendix 3.

## **Aged care and the SRS sector**

25. The landscape for aged care providers is complicated and confusing. There are both State and Commonwealth regulatory regimes, with an Accommodation Bond Guarantee Scheme at the Commonwealth but not the State level. No single agency has overall responsibility for the growing aged care sector. A brief overview is attached at Appendix 1.
26. The primary source of revenue for SRS facilities are payments made by residents and/or their families.

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27. Although SRS are essentially private businesses, some government funding<sup>2</sup> is provided to pension-level<sup>3</sup> proprietors by the department through its Supporting Accommodation for Vulnerable Victorians Initiative (SAVVI). However, Mentone Gardens was not eligible for this funding.
28. The primary purpose of the department's regulation is to protect the safety and wellbeing of SRS residents<sup>4</sup> by establishing minimum standards for the accommodation and care provided in these facilities. Regulation is necessary as there is reliance by residents on proprietors for both care and accommodation and many residents have some form of illness or disability which makes them more vulnerable than the general population.
29. The key outcomes that the department has sought to achieve through its involvement in the SRS industry include:
- SRS premises which are safe, properly maintained and provide a home-like environment
  - resident care and support is safe and effective, and provided in a timely and respectful manner
  - staff members are competent to deliver care
  - proprietors and staff of SRS are aware of their responsibilities and accountable for the services they provide
  - individual residents' rights are protected
  - residents' finances are not misused or abused<sup>5</sup>.
30. The current legislation also:
- sets out requirements for SRS proprietors:
    - to register the premises, and to satisfy certain criteria about their personal and financial suitability to operate an SRS
    - regarding the physical premises, staffing, financial management, provision of certain services and protection of certain personal rights (for example privacy, dignity and security)
  - establishes:
    - a statutory role for Community Visitors<sup>6</sup> in visiting SRS, inquiring into matters and investigating complaints
    - administrative arrangements for the monitoring and enforcement of the regulatory scheme.
31. Until 1 July 2012, SRS were regulated by the department under the Health Services Act. The regulatory scheme was reviewed due to significant changes in the sector and the mix of people residing in SRS, and a new legislative framework was introduced<sup>7</sup>. Some of the key reforms introduced financial protections for residents receiving services from SRS. These protections were intended to ensure that residents' money was safe and secure<sup>8</sup> and included:
- statutory limits on the types of fees and charges that a proprietor can ask a resident to pay. It is now an offence for a proprietor to request, or accept, the payment of a security deposit, or fee in advance, in excess of one month's residential fees<sup>9</sup>, unless a resident makes a request in writing to advance a payment above that limit<sup>10</sup>

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2 SAVVI funding is provided to those pension-level SRS who meet certain eligibility criteria.

3 Pension-level SRS are defined as an SRS in which at least 80% of registered beds are offered at pension-level <[www.health.vic.gov.au/srs/plp.htm](http://www.health.vic.gov.au/srs/plp.htm)>.

4 *Review of the Regulation of Supported Residential Services in Victoria Discussion Paper - May 2008*, Department of Human Services, page 4.

5 Discussion Paper, as referred to in footnote 4.

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6 The Community Visitors Program is managed by the Office of the Public Advocate. Community Visitors are empowered to conduct visits to SRS at any time.

7 *The Supported Residential Services (Private Providers) Act 2010 and the Supported Residential Services (Private Proprietors) Regulations 2012*.

8 Victoria, *Parliamentary Debates*, Council, 24 June 2010, page 3135.

9 Ss 89-91 *Supported Residential Services Act 2010* (Vic).

10 Sec 91, *Supported Residential Services Act 2010* (Vic).

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- a requirement for the proprietor, within seven days of receiving a security deposit or fee in advance, to place those funds into a trust account held at an authorised deposit-taking institution, such as a bank. Separate records of these transactions must be maintained, including the balances remaining of certain fees paid prior to 1 July 2012
  - withdrawal of monies from a trust account is only permitted in accordance with the agreement between the proprietor and resident.
32. The Minister for Housing, Disability and Ageing is now the responsible Minister for SRS regulation and the department is responsible for monitoring SRS compliance.
33. SRS vary in the services they provide, the people they accommodate and the fees they charge. There are currently 143 SRS registered with the department ranging from small facilities accommodating a few people to larger ones with up to 90 residents.

## Mentone Gardens

34. Mentone Gardens was a 42-bed SRS, providing accommodation and care to the frail and aged, some of whom suffer from varying degrees and types of dementia.
35. Parklane was placed under voluntary administration pursuant to the *Corporations Act 2001 (Cwlth)* in June 2013, and into liquidation in September 2013.
36. At the time of his death in January 2014, one of the proprietors was aged 99 years and residing in a nursing home. Day-to-day operations of Mentone Gardens appeared to be at the direction of the proprietor's wife<sup>11</sup>.
37. The administrator's report dated 8 July 2013 stated:
- We were advised by the current company accountant that an amount over \$3.0 million of deposit/bond money was not held in a trust account as required under the ... (SRS Act). ...
  - Initial investigations and discussions with [the proprietor] indicate that some these [sic] deposit / bond funds were transferred to a related entity ... while other funds appear to have been used to meet trading expenditures for the facility and to repay the deposit / bond monies of earlier residents that had departed the facility. ...
  - The director has provided a statement of assets and liabilities for himself and his wife and it would initially appear there are no realisable assets for the benefit of creditors.
38. The administrator's report also noted that:
- the overall liabilities owed by the proprietor is approximately \$4.5 million, and based on the company's assets, a 'dividend will not be paid to unsecured creditors'
  - the proprietor acted as the company's accountant and prepared the financial reports, however, financial records were not 'maintained in a manner that would accurately explain various transactions of the company'
  - no annual statements or returns had been lodged by the proprietor since 2003, and that there was 'little financial information to enable [the administrator] to conduct further investigations'.

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<sup>11</sup> Report by Joint & Several Administrator, 8 July 2013.

39. In addition, the administrator formed the opinion that:

An extensive review of the company's bank statements for the period July 2005 to the date of [their] appointment revealed that Parklane [trading as Mentone Gardens] ... did not hold the funds placed with it in an appropriate trust account and in most cases drew upon the trust monies shortly after they were received. This conduct appeared to have occurred during the entire period reviewed.

40. In September 2013, Mentone Gardens was sold to a new proprietor.

41. The following conclusions were drawn by the liquidator in his report dated 23 June 2014<sup>12</sup>:

- On or around 25 August 2010, 'the company should have been aware that it was plainly and inescapably insolvent'. There were no proper financial records made available to the liquidators for the entire 25-year history of the company. One Statement of Financial Position ('balance sheet') for the company for the year ended 30 June 2012 disclosed no liability with respect to resident creditors.
- In the absence of any other explanation and where in available financial disclosures the company was presented to be profitable, the company's insolvency was caused by 'misappropriation of funds'. The company obtained significant deposits from residents who were variously informed that the deposits were held in trust in a separate investment account, and were to be refunded at the end of the residence.

The terms attached to the deposits were that they were not refundable for three months. The liquidator's investigation disclosed that the three month time delay was likely necessary as the company did not retain sufficient reserves to meet its obligation to refund deposits, but relied on new residents' deposits to pay refunds.

42. The liquidator concluded that the proprietor was insolvent before 25 August 2010. In his report, he stated that:

[E]ven a cursory review of the company's financial position from any time at least beyond 25 August 2010 by the State Government would have uncovered the insolvency and total failure to provide any systemic protection of resident monies ... The State Government's failure to undertake any timely meaningful review of the facility's financial position and its management had enabled [the proprietor] to continue their conduct in relying on new resident deposits to pay outgoing resident claims ...

43. In January 2015, the Australian Securities and Investments Commission advised my office that it was investigating this matter.

**A**lthough residents had a right to be free from exploitation and although there was a moral and legal obligation for the fees to be held in trust until required, my father's vulnerability had been exploited and his monies taken!

**Daughter of former resident**

<sup>12</sup> Supplementary Report dated 23 June 2014 to ASIC in accordance with the provisions of section 533(2) of the Corporations Act 2001, Roger Grant, Dye & Co. Pty Ltd (it should be noted that at the date of his report, the liquidator had not been able to examine the proprietor's wife and the company's bookkeeper).

# History

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## 1990s

44. On 18 February 1991 the department first registered Parklane to operate Mentone Gardens<sup>13</sup>.
45. Mentone Gardens' registration was first renewed on 1 January 1993 for three years to 31 December 1995.
46. Parklane was prosecuted by the department for breaches of the *Health Services (Residential Care) Regulations 1991* on 2 June 1995. The prosecution occurred following the investigation of a complaint which alleged that the proprietor's wife had ordered the removal of a resident's catheter, leading to incontinence and other serious impacts on her wellbeing. Her incontinence, immobilisation in bed, and inadequate staff numbers to keep her mobile, created a serious pressure sore. Medical advice to transfer her away from the facility was not immediately followed.
47. According to the brief of evidence presented to the court, a former employee of Mentone Gardens told the department that the pressure sore "... looked like a cavity, a hole [...] I only have a small hand, but I felt I could have got my fist in it. If I clenched my hand [...] it could have fitted in there, it was awful."
48. Parklane was found guilty of breaches relating to record-keeping, personal hygiene and mobility standards, staffing and care plans. It was fined \$4,800 and ordered to pay the department's legal costs of \$8,000 within six months.
49. Mentone Gardens' registration was again renewed on 5 January 1996 for the period 1 January 1996 to 31 December 1998. The memorandum prepared by the authorised officer recommending renewal made no reference to the 1995 prosecution.
50. In July 1996, due to a delay in payment, the Magistrates' Court issued a warrant to the Sheriff to recover the outstanding costs; however, there were 'no assets' which could be seized from the proprietor to cover the outstanding amount. In January 1997, the department received \$921 from Parklane as the first payment towards the legal costs. Parklane eventually entered into a payment plan with the department in June 1998 to pay off an outstanding debt of \$7,436.26<sup>14</sup>. Parklane made three further payments totalling \$3,000 in July, August and September 1998. The department's files do not show that the remaining debt of \$4,436.26 was ever repaid.
51. On 6 December 1998 the department renewed Mentone Gardens' registration from 1 January 1999 to 31 December 1999. The memorandum recommending renewal did not include any information about the 1995 prosecution of Parklane, or its delay in paying back legal costs to the department.

## 2000-01

52. On 1 January 2000, the department issued Mentone Gardens with a registration renewal certificate to 30 June 2001.
53. Approximately two months after it issued a renewal certificate, Parklane was prosecuted for a second time, on 8 March 2000, for care plan and accident record breaches. This prosecution arose out of a complaint made by the daughter of a resident who alleged that her mother, who suffered dementia, had absconded from Mentone Gardens on three occasions. On one of those occasions the resident was found wandering across Nepean Highway where it is a six-lane divided road. The department found that her escapes and attempts to break windows and glass doors were not properly recorded, and strategies were not in place to manage her behaviour.

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<sup>13</sup> Unbeknown to the department, the proprietor had been convicted and imprisoned for fraud in 1958. This conviction was not included on the proprietor's criminal history check provided by the proprietor to the department.

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<sup>14</sup> This consisted of \$7,079 owing from the original legal costs, plus interest and additional legal costs.

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It also found similar failures regarding a male resident with high care needs. Parklane was fined \$1,500 and ordered to pay costs of \$3,000 to the department.

54. The Magistrate drew the following conclusions about the seriousness of the case:
- The proprietor's conduct was 'appalling without using that word loosely', and its care plans for the two residents were 'completely inadequate', especially in view of its 1995 conviction for similar breaches.
  - It was just 'a matter of chance' that neither resident had been harmed.
  - The available sentencing options were 'appallingly inadequate', and the Court should be able to send a stronger message about SRS obligations to 'almost the most vulnerable people in our community'.
55. At the request of the Magistrate, the department reported his remarks to the Minister and new regulations were implemented to increase the penalties for such breaches, under the *Health Services (Supported Residential Services) Regulations 2001*. The Regulatory Impact Statement for these regulations specifically cited the Magistrate's remarks. The increased penalties were later inserted into the Health Services Act in 2004.
56. In April 2000, regional department staff consulted the Manager, Residential Care Registration and Compliance, who was involved in both prosecutions of Parklane, as to his views about renewal of Mentone Gardens' registration.
57. The Manager identified concerns with the proprietor being 'fit and proper'. He referred to the Magistrate's comments in the 2000 prosecution and stated that:
- I believe that [the proprietors] are not fit and proper to be involved in the operation of a SRS and recommend that you consider [its] past performance ... before making a decision on this matter.

58. On 15 June 2000, the Regional Director wrote to the proprietor's solicitors about the application for renewal of registration. In that letter, he said he had yet to make a decision on whether to renew registration:
- I need to be convinced that the criteria for renewal of registration set out in Section 89 of the Act are satisfied...
59. In addition, the Regional Director referred to the recent prosecution and noted that a 'conviction may be grounds for revocation of registration under Section 102(1)(c)'.
60. A meeting was held between departmental officers and the proprietor on 28 July 2000, and the proprietor was provided with an opportunity to respond to the department's concerns about renewal of registration.
61. The department's authorised officer involved in the assessment of Mentone Gardens' application for renewal met with the department's legal branch on 16 August 2000, and sought advice as to whether to revoke Mentone Gardens' registration.
62. At that meeting, the authorised officer stated her view that there was not a strong case for refusing renewal of registration, for a number of reasons, including:
- only two complaints had been received in the relevant registration period, and were not substantiated
  - the only other complaint made about Mentone Gardens in recent times was on 11 November 1998
  - Community Visitors had a high opinion about the quality of care provided at Mentone Gardens
  - the department's main concerns had been about the quality of service plans maintained by the proprietor. The department noted that the proprietor had sought advice and guidance about service plans from the department and did not receive a response, due to an oversight.

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63. Internal legal advice, dated 31 August 2000, confirmed that for the above reasons, the department believed it would have difficulty establishing that the criteria for renewal of registration were not satisfied if the matter was appealed to the Victorian Civil and Administrative Tribunal (VCAT).
64. Although the prosecutions were referred to within the legal advice, there was no mention that Parklane had failed to pay the legal costs associated with the 1995 prosecution.
65. On 5 September 2000, the department renewed Mentone Gardens' registration. However, conditions were imposed, including a reduced registration period from 5 September 2000 to 20 June 2001.
66. On 7 November 2000, a complaint was received by the department from a resident who said that he had been charged a \$1,900 'bond' because 28 days' notice of departure was not provided. This information was apparently not provided in the residential statement<sup>15</sup> upon his admission into the facility. The department appears to have carried out an inspection of Mentone Gardens eight days after receiving the complaint. However, it is unclear what this inspection entailed as the departmental notation on record simply states that the complaint was 'unsubstantiated' [sic].
68. The department issued a renewal of registration certificate to Mentone Gardens on 1 July 2001 for the period until 31 July 2002. The memorandum recommending renewal of registration in 2001 referred to the convictions, however, did not refer to the outstanding legal costs.
69. In June 2002, the department conducted a care audit which highlighted a number of compliance breaches including: a number of residents not having residential statements, no record of administration of medication to residents on medication sheets and no record of authority for management of money for three residents.
70. On 14 March 2003, the department renewed registration for the period 1 August 2002 until 31 March 2005. In the 2003 renewal application forms, the proprietor did not declare the previous Parklane convictions, although required to do so. The department failed to notice this omission when it assessed the application. The 2003 memorandum recommending renewal of registration did not make reference to either the convictions or the outstanding legal costs to the department.

## 2004

71. On 16 July 2004, the wife of a resident complained that she had received an invoice for \$50,000 being for one year's fees in advance. The complainant also had additional concerns about the care provided to her husband. The department referred the resident to VCAT but took no action itself.
67. In March 2001, after following up an inspection regarding another (unrelated) complaint, the department highlighted that there were a number of matters requiring further action, including service plans and residential statements.

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<sup>15</sup> Section 106(1) of the Health Services Act provided that a residential statement document the nature of the health services to be provided to the resident, including care and management of money (other than money received for accommodation or services provided by the proprietor).

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72. In September 2004, the department inspected Mentone Gardens following another complaint. During this inspection it identified that there had been a breach of the legislation in relation to failure to notify a doctor or the next of kin of a resident who had had a fall.
73. The following month in October 2004, after inspecting Mentone Gardens following the receipt of another complaint, the department discovered a number of breaches of the legislation in relation to residents' privacy and non-compliant administration of residents' medication.

## 2005

74. In May 2005 during a pre-registration inspection of Mentone Gardens to ascertain compliance with conditions of registration, it was discovered that no residential statements were available. The proprietor was requested to have all residential statements available within four days. It is unclear whether the department undertook any follow-up action as there are no further notations on file in relation to this matter.
75. A further complaint was received by the department on 31 March 2005 from the wife of a resident of Mentone Gardens. The complainant stated that she was required to pay a bond of \$50,000 and that it would not be refunded until two months after discharge. The complaint was withdrawn by the complainant two months later when the matter was resolved between the complainant and Mentone Gardens.
76. On 12 July 2005, the department again renewed Mentone Gardens' registration for the period 1 April 2005 to 30 August 2007.
77. As with the application for renewal of registration in 2003, in 2005 the proprietor again failed to disclose the previous convictions under the Health Services Act.
78. This time, the department noticed that the proprietor did not disclose the convictions. In response, the department informed him that it was 'prepared to assume that the declarations were provided in error, and unintentional'. The proprietor wrote to the department, apologising for the omission and said:
- One thing that puzzled us was that this discrepancy was not noticed at the time of our last registration renewal [2003] when it could have been corrected then.
79. On 24 October 2005, a complainant contacted the department again in relation to a complaint she originally made on 16 July 2004 (see paragraph 71). The complainant reported that she believed some of the documentation submitted by the proprietor to VCAT had been altered by the proprietor and that her husband's signature on his residential statement had been forged.
80. A copy of the VCAT order obtained by my investigators dated 7 October 2005 required that Parklane pay \$7,868.40 to the resident within seven days. The complainant informed the department of this outcome and provided it with certain documents that had been tabled at the hearing. There is no evidence that the department sought further information about the VCAT hearing.

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81. In response to the allegation that the proprietor had altered certain documents, an authorised officer inspected the facility and seized and reviewed the resident's files but did not record any analysis of these documents. The authorised officer sought advice from a departmental legal officer, who responded that it would not be appropriate for the department to comment on matters that had already been dealt with by VCAT. No reasons were given for this view. A departmental legal officer also stated that allegations of fraud should be handled by Victoria Police. The department took no further action in relation to this matter.

## 2007

82. In February 2007, a care audit undertaken by the department highlighted a number of non-compliances, including non-compliant residential statements, no written authority to handle residents' money and non-compliant administration of medication.

83. The department, on the basis of a self-assessment<sup>16</sup> completed by the proprietor, assessed Mentone Gardens and applied an 'E' risk rating, the highest risk rating requiring the proprietor to implement 'urgent corrective action', and to report when the corrective actions were completed.

84. On 29 May 2007, the proprietor wrote to the department confirming that the items listed in the action plan had been addressed. Despite the above breaches, and on the basis of the proprietor's assertion that corrective action had been taken, the department reclassified Mentone Gardens to an 'A', the lowest risk rating.

85. There is no indication that departmental officers visited Mentone Gardens to confirm that the 'urgent corrective actions' had been taken before altering its risk rating.

86. In July 2007 prior to renewal, the department conducted an inspection and identified that three residential statements were not sighted. These were discussed with the proprietor who undertook to address them as soon as possible.

*This is not a case of naive elderly people being taken advantage of at their most vulnerable. ... in this case, the law is not protecting them, the government is not protecting them, the system is not protecting them, and it appears to have failed them thus far. Many victims have followed exhaustive and sufficient due diligence and could not have avoided the outcome.*

**Grandson of former resident**

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<sup>16</sup> In 2005, the department incorporated a 'self-assessment' component into its renewal of registration decisions. The self-assessment required proprietors to provide information to the department about its compliance with legislative responsibilities. From this information a desktop audit was conducted by authorised officers. If breaches were identified these were documented in an action plan requiring proprietors to address the deficiencies by specified timeframes.

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87. On 15 August 2007, Mentone Gardens' registration was renewed for the period 31 August 2007 to 31 August 2010. In the period leading up to the renewal of registration, the department's records reveal that over a two-year period there were 39 legislative breaches by Mentone Gardens. In particular, the department received information from the Director of Quality at a Victorian hospital about significant quality of care concerns regarding a Mentone Gardens resident.
88. A follow-up inspection conducted by the department in September 2007 identified that residents' next of kin were still to return two unsigned residential statements.

## 2010

89. In August 2010, an inspection carried out by the department identified that a residential statement for one resident had not been signed.
90. Mentone Gardens again applied for renewal of registration, and in the report recommending renewal, the departmental officer outlined:
- there were some concerns primarily relating to an increase in the dependency of residents and the standard of documentation (at the facility)
  - there had been four complaints covering 10 issues, of which three required further action to be taken by the proprietor.
91. As with previous renewals, the prosecutions from 1995 and 2000, and the outstanding legal costs, were not noted.
92. Mentone Gardens was again assessed at 'E' – the highest risk rating. The department issued an action plan outlining urgent corrective action to be taken and on receipt of the proprietor's response, the risk rating was changed to an 'A' – the lowest risk rating. Once again, there was no evidence of departmental officers attending the premises to confirm compliance, or any justification provided to support a change in the risk rating.
93. On 3 September 2010, the department renewed Mentone Gardens' registration for a period from 1 September 2010 to 31 August 2013. The statement submitted by Mentone Gardens to the department in support of its 2010 renewal application contained a declaration by its accountant that it had '... the financial capacity to operate for a period of up to three years'.
94. The department relied on this statement and the certification by Mentone Gardens' accountant that the company had '*current and likely continued financial capacity*', and renewed its registration.
95. Notwithstanding the department's assessment that it had financial capacity to operate at this point, the liquidator's report indicates that Mentone Gardens was operating insolvent as at August 2010.
96. In November 2010, a complaint was received by the department regarding Mentone Gardens' failure to repay \$50,000 in bond money. The complainant stated that:
- Mentone Gardens had not repaid a bond payment to the estate of a former resident within two months as required by the residential statement
  - the proprietor had taken additional fees of \$50,000 from the bond money
  - there were concerns about the accounting practices of Mentone Gardens and it was suggested that the department should investigate.

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97. A departmental inspection some weeks later identified that Mentone Gardens had failed to return the bond money within the required time frame. To make amends, Mentone Gardens paid interest associated with the late payment to the complainant.
  98. There were two breaches of the Health Services Act recorded in relation to residential statements and the proprietor was required to provide a written assurance that he had addressed these matters by 28 March 2011. The proprietor provided a written assurance to the department on 20 March 2011 and the matter appears to have been closed without any further action.

## 2011

99. An inspection carried out by the department in February 2011 following the November 2010 complaint revealed that residential statements were still non-compliant.
100. In June 2011, the department undertook an inspection of Mentone Gardens in response to a further complaint. At that inspection the department found that the proprietor was non-compliant with administration of medication.
101. A further complaint was received by the department on 2 December 2011. The husband of a former resident complained that he had not received a \$23,000 refund for six months rent in advance from the proprietor some two months after his wife left the facility. An inspection of the facility was carried out by the department a week later but the records could not be located and the proprietor was not present. It is unclear whether this matter was resolved by the department as there are no further notations in relation to this matter.

## 2012

102. In advance of the new legislation commencing on 1 July 2012, the department rolled out 'Getting Ready' workshops to SRS proprietors and staff in March, April and May 2012. An attendance roster revealed that the proprietor of Mentone Gardens did not attend. The workshops did not include residents or resident representatives.
103. The department received two further complaints in January and May 2012 about the failure of Mentone Gardens to repay accommodation bonds of \$55,000 and \$50,000. In both instances Mentone Gardens repaid the bonds following contact by the department. Following inspections of both complaints, the department identified non-compliant residential statements.
104. When the SRS Act and Regulations commenced on 1 July 2012, a new certificate of registration was provided to Mentone Gardens.
105. On 7 November 2012, the department notified all SRS proprietors in writing that it would implement a new regulatory tool, the Targeted Compliance Review (TCR), that the first TCR would occur between November 2012 and February 2013, and that the department would monitor compliance with obligations regarding residential and services agreements,<sup>17</sup> residents' money and trust accounts.

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<sup>17</sup> Under section 47 of the SRS Act, residential and services agreements provide a written agreement between the proprietor and the resident containing prescribed information of the nature of the services to be provided. Regulation 39 of the SRS Regulations sets out 'prescribed information' and includes the type of service being conducted, the goods and services offered directly to the residents and all fees and charges applying to those goods and services.

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## 2013-15

106. On 11 and 18 January 2013, two families of deceased residents complained that bond monies of \$100,000 and \$65,000 respectively had not been repaid. Both complaints were closed by the department with a notation that a TCR had been scheduled in the next two weeks. The TCR did not take place until 26 February 2013.
107. Prior to the first TCR at Mentone Gardens, authorised officers attended the facility on 25 January 2013 in response to the above complaints. The officers discussed the complaints with the proprietor's wife and the manager of the facility. However, when asked to produce documentation to substantiate compliance, the proprietor's wife advised that the documentation would not be available until the TCR inspection.
108. The TCR was scheduled on 6 February 2013, but was postponed at the request of Mentone Gardens. The TCR was eventually conducted on 26 February 2013 and identified numerous breaches, including the failure to place certain fees in trust accounts and missing and inadequate residential agreements. Following the TCR, a compliance instruction was issued to Mentone Gardens requiring the breaches to be addressed by 26 March 2013.
109. On 22 April 2013, the landlord met with departmental officers and advised them that:
- Mentone Gardens was in significant rental arrears
  - the proprietor's wife had resigned her directorship in 2011 and that the proprietor was living in an aged care facility
  - the proprietor's wife had been making payments to her family members.
110. In an internal email dated 22 April 2013 reporting the meeting, a departmental legal officer stated that:
- I presume he is alleging she is doing that to avoid creditors, which would be an offence under the Corporations Act.
111. On 22 April 2013, a family member of a deceased resident complained they had not been refunded \$200,000 in bond money. The complaint was closed by the department with advice to the complainant that they should seek legal advice. A phone call was made by the department to the proprietor's wife the following day requesting an appointment to follow up on non-compliance identified in the TCR and to investigate the recent complaint.
112. This follow-up inspection established that the proprietor was still not compliant and a second compliance instruction was issued to Parklane on 26 April 2013, again requesting compliance and setting a new deadline of 10 May 2013.
113. After the second compliance instruction was issued, but before the deadline of 10 May, a senior authorised officer discussed alternative courses of action with central office staff. This centred on whether the department could take high-level enforcement options such as revocation of registration, or whether it had a statutory obligation under section 36 of the SRS Act to first request a registration statement<sup>18</sup> from Parklane, and allow 28 days for the proprietor to provide one. The department's Legal Services Branch was not consulted. Instead, central office staff and the senior authorised officer requested further information from Mentone Gardens about its financial state in a 'show cause' letter.

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<sup>18</sup> Under section 36 of the SRS Act, the Secretary may request a proprietor provide a 'registration statement' to consider whether the registration of an SRS should remain in force. The statement contains information about the individuals running the business, and statements about the health, financial situation and criminal history of the proprietor or its directors.

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114. A memorandum to the Regional Director dated 3 May 2013 and attaching the 'show cause' letter, stated that further to the non-compliance issues, the department had obtained copies of trust account statements which showed 'substantial discrepancies' with the amounts recorded in residential and services agreements. The memorandum also stated that:
- Parklane appeared to be in rental arrears of \$250,000 – \$300,000
  - the proprietor's wife had resigned her directorship of the company in 2011 without notifying the department<sup>19</sup>
  - the proprietor did not appear to be present at the SRS
  - the senior authorised officer had concerns about the financial capacity of the proprietor to operate the SRS
  - Parklane might not be operating Mentone Gardens in accordance with the SRS Act and may no longer satisfy the registration criteria.
115. The memorandum noted that if Parklane could not address these issues in a timely manner, the Minister might have grounds for revoking registration and appointing an administrator.
116. The Regional Director approved the memorandum and sent the 'show cause' letter to the proprietor on 6 May 2013. The letter requested that the proprietor contact the authorised officer within seven days to set up a meeting and provide the following information:
- financial statements providing an accurate assessment of the current financial position of Parklane
  - evidence that Parklane held sufficient trust account assets to meet its liabilities to past and present residents
  - evidence of suitable arrangements for the ongoing management of Mentone Gardens.
117. On 10 May 2013, the department received a fax from Parklane's lawyer requesting further time to comply. On 23 May 2013, a meeting occurred between the senior authorised officer, the proprietor's wife, Parklane's lawyer, and a representative from their business advisor. The department was told that they were trying to determine the company's financial position and the lawyer undertook to meet with the authorised officer again for another follow-up visit to Mentone Gardens.
118. On 24 May 2013 the department was advised that a bond of \$30,000 had been paid by a resident but not refunded. The department advised the resident that the legislation required return of the bond within 14 days and that the complainant could seek an order through VCAT.
119. The department conducted a further follow-up visit on 7 June 2013 and found that the breaches remained unresolved.
120. The company was placed into voluntary administration on 12 June 2013.
121. Parklane was placed into liquidation in September 2013, and its SRS business was sold in the same month.
122. ASIC advised my office in January 2015 that it is investigating the matter.
123. A chronology is provided at Appendix 2 to this report.

**T**hese are some of the most vulnerable members of our community and need our help. Many are frail and struggle to find a strong voice. They feel betrayed and hurt, a feeling which is exacerbated by the apparent indifference and evasiveness of the government.

**Son of former resident**

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<sup>19</sup> Under section 30 of the SRS Act, it is an offence if an SRS proprietor fails to notify the Secretary that a person has ceased to be a director of the proprietor company.

# Legislative and policy framework

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124. This section of the report outlines the department's statutory responsibilities, established policies and procedures.

## Registration

125. A person who intends to operate an SRS must apply to the department for registration. It is an offence to operate an SRS without being registered with the department<sup>20</sup>.

126. In registering an SRS, the Health Services Act outlined that the department must consider:

- whether the proprietor, or the director/s of a proprietor company:
  - is a fit and proper person to provide that service
  - has, and is likely to continue to have, the financial capacity to provide that service
- the suitability of the proposed premises, including whether:
  - the premises are safe and appropriate for an SRS
  - arrangements have been or will be made for monitoring and improving health services
  - whether the applicant has proposed appropriate arrangements for management and staff, and
- whether the proposed management arrangements are suitable.

127. Under the Health Services Act, registration was granted for a period of two years, (although three year terms were common), after which the proprietor could submit an application to renew<sup>21</sup>.

128. The criteria for registration under the SRS Act, has predominately remained the same. The primary difference is that there is no longer a requirement for SRS proprietors to undergo a renewal of registration. Instead, registration remains in force until it is revoked or cancelled by the department<sup>22</sup>. The Secretary may also impose conditions on registration under section 23.

## Monitoring powers

129. Once an SRS is registered, the department monitors and enforces proprietors' compliance with their legal obligations. From 1 February 1991, the department's monitoring and enforcement role over SRS was governed by the Health Services Act and its Regulations<sup>23</sup>. After 1 July 2012, it was governed by the SRS Act and the SRS Regulations.

130. Pursuant to the SRS Act, monitoring powers allow the department to enter and inspect SRS facilities and records, and to question proprietors, staff and residents. If non-compliance or offences are identified, enforcement powers provide for penalties or the threat of penalty, to compel compliance.

131. Enforcement powers can penalise proprietors or remove their right to operate an SRS entirely. These penalties can include infringement notices, criminal prosecutions, censure in parliament, and suspending admissions. In very serious cases, extra conditions can be placed on the registration of an SRS, or registration can be revoked. The most serious enforcement powers are exercised by the Secretary, the Minister, or their delegates.

132. The monitoring and enforcement powers available to the department under the Health Services Act and the SRS Act are similar, although there are some differences. Table 1 compares the monitoring and enforcement powers available under both Acts.

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20 Sec 111, *Health Services Act 1988 (Vic)*, Ss 136, 137, *Supported Residential Services Act 2010 (Vic)*.

21 The Secretary had the discretion to grant a longer or shorter period. In practice, registration was generally reviewed every three years. For example, a shorter registration period may be granted following enforcement activity.

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22 Sec 19, *Supported Residential Services Act 2010 (Vic)*.

23 The relevant section of the Act relating to SRS came into effect on 1 February 1991. Prior to this SRS were monitored and enforced under the *Health Act 1958*.

Table 1: Monitoring and enforcement powers under the Health Services Act and the SRS Act

	Health Services Act	SRS Act
<b>Monitoring powers available to authorised officers</b>		
Apply for a warrant to search non-SRS premises	Only for premises suspected to be an unregistered SRS	ss.136 and 137 - If premises are suspected to be an unregistered SRS or if reasonable belief that the premises contains evidence of an offence
Enter SRS premises at any time	s.147	s.134
Examine or seize any relevant thing	s.147	s.143 – only for things at that facility
Require SRS proprietor or member of staff to produce documents	s.147	s.144 – only for documents at that facility
Require SRS proprietor or member of staff to answer questions	s.147	s.144
Ask residents questions	s.147	s.144
Serve infringement notice for prescribed offence	s.155	s.155
Initiate legal proceedings for an offence against the Act	s.156	s.197
Do anything reasonably necessary to perform authorised officer role	Not available	s.143
<b>Enforcement powers available to Secretary or Secretary's delegate</b>		
Accept a formal undertaking by a proprietor to take action within agreed timeframes to address non-compliance	Not available	s.156
Direct proprietor to comply	s.105 – direction to comply with a prescribed standard under the regulations	s.160 – a 'compliance notice' requiring the proprietor to remedy a specified matter
Request a 'registration statement' to determine whether the registration of an SRS should remain in force	Not available	s.36
Add new conditions to the registration of an SRS	s.90 and s.95	s.23
Refuse to renew registration of an SRS	s.90	No renewal process
<b>Enforcement powers available to the Minister or Minister's delegate</b>		
'Name and shame' an SRS proprietor via Parliamentary censure under certain circumstances	s.99	s.166
Suspend admissions to an SRS under certain circumstances	s.101	s.167
Revoke the registration of an SRS under certain circumstances	s.102	s.168
Appoint an administrator to an SRS under certain circumstances	s.103	s.170

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### **Authorised officers**

133. Authorised officers are appointed by the Secretary of the department<sup>24</sup> to monitor the compliance of SRS with the minimum service standards and ensure quality care and accommodation outcomes are provided to residents<sup>25</sup>. Currently 14 authorised officers operate across seven regional offices.
134. Between 2009 and 2011, the department contracted a training organisation to deliver the Certificate IV Government (Investigations) training to all existing and new authorised officers. The department also provides authorised officers with regular training and continuing professional development. Since 2010, the department has provided on average four training sessions per year to authorised officers on various aspects of the legislative framework, practical sessions on getting ready for the new SRS Act, and how to conduct TCRs.
135. In response to my draft report the department stated:
- [Certificate IV training] is not compulsory, but is strongly encouraged ... [W]here relevant, Certificate IV training can be incorporated as a desirable attribute in position descriptions for recruitment purposes.

### **Monitoring and enforcement procedures – Health Services Act**

136. Under the Health Services Act, authorised officers monitored SRS through:
- care audits and facility audits<sup>26</sup> to assess compliance
  - investigations to respond to complaints received, and
  - follow-up inspections to determine whether proprietors had met the deadlines to comply with action plans (plans were issued when breaches were identified in audits or inspections).
137. If an SRS proprietor failed to address the breaches outlined in an action plan, the legislation provided the following enforcement options:
- refuse to renew, or revoke, registration or impose conditions on a proprietor's registration
  - limited period of renewal of registration instead of a term of two to three years
  - issue infringement notices
  - 'naming and shaming' a proprietor through parliamentary censure<sup>27</sup>
  - suspension of resident admissions to an SRS
  - prosecution of offences
  - appointment of an administrator.

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24 Previously under section 145 of Health Services Act and currently under section 130 of the SRS Act.

25 Campbell Research & Consulting, *Supported Residential Services Action Plan Review Report*, prepared for Department of Health, August 2011.

26 These audits were not designed to examine the overall financial state of SRS. However, audits of care included monitoring of some records concerning residents' money.

27 The department's internal memoranda and documents indicate that this sanction has never been used for an SRS proprietor.

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138. Under the Health Services Act, the decision of whether or not to prosecute an SRS rested with the department's Director, Legal Services. Since 1993, the department has successfully prosecuted 35 SRS proprietors. In a total of 38 prosecutions, Mentone Gardens was one of three SRS that were prosecuted twice.

### **Monitoring and enforcement procedures – SRS Act**

139. To monitor whether an SRS is meeting its legal obligations, authorised officers:

- handle complaints about SRS facilities from staff, residents, family members and the general public in accordance with the *Supported Residential Services Complaints Management System Guidelines & Procedures* dated August 2008<sup>28</sup>. The primary function of the Complaint Handling System is to:

Provide valuable input into the ... regulatory role ... The input provided by the Complaints Handling System, ... is central, both to improvement in the quality of care provided at facilities and to improvement in the way we undertake our regulatory role<sup>29</sup>.

- undertake TCRs. This regulatory practice is risk based and differs from the previous model of conducting care and facility audits, on a 'one size fits all approach'. TCR monitoring focuses on specific areas of the Act or Regulations and the risk rating of each SRS determines the number and frequency of TCRs undertaken. Compliance instructions are issued if breaches are identified. The first TCR was undertaken by the department in 2012-13 and focussed on:

- resident's money (including trust accounts)
- residential and services agreements

140. A key principle outlined in the department's complaint handling guidelines is the identification of systemic issues, that is:

The department will classify and analyse complaints in order to identify and rectify system issues, emerging trends and any changes needed to departmental policies and procedures.

*It seems truly bizarre that a government should implement a system with greater safeguards for residential tenants than for the generally vulnerable and sometimes disabled residents of SRS.*

**Son-in-law of former resident**

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28 This policy has not been updated to reflect the new legislation.

29 Department of Human Services (2008) *Supported Residential Services Complaints Management System Guidelines & Procedures*.

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## Renewal of registration

141. To renew registration under the Health Services Act the department was required to consider<sup>30</sup> whether the quality of the service provided at an SRS, since it was last registered, was satisfactory, and whether the proprietor:

- was a fit and proper person to continue to be the proprietor of the establishment
- had, and was likely to continue to have, the financial capacity to carry on the establishment
- carried out the services of the establishment in conformity with the Act, or in accordance with any conditions of registration
- had been convicted or found guilty of any offence under the Act or its Regulations<sup>31</sup>.

### ***Assessing applications for renewal of registration***

142. The department's process to renew registration under the Health Services Act was documented in its *Applications for renewal of registration of supported residential services (SRS) – process & Regional Director Role/Consideration*.

143. Authorised officers would consider the information contained in the application, and past performance to determine whether an SRS met the criteria for renewal of registration. A checklist<sup>32</sup> recorded the assessment of the proprietor against the renewal criteria. The Regional Director was ultimately responsible for decisions to renew a registration.

144. As part of their application, SRS proprietors were required to:

- provide a statement of compliance outlining their compliance with any conditions of registration
- complete a 'self-assessment' of their understanding of their legislative responsibilities
- sign a statutory declaration regarding any previous convictions, bankruptcies, or failed businesses within the last 10 years
- submit a 'financial capacity statement', that included a signed declaration by an accountant.

145. A Regional Director considering an application for renewal of registration could:

- renew registration
- grant a limited registration period
- apply conditions to registration, or
- revoke registration.

146. At interview, departmental officers confirmed that revocation of registration was rarely exercised given the implications of such a decision. In particular, the department would have to find alternative accommodation for aged and/or disabled residents, which could be highly distressing for residents.

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<sup>30</sup> Sec 89, *Health Services Act 1988* (Vic).

<sup>31</sup> Inserted in 2006.

<sup>32</sup> *Renewal of Registration: Assessment of Application*.

# Departmental failings

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## Consideration of material issues

147. My investigation involved a review of the department's files relating to the monitoring of Mentone Gardens over a period of eight years, from 1995 to 2013 when it went into liquidation. The department's records show that authorised officers visited Mentone Gardens 89 times between 2000 and 1 July 2012 to conduct facility and care audits and investigate complaints. At interview, a number of departmental officers including authorised officers stated that their monitoring of Mentone Gardens in this period did not raise any significant issues of a financial or quality of care nature.
148. The Manager, SRS Accommodation and Support said in relation to the monitoring of Mentone Gardens prior to the new legislation:
- ... our focus has generally been on the support needs and the care needs ... we were not getting any noise around care needs and things like that. It's quite - you know like we've all had the opportunity now to go back and do that forensic look at the files and um - and also when the administrator came in and also when all the affected families started ringing, couldn't fault the care. You know, there's no way. Couldn't fault [the proprietor], couldn't fault the care, ... Absolutely fantastic. And this is to a T.
149. A Regional Director said:
- ... in actual fact, the care of the residents was really good, and the residents really liked it. So, if you go hard and you end up shutting the place down, you've got residents out on the street ... They're not in any physical danger, they're getting good care.
150. Despite these views, the department's monitoring of Mentone Gardens after the 1995 and 2000 prosecutions consistently identified quality of care breaches and issues involving residents' monies, including failures to repay bonds. The department's oversight and instructions to Mentone Gardens to rectify the breaches were not effective in either educating the proprietor about their responsibilities or preventing the reoccurrence of breaches.
151. Beyond obtaining police checks and statutory declarations, it was important that the department considered any concerns raised, or issues identified, that were central to the 'fit and proper' criteria. As outlined in the department's own assessment guidelines, this included any substantial concerns raised internally or in the course of its monitoring activities.
152. My investigation identified a number of issues relating to Mentone Gardens that brought into question the appropriateness of the department's decision to repeatedly renew registration. Matters of concern regarding the proprietor's financial capacity to conduct the business are set out at paragraphs 184 to 232. In addition to these matters, there were also concerns raised about the standard of care provided by the facility, and these are set out below.
- Failure to notify doctor or next of kin of resident falls (2004 and 2005)***
153. On at least two occasions, in September 2004 and November 2005 whilst recording several falls by residents, Mentone Gardens' staff did not notify the resident's doctor or next of kin. The department was aware of these breaches, however no action was taken beyond verbal undertakings by the proprietor that this would not happen again. It should be noted that the 2000 prosecution involved similar issues of inadequate incident records and failures to notify doctors and family of such events.

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### ***Sub-standard care to a resident following a fall (2006)***

154. In May 2006, the Director of Quality of a public hospital reported to the department an incident of poor care provided by Mentone Gardens to a deceased former resident. The Director reported that:
- the resident was admitted to hospital following a fall and sustained a head laceration
  - the wound was dressed and the resident returned to Mentone Gardens
  - two days later the resident was re-admitted to hospital with dehydration, in a 'decreased conscious state', and with pressure sores
  - the resident had matted blood in her head from the laceration and still had ECG dots on her chest from a previous hospital admission at another facility days before, indicating that her hair had not been washed and she had not been bathed.
155. The Director requested that the department conduct a random inspection of Mentone Gardens. The Director was unable to release the resident's name, and the department informed the Director that it would be 'very difficult to investigate without the resident's name'<sup>33</sup>, however, the matter would be referred to an authorised officer who monitored the facility. The department took no further action on the matter.

### ***Substandard knowledge and referral following the death of a resident (2009)***

156. A complaint received in May 2009 raised concerns that Mentone Gardens' staff did not have the skills to identify higher care needs and refer residents to specialist services when necessary. In response to this complaint, the department investigated Mentone Gardens' record-keeping in relation to one resident who developed pressure sores before her death at the facility in 2009. The investigation identified inadequate documentation regarding care, medication and changes to her health.
157. The investigation did not lead to any further action beyond a care audit of the facility.

### ***Decisions to renew registration***

158. On a number of occasions, the 1995 and 2000 prosecutions were not taken into account when the department was considering whether to renew Mentone Gardens' registration<sup>34</sup>.
159. Evidence-based decision making is central to a regulatory role. As such, the failure to consider matters that are central to the question of whether the proprietor was 'fit and proper' is a serious oversight by the department.

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<sup>33</sup> The proprietor had provided the department with the resident's month and year of admission.

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<sup>34</sup> As detailed in the History section of this report.

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### ***General observations across the history of inspections***

160. The department's files indicate consistent breaches by Mentone Gardens and failures to meet its legislative responsibilities. Common breaches related to the proprietor's responsibilities to:

- create residential statements that contained sufficient information about the proprietor's responsibilities. On 12 occasions, residential statements were either absent, or identified by the department as inadequate
- keep evidence of written permission from residents for Mentone Gardens to handle their personal money. This lack of evidence was identified on four occasions
- administer medication. The department's file indicated five separate occasions when Mentone Gardens breached its administration of medication responsibilities.

161. In addition, a departmental investigation into Mentone Gardens in 2009, noted that poor record keeping regarding residential care and medication was a consistent practice.

162. The breaches by, and complaints, about Mentone Gardens should have prompted closer consideration by the department or enforcement action, particularly after the repetition of similar breaches over time, including some that echoed the offences in the 1995 and 2000 prosecutions.

163. While complaint and inspection histories were attached to reports recommending renewal of registration, those reports placed little emphasis on the extent of Mentone Gardens' non-compliance. In this regard, none of the reports documented a clear rationale as to how the breaches may or may not have impacted on the renewal of registration criteria. Rather, in each renewal, authorised officers ticked off the checklist that Mentone Gardens had satisfactorily complied with the legislation.

### **Value of self-assessment component**

164. It is unclear what value the introduction of the self-assessment, first applied to Mentone Gardens in 2007, brought to the renewal of registration process. In particular, aspects of the proprietor's responses contradicted the department's internal knowledge of non-compliance, and were on occasion accepted by the department. Mentone Gardens still received the highest initial risk rating. Risk ratings were changed without clear rationales and despite departmental knowledge that Mentone Gardens repeatedly failed to meet some core legislative responsibilities.

165. There is also no evidence that the department undertook to inspect the premises of Mentone Gardens upon receipt of the proprietor's responses, which attested that the items specified in the action plans issued by the authorised officer had been finalised.

**R***esidents have been denied the protection and security they rightfully should receive from the society and community they have nurtured and fought for.*

**Client advocate of former resident**

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166. As many of the proprietor's responses contradicted the department's knowledge of Mentone Gardens' historical performance, an inspection to confirm compliance with the specified items in action plans would have provided the department with a clearer picture of compliance.
167. Any decision to grant renewal of registration should have been justified against the relevant criteria. The absence of any evidence documenting the rationale for renewing Mentone Gardens' registration points to an inadequate assessment process.

### Capacity to issue infringement notices

168. While the department had the legislative power to take action to enforce compliance with the legislation, the department did not implement regulations which would have enabled it to take particular enforcement steps, for example, to issue infringement notices under section 155 of the Health Services Act.
169. During the entire period of operation of that Act, authorised officers did not actually issue infringement notices. The reasons for this were outlined by a departmental legal officer in a 2009 email:
- ... Authorised Officers may serve an infringement notice on a person to whom [sic] the officer believes has committed a 'prescribed offence' ... However, no regulations seem to have been passed which set out what the prescribed offences are. Accordingly, although a framework exists within the Act for service of infringement notices, authorised officers are unable to currently use this power.

170. At interview, the Director, Ageing and Aged Care stated that:

Infringements is a new form of compliance action under the new [SRS Act] legislation and it was always anticipated that that would not be in place from the first of July [2012]. In any case, it's only intended to deal with very minor infringements of the Act, and it's something that we actually have to do in conjunction with the Sherriff's Office and, you know, there's a process to be gone through with that and that's underway.

171. Despite the availability of this power, my investigation established that during the entire period of operation of the Health Services Act, it could not be used in practice by authorised officers. During this time, the department did not develop prescribed offences in the Regulations that could attract an infringement notice.
172. Emails obtained during my investigation show that the central office of the SRS unit in the department did make some attempts from January 2006 to implement this power; however, these attempts did not lead to any kind of operational capability. In 2007, a departmental legal officer wrote an email to regional office staff stating that:

When I explored this last year, I was led to believe that Departmental policy did not favour the use of infringement notices because there is currently no training available for their use. (The concern being that if issued notices are challenged in court, it would tie up resources justifying the notices and defending them). As you would be aware, I would support the judicious use of infringement notices as part of the armoury of an authorised officer.

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173. Emails examined during my investigation shows that the departmental legal officer continued to explore how to implement this system; but by 2008, her response to regional office staff asking for advice about infringement notices was that the option could not be used:

We are not able to use the infringements system – alas and alack. If there is non-compliance you need to gather the relevant evidence and mount a prosecution – or look at other sanctions such as conditions on registration etc.

174. The inoperability of the infringement notice power was confirmed by advice from a more senior departmental legal officer, provided to other officers in the department's central and regional offices in 2009:

Section 155 of the Health Services Act states that Authorised Officers may serve an infringement notice on a person whom the officer believes has committed a 'prescribed offence' against the regulations. However, no regulations seem to have been passed which set out what the prescribed offences are. Accordingly, although a framework exists within the Act for service of infringement notices, Authorised officers are unable to currently use this power.

175. Both the Health Services Act and the SRS Act provide authority for authorised officers to issue infringement notices to SRS proprietors for prescribed offences. Despite efforts to implement a capability to issue infringement notices being pursued from at least 2006 (but not finalised), that power was never implemented under the Health Services Act.

## **Systemic oversight and ability to identify complaint trends**

176. The department's approach to complaint handling was focussed on responding and resolving issues at hand. Responsibility for identifying, analysing and responding to systemic issues, patterns or trends relating to SRS across a region was unclear. We found no evidence that complaint data was analysed to ascertain patterns and trends across regions, which might not only indicate problems with care of residents, but also the proprietor's financial capacity. Nor did the systems allow them to take into account the history of a particular SRS.

177. Therefore, patterns of non-compliance by Mentone Gardens were not identified over a period of more than a decade. Specifically complaints about care and residents' monies were treated on a case-by-case basis and a continuing pattern of non-compliance was not identified. Nor did the complaints prompt any revision of the level of risk posed by Mentone Gardens.

178. The Manager, SRS Accommodation and Support told my investigation officers that while she had oversight of the SRS sector systemic issues state-wide, identifying trends, patterns and systemic issues affecting individual regions are each particular region's responsibility.

179. A senior officer at a regional office told my investigators, at interview, that he was unaware of any formal process for this activity. He said:

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Certainly we do that in the regional offices. We look at the things that we identify ... to better target which facilities ... we use that for our risk classification system to prioritise which facilities get which inspections. We also use it - I tell every new authorised officer, before you go to an SRS to do a significant inspection like a TCR, just have a look at their file over the last 12 months. If there's not much on the file, look at the records on the database for the last couple of years and have a look and see what's been going on there. It'll give you an idea of whether this place is generally compliant or whether if you find something wrong they respond appropriately and quickly or whether they drag their feet. So we use it for informing ourselves before we go on an inspection, for prioritising inspections but also for setting the timelines to respond to things.

180. In an investigation in 2008, this office identified the failure of the former Department of Human Services to exercise regulatory powers on reported legislative breaches by the owner of an SRS<sup>35</sup>. That investigation identified that the department had consistently received serious allegations about the actions of the owner of an SRS since 2001. While the department had added conditions to the SRS registration and monitored the owner's compliance, it had the opportunity to investigate and impose appropriate sanctions sooner, but failed to do so.

181. The 2008 investigation concluded that:

- the repeated non-compliance by the SRS had each been dealt with by the department in isolation, rather than in a holistic sense
- the department should make better use of information it collated from audits to better serve SRS residents
- a general reluctance of the department to issue sanctions or exercise any of its powers for recurring breaches of the Health Services Act.

182. As a result of the investigation, the Secretary committed to:

- reviewing methods for conducting investigations of complaints regarding SRS and amending departmental policies and procedures
- developing processes for tracking complaints about SRS proprietors
- training authorised officers to enhance complaint handling and management practices.

183. The department was put on notice regarding the absence of an overarching system to enable it to identify systemic issues in relation to the overall sector and individual SRS. Given that the investigation was finalised seven years ago, it is of particular concern that a capability to identify emerging trends in complaints remains absent.

*I can scarcely describe the tumult which has been caused to my 101 year old [mother in law] by this matter and by the subsequent lack of acknowledgement or acceptance of departmental failings.*

**Son-in-law of former resident**

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<sup>35</sup> Victorian Ombudsman, *Annual Report 2009*, pages 25-26.

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### ***Failure to address financial capacity***

184. The general attitude of departmental staff at interview was that the department could not investigate complaints about residents' money before the introduction of the SRS Act, as the Health Services Act did not make provision for it. A regional officer said:

... I'm aware that there'd been a number of complaints from the families of former residents saying they were having trouble getting their fees back, you know, the large ingoings. And under the previous legislation [Health Services Act] that was really none of [our] business because ... there was nothing about that in the legislation. ... [W]hen we got those complaints, we would recommend to the person who was talking to us...that they seek some legal advice ... because it's essentially a contract matter ... We also got complaints from families who were trying to work out - not so much ... the quantum of money they were given back but what the money was used for or whether the facility had been providing them access to records ... Checking the ... financial aspects of the residents was a secondary aspect ...

185. Also, there was a perception that such matters involved a contractual agreement between the resident and the proprietor and were therefore outside the department's jurisdiction to monitor or enforce. At interview the Director, Ageing and Aged Care told my officers:

Those residential agreements, under the prior Act, were private contracts between the resident and the proprietor. The legislation had no control over the fees and charges paid, and the department had no mandate or authority to investigate those matters.

186. While the department considered it had no jurisdiction to monitor and enforce compliance with residential statements, the Health Services Act did in fact provide, under section 106(4), that the department was able to offer any assistance to resolve a dispute arising from a residential statement.

187. In this instance, complaints regarding a failure to return monies were first raised in 2000 and continued to be raised up until Mentone Gardens was placed into administration.

188. There were five such complaints made after the passing, and before the commencement of the SRS Act, which raised concerns about Mentone Gardens' failure to return monies, ranging from \$20,000 to \$50,000.

189. Despite the fact that the Health Services Act did not contain specific requirements around trust monies, these complaints were generally about the proprietor's inability to repay what were nominal amounts in a timely manner. These matters should have raised concerns about the proprietor's financial capacity, a criterion for SRS registration.

190. In addition, the complaints were received at a time when the new legislation had received royal assent, in 2010, but before the commencement of the new legislation which was to occur in 2012. The new SRS Act required residents' funds to be held in a trust account. Given that the new framework was intended to increase protection of residents' finances, the department should have been more proactive in identifying those SRS receiving trust monies, and worked with them to ensure compliance and readiness for the new framework.

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191. At interview, the Director, Ageing and Aged Care was asked whether she considered that an inability to return monies could have been a sign, particularly from 2010 onwards, of Mentone Gardens' financial difficulties. The Director, Ageing and Aged Care stated:

That's a very long bow to say that because there is a dispute about a payment, that there is a concern about their financial capacity ... Some of them were simply about the time, and they were not made as a formal complaint. I think that is overstating the issue ... in actual fact, it may not have been the best business practice, but we do appear to know from the administrator's report that the business model that [the proprietors] were using was to repay bonds with incoming bonds, which may [have explained] why there was a delay in the repayment ...

That is not any indicator, necessarily, of their financial capacity. We also know that the administrator said that it was very clear that the proprietor had a very expensive care model... had staff that were well above their fee structure. Again, there is nothing in that to indicate that there was a financial capacity issue... The department would not know what their cash flow issues are, just like any other business.

192. However, a Certified Practising Accountant, consulted as part of my investigation, confirmed that the inability to pay outstanding liabilities, including the return of funds to residents, can signal financial instability.

## Consideration of financial capacity

193. To assess SRS financial capacity, the department needed a robust and stringent process in place and to assure itself that proprietors, albeit private providers, were financially able to provide an SRS service. In my view, the department's renewal of registration process did not appropriately reflect this responsibility.

194. When assessing the criterion relating to current and likely continued financial capacity, the department required SRS proprietors to submit a financial capacity statement. A template developed by the department and completed by the proprietor of Mentone Gardens for 2010 is shown following.

Figure 1: Financial capacity statement completed by the proprietor of Mentone Gardens, 2010.

SCHEDULE A

**Supported Residential Service - Financial Capacity Statement**

<b>Supported Residential Service name:</b>	Mentone gardens
<b>Proprietor name:</b>	PARK VINE ASSETS PTY LTD

**1. Financial capacity**

Complete the following:

	Next year forecast budget \$	Last year actual ...2009 \$	Previous year actual ....2008 \$	Previous year actual ....2007 \$
Supported Residential Service Business - Operating Profit/Loss	210,000	259,676	237,498	232,979
Supported Residential Service Business - Net Assets	1,100,000	1,237,492	1,149,676	1,265,474
Supported Residential Service Business - Net Cash	150,000	172,364	144,908	140,307

Year end is:  30 June  OR 31 December  OR Other.....

Notes:

- Year - Indicate the year applicable and quote the financial results ended in the year shown.
- Any operating profit or loss figure must be stated prior to any discretionary distributions to the proprietor, for example, dividends, but not wages.
- Net Cash - Including the balance of all cash, deposits, overdrafts or short-term loans that are used in the operation of the Supported Residential Service.

**2. Proprietor declaration**

I certify that:

- The figures contained in this declaration accurately show my financial position; and
- I am not aware of any financial or legal reasons that would, for financial capacity reasons, prevent me from discharging my responsibilities as a Supported Residential Service proprietor.

Name: [Redacted] Signature: [Signature] Date: 24.6.10

**3. Accountant declaration**

I certify that I have considered all the financial statements and records pertaining to the above-mentioned proprietor's financial affairs, and have formed an opinion that the proprietor has, and is likely to continue to have, the financial capacity to operate [Redacted] (name of facility) for a period of up to three years.

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195. The checklist used by authorised officers to assess the information provided by proprietors outlined that if the figures in the statement:

- were 'positive' and an accountant had certified the statement, the criterion of financial capacity was satisfied (and accepted by the department)
- 'showed a zero or negative figure', or represented 'a steady significant decline in profitability of net assets', a further assessment of financial capacity was to be conducted by the department's senior registration officer.

### ***The department's attitude towards oversight of financial capacity***

196. Departmental staff interviewed were reluctant to accept a role in considering proprietors' financial capacity, and were clear on the distinction that proprietors, regulated by the department, were private organisations.

197. At interview on 20 January 2015, the department's Director, Ageing and Aged Care, confirmed that the department relied solely on the financial capacity statement to assess Mentone Gardens' financial capacity. When asked whether this was sufficient she said:

Well, it is a process that is used regularly in other organisations, including those responsible for the Corporations Act, so yes ... We do not have the authority or mandate under either bits of legislation to audit financial accounts, or to investigate financial accounts ... [M]aybe we could [have] improve[d] the forms, but ... whether or not we rel[ied] on any more detail, financial information, no we [did] not, because we [were] not responsible and d[id] not have the authority to manage, or oversight the financial situations of a private company.

198. While the Director suggests that the department was limited in its assessment of SRS proprietors' financial capacity given they are 'private businesses', my investigators were told by a Regional Director that:

- the department could have considered additional information, such as proprietors' financial accounts. However, this information was not considered because the 'internal view' was, it was not the department's role to audit the financial accounts of a private business
- the department would have needed to change its processes to allow for this, as its process did not allow for it to 'demand audited accounts, or [a] set of full financial records'.

199. My investigation found that the department previously adopted a broader approach to the use of its powers, under the Health Services Act, to investigate financial concerns relating to SRS proprietors.

200. In 1995, the department conducted an investigation prompted by a complaint in relation to another SRS about fees that were overcharged by several thousand dollars to an 88-year-old SRS resident, and allegations that a proprietor was exploiting the personal finances of that resident. The investigating authorised officer used the department's monitoring powers<sup>36</sup> to obtain and scrutinise relevant financial and bank accounts, in order to trace the movement of the resident's money.

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<sup>36</sup> Sec 147, Health Services Act 1988 (Vic).

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201. The department initially considered altering the SRS registration to require that it engage an independent auditor to review its financial accounts periodically, and report to the department on those reviews.

202. The department did not proceed with this decision, and instead, decided to reconsider the findings of the investigation during the renewal of registration process, to determine whether the proprietor was still 'fit and proper' to operate an SRS. The proprietor initiated Supreme Court action<sup>37</sup> objecting to the department's action. The department successfully defended the right to take its investigation of the financial irregularities into account in determining the fit and proper criteria.

203. In response to my draft report, the department stated:

In relation to the conclusions reached in these paragraphs, the department notes that each case involves particular facts and circumstances. Where the department's consideration of the 'fit and proper' person criterion for registration turns on an assessment of financial records will depend on the relevant facts and circumstances, and the information that is available to the department at the relevant times in relation to a particular proprietor.

204. Consequently, the department varied the conditions of the SRS registration to require that the proprietor resign from the SRS and cease contact with residents of the SRS.

205. The powers used in that case remained available until 1 July 2012, when the SRS Act came into effect<sup>38</sup>. Similar powers remain available under the SRS Act. The department's investigation demonstrates that:

- it was able to assess the criteria of registration, at any time, in response to complaints or concerns
- it was able to require proprietors to submit audited accounts
- the renewal of registration criterion that a proprietor was 'fit and proper' to operate an SRS, could form grounds for investigating concerns about financial irregularities.

206. The department's lack of response to concerns raised about Mentone Gardens was therefore inadequate and demonstrated an ignorance of the powers available to it.

### ***Awareness of viability concerns and potential exploitation***

207. My investigation identified that at least as far back as 2008, the department was aware of systemic problems in the SRS sector concerning residents' money, given certain financial practices of some proprietors.

208. A discussion paper prepared by the department in 2008 acknowledged the importance of financial viability<sup>39</sup>. That paper noted that:

Increases in the number of administrator appointments have highlighted the industry's continued challenges in managing financial viability, which seem to be exacerbated by rising rental and staffing costs.

209. The paper also identified certain financial practices of SRS that pose risks to residents accommodated in such facilities. These risks include the loss of upfront payments made by residents or inappropriate use of residents' money, and the potential for proprietors to exploit the finances of residents.

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<sup>37</sup> Crowntron Pty Ltd (CAN 052 824 361) v Department of Human Services Secretary [1997] VicSC11 (11 February 1997) unreported.

<sup>38</sup> A 2004 amendment to the Health Services Act reinforced the powers of authorised officers to include an explicit provision requiring proprietors or staff to answer questions to the best of their knowledge and to take reasonable steps to produce requested documents.

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<sup>39</sup> *Review of the Regulation of Supported Residential Services in Victoria; Health Services Act 1988 and Health Services (Supported Residential Services) Regulations 2001*, Discussion Paper, May 2008.

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210. My investigation also identified internal email correspondence that confirmed that departmental staff were aware for a number of years that Mentone Gardens was charging residents large fees upon reception.

211. In the course of the investigation, departmental officers emphatically told my officers that the focus and the intent of the legislation was on the 'care of residents'.

212. This view is correct; the primary purpose of the department's statutory regulation is to protect the safety and wellbeing of SRS residents. However, the department has failed to appreciate the impact financial exploitation has upon residents, and that such impacts also directly relate to health and wellbeing.

213. In light of its own long-standing views, the department should have ensured that its processes to assess financial capacity were effective to mitigate risks, including the potential for residents' finances to be exploited.

### ***Adequacy of department's process to assess financial capacity***

214. My investigators consulted a Certified Practising Accountant (CPA) to obtain a professional opinion about the rigour of the department's process used to assess financial capacity.

215. The CPA advised that:

- A 'true picture' of an SRS' financial capacity could not be drawn from the information included in the statements submitted.
- The information contained in the financial capacity statements was inadequate and should have been supplemented with:

- information regarding the proprietors' short and long term assets<sup>40</sup> and liabilities to enable a clearer assessment of the viability of its operations, and
- cash flow information including income and expenditure/ payments activity for an assessment of business liquidity.
- The absence of information about SRS' assets and liabilities, means that authorised officers are assessing 'financial capacity' based on incomplete information.
- While a proprietor may indicate a 'net cash position' at a particular point in time i.e. a bank balance, a requirement to pay significant liabilities the following week, may render the company insolvent.
- Any review of financial capacity by the department should extend to related companies of an SRS proprietor.

216. The department relied solely on the financial capacity statements provided by proprietors to assess financial capacity for registration renewal purposes. Based on the CPA's expert opinion, the information gathered allowed for a superficial review only, and was inadequate to determine financial capacity, and therefore to inform registration renewal decisions.

217. There were different views between the administrator and liquidator in relation to the level of outstanding liabilities of Mentone Gardens. However, both experts were consistent in their findings that the proprietor did not retain appropriate financial records, or recognise the liabilities associated with residents' funds.

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<sup>40</sup> Assets include cash, investments and receivables, such as fees owing to the facility. Liabilities include outstanding debts to creditors, such as the requirement to return bond monies, outstanding employee wages and benefits, leasing, financing and rental obligations.

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218. Had the department had a more rigorous process in place, it should have been able to identify as early as 2010 that Parklane did not have the financial capacity to operate an SRS.

### ***Outstanding legal costs***

219. The proprietor did not pay legal costs associated with the 1995 and 2000 prosecutions in a timely manner. It is not clear whether some of these costs were ever finalised.

220. An inability to meet liabilities, such as the payment of outstanding costs, can also signal potential financial hardship<sup>41</sup>. In this regard, the department failed to consider the potential link between Mentone Gardens' inability to finalise its debt to the department and its financial position, when making decisions to renew its registration.

221. My investigation sought to establish whether these outstanding costs were ever finalised by the proprietor, and whether the department considered the debt in the context of financial capacity.

222. This view was put to the department's Director, Ageing and Aged Care, who in response said that:

I don't think that a request to pay a significant fine over a period of time, necessarily relates to financial capacity ... I don't think there is any evidence of [that]. So if you're saying that the department should have picked up that [there was an issue] with financial capacity, I'm sorry but I don't accept that.

223. However, my investigation identified that the link between the outstanding costs, and the criterion of financial capacity, was identified by the Program Manager, Aged Care and Acute Services, when considering whether to renew Mentone Gardens' registration, in 2000.

224. The region had been informed by the department's legal branch that it was unclear whether the 1995 costs had been finalised, however the issue would continue to be investigated.

225. An internal email from the Program Manager, Aged Care and Acute Services to the legal branch asked the legal branch to keep the region informed as to the progress of the investigation, and stated that:

In the event you find that there are outstanding amounts from the 1995 and/or 2000 prosecutions, can you please advise if this non-compliance is a matter the RD can, under section 89, take into account (financial capacity?) in considering whether to renew the registration ...

226. There is no evidence that this query was responded to, and all of the following memoranda recommending renewal of registration, including the 2000 memorandum, make no reference to the outstanding costs.

227. Departmental officers interviewed as part of my investigation were unable to advise my officers on the status of the above matters.

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<sup>41</sup> Australian Government, Auditing and Assurance Standards Board, *Auditing Standard ASA 570 Going Concern (July 2013)*, page 14.

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228. My officers sought final confirmation from the department as to the status of this debt. In response, the Manager, SRS and Accommodation Support informed my officers that:

The management of recovering costs as awarded is the responsibility of the Department of Justice Court system and therefore [the department is] not in a position to confirm the finalisation of these matters.

229. However, internal email correspondence dated 15 June 2000 shows that if the outstanding legal costs were paid to the department, they;

would be sent to... [the department's] informant. I presume [the informant] will forward it to the Legal Branch as the Branch has paid \$9,350 in legal costs for the case.

230. I note that the proprietor, following the 1995 prosecutions, entered into a payment plan direct with the department for the outstanding costs. It is also concerning that there is no evidence of the department having made enquiries with the Department of Justice as to the outstanding fines.

231. The evidence strongly suggests that the outstanding legal costs were not finalised, and the outstanding fines may also not have been finalised.

232. The department made a grave oversight in its consideration of Parklane's financial capacity when it failed to take account of the company's difficulties with repaying the legal costs.

## Transition period between royal assent of the SRS Act and its implementation

233. The department had a two-year period between the royal assent of the SRS Act and its commencement, to develop a policy framework around the new provisions.

234. During the transitional period, the department rolled out 'Getting Ready' workshops to SRS proprietors and staff over sessions in March, April and May 2012. The purpose of these sessions was to:

[a]ssist [proprietors and staff to] develop an understanding of [their] responsibilities under the new SRS scheme and identify the changes [they] need to make to current practices in order to comply with new requirements.

235. When asked why the sessions were held so late in the transition period, the Manager, SRS and Accommodation Support said that it was 'so that it would be fresh in the minds of the proprietors'.

236. While attendance was strongly recommended at these workshops it was not mandatory. An attendance roster revealed that the proprietor of Mentone Gardens did not attend. When asked about this, a senior officer at the department's central office said she believed that the proprietors had attended an introductory session held in October 2011.

**M**y father lived a frugal and happy life but the news of the loss of his Mentone Gardens deposit disturbed and confused him over his last few months. He deserved a far more peaceful ending to his life.

**Son of former resident**

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### **Communication about new legislative framework**

237. The information sessions did not include residents or resident representatives. Informing residents of the new legislative requirements was predominately left to proprietors. The department:
- provided proprietors with booklets, *Living in an SRS – Guide for residents and prospective residents*,<sup>42</sup> and uploaded videos to its website
  - instructed proprietors to display the poster at the SRS facility.
238. However, a senior officer at the department's central office was unable to confirm whether that information was in fact passed onto residents.
239. When asked whether the department had the option of attending each SRS and engaging with residents about the new legislative framework, the Manager, SRS and Accommodation Support said:
- I wasn't part of the legislative review team ... they had a communication strategy. I'm not quite sure of all the details in that communication strategy.  
...  
But we wouldn't have had the resources to knock on every resident's door  
...  
the residents aren't our direct clients ...
240. However, the Director, Ageing and Aged Care recognised that residents are stakeholders of the SRS industry. The creation of a regulatory regime for the SRS sector was for the sole reason to provide government protection to residents.

241. The department placed trust in proprietors to inform residents of the new legislative provisions. While educating stakeholders, including residents, of legislative change is a government responsibility, in this case, the task incorrectly fell to the proprietors. This placed the department at risk of proprietors failing to inform residents of their rights under the new legislation.

### **Scheduling of Targeted Compliance Reviews (TCR) for trust accounts**

242. The department did not undertake any preparation for the new legislative requirements relating to trust accounts, until after the legislation came into effect. This was despite the fact that the legislation had been passed in August 2010 with a commencement date of 1 July 2012.
243. In addition, although the new TCR regime was planned to start in August 2012, due to staffing issues, the first TCR was delayed. The department's Manager, SRS and Accommodation Support told my officers:
- ... we developed the TCR, we scheduled it for August. ... I said it would be good to get this done ... at least start in August. Okay, people were pretty – people from the review team went on leave straightaway. You know, you can understand that. They'd spent years working long hours and doing lots of work ... The SGI came in, right, the Sustainable Government Initiative,<sup>43</sup> and also there was a lot of churn within the regions among the AOs. You know, some of the AOs who had other career pathways that they could pursue decided to obviously go and pursue them.

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<sup>43</sup> The Sustainable Government Initiative was a public service workforce reduction program announced by the Victorian Government in December 2011. As part of the Initiative, Voluntary Departure Packages were offered to eligible employees who wished to retire or resign from the Victorian Public Service.

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244. During the transition period (2010-2012), Mentone Gardens received \$1.475 million in payments from residents<sup>44</sup>. This is supported by documentation between the proprietor and residents, indicating that the proprietor agreed to receive monies:

- 'on trust'
- as a 'payment towards security deposit'
- a 'deposit will remain intact for the duration of residents stay and will become repayable'.

245. Despite the new risk-based rationale for TCRs, high-risk facilities were not necessarily inspected first. A senior authorised officer conceded that Mentone Gardens' first TCR should have been conducted earlier, however:

... each authorised officer considered each of their SRS's and went and did them in the order – and made the appointments to them – in the order they believed appropriate. I know that some authorised officers took the view that it would – in order to get experience at doing these, because this is a brand new process ... do the ones ... where we expect that there won't be big issues first. Do a few of those first before doing the ones where there's a high risk so that they are as well trained as possible in the process so they'd had some practice.

246. The approach adopted by the regions was put to the Manager, SRS Accommodation and Support, at interview, and she said that she was not aware of this practice, and was concerned about the order in which authorised officers had visited SRS for the first TCR:

... I am concerned ... I can see the strategic consequences of them, ... Let's put it this way. We've done all the thinking, we have the reasons why we suggest that they do things our way, right. They choose whether they say, "We're not going to, you know, do that. We're going to do it this way". At the moment, we don't have any way of saying, "No, you will do it this way".

247. Mentone Gardens' TCR was initially scheduled for 6 February 2013, and then postponed at the request of Mentone Gardens until 26 February 2013, during which an array of non-compliance issues were identified by the department.

248. On 26 April 2013, a follow-up inspection was undertaken. A senior authorised officer advised my officers that this occurred a month after the first compliance instruction's deadline of 26 March 2013, as:

Because we were busy doing TCR's at other places, you know, there was leave, you know, we were expecting [the authorised officer responsible for Mentone Gardens] to come back [to work] and she never did. We spoke with ... [Mentone's proprietor] about the time and, you know, we just wanted to give them the best opportunity to get it right given that there were no immediate risks-immediate purported risks to the health and wellbeing of residents.

249. At interview, my investigation officers asked the senior authorised officer why a second compliance instruction had been issued after the first deadline had not been met, rather than escalating to enforcement action. He stated:

That's the departmental process. The departmental process is to ask them to fix it. If they haven't fixed it, ask them to fix it again ... And there were additional breaches found at that second inspection... And that's when I started having significant concerns and started talking with the regional director and [Central] office about, you know, what are we going to do about this. Because at that point I'd identified that there was quite a deal of money because I'd looked at more of their documents ... So I went, "Okay this is not just tens of thousands of dollars anymore, this is now hundreds of thousands of dollars potentially".

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44 Schedule of Creditors, page 18 of Liquidator's Report.

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250. In my view, the department spent unnecessary time issuing a second compliance instruction after a deadline for compliance had already been broken. After the second compliance instruction was issued, department staff spent further time issuing a 'show cause' notice when they already had information about:

- non-compliance with trust account requirements involving very large amounts of resident's money
- financial capacity concerns over hundreds of thousands of dollars in unpaid rent
- evidence that the proprietor's wife had committed an offence by failing to disclose her resignation as a director
- concerns about the proprietor's capacity to act as sole director of Parklane while he was residing in a nursing home.

251. On 3 July 2013 the Director, Ageing and Aged Care, sought advice from the Director, Legal Services Branch, on the powers and actions the department could use 'to mitigate against a similar situation occurring in other privately operated SRS'.

252. In her response on 18 July 2013, the Director, Legal Services Branch stated that:

Legal Branch notes that the [SRS Act] contains other powers besides compliance instructions that could be used to greater effect by authorised officers, particularly in a situation as serious as this one, with large amounts of money being misappropriated by a non-compliant body corporate proprietor ... If authorised officers had used the more assertive powers under section 143 and 144 of the [Act] after the initial failure of [Parklane] to meet the requirements of the first compliance instruction—or even after the failure to answer questions satisfactorily during the first inspection—the scale of [Parklane's] failure to properly manage the finances of residents may have come to light earlier.

However, this is purely speculative as you instruct that staff at the facility stated that the finances were in the process of being reconciled by accountants at that time. This would have made it difficult to access any documentation and to form a clear view about the state of Parklane[']s ... finances.

...

In summary, this particular case demonstrates the importance of ensuring that proprietors are fully aware of their obligations under the [Act] in relation to the management of residents' money, and that authorised officers assertively use their powers under the Act, both in conducting regular oversight of regulatory compliance and when responding to complaints by family members.

253. According to an inspection of the department's file, this was the only time that internal legal advice had been sought regarding Mentone Gardens after the start of the SRS Act. Given the severity of the concerns identified, legal advice should have been sought earlier.

### ***Delayed development of policies and procedures under the SRS Act***

254. From the evidence obtained during my investigation, the department's transition to the new legislation was inadequate, leaving a number of policies incomplete.

255. Despite a two-year transition period before the legislation came into effect, several relevant documents and policies were produced more than a year after the legislation became effective. These documents, including the date they were released to staff, are outlined below:

- Regulatory Practice Framework – January 2013
- Guide for authorised officers conducting inspections of Supported Residential Services – January 2013
- Issuing a Compliance Notice (Draft) – June 2013

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- Enforcement Review Panel – July 2013
  - Supported Residential Services Guide to enforcement – July 2013
  - Supported Residential Services Risk-based Regulatory Compliance Guide – August 2013
  - Compliance and Enforcement Policy – December 2013
  - Policy framework for requesting registration statements – August 2014.

256. The Manager, Residential Services stated that these policies had not been completed by 1 July 2012 in readiness for the start of the new Act as:

... we decided that in the first instance that we would focus on the compliance instructions and the Targeted Compliance Reviews and that we would ... develop the policy around the other policy options as time permitted. But just because [the Regulatory Practice Framework] is dated January 2013 does not mean these processes were not in place before then.

257. Comprehensive guidance to underpin legislative changes and to ensure consistent practices by the department remain outstanding nearly three years after the commencement of the legislation. It is therefore questionable how authorised staff could operate in a regulatory environment that lacks sufficient policy and procedural guidance.

258. Departmental staff said that it was more of a priority to develop instructions for TCRs than it was to ensure a complete suite of policies and procedures for authorised officers. It would appear that the department has not yet established a complete framework to implement the Act or adequately trained staff in how to enforce the Act or the framework.

# Is the department prepared for next time?

259. The previous chapters of my report have described the history of what happened at Mentone Gardens, the department's obligations as a regulator, and how it failed in carrying out those obligations. This chapter queries whether the department is now in a position to properly address similar problems if they were to happen again.

## Continued delay in implementing infringement notices

260. Infringement notices are an important penalty in a regulatory toolkit, where low-level breaches that are easily proven can result in a quick and proportionate penalty without having to close down an SRS, or prosecute. Fines can also deter SRS operators from perpetuating the same breaches over time.

261. Since the commencement of the SRS Act, the department has made some progress towards implementing this power, by prescribing specific offences under the Regulations, educating proprietors about offences, and liaising with the Department of Justice and Tenix Solutions<sup>45</sup> about how to administer an infringement notice system.

262. However, at the time of writing, the SRS infringement system remains unfinalised. Nearly three years since the commencement of the SRS Act, and over 24 years since the commencement of the Health Services Act, the department has never issued an infringement notice to an SRS proprietor, despite having the legal power to do so.

263. When asked at interview why the infringement system has not yet been implemented under the SRS Act, the Manager, Residential Services stated:

We had some authorised officers that were eager to start using [infringement notices] because they thought that was a way to just issue infringement notices to change behaviour. But the [Regulatory Impact Statement] said that, I think it said we'd expect a maximum of 50 per year. So it's important before you introduce a new enforcement mechanism that you have it completely right. And with infringements as well, you have to go through Tenix, because they're the only people who can develop and manage that system. That took a long time to do that as well.

264. The Regulatory Impact Statement does not mention an expected maximum number of infringement notices.

265. In response to the same question about why implementation of the infringement system has been delayed, an authorised officer at the department stated:

I have no firsthand knowledge of that, only what I've been told at different meetings by people from [the central office]. [...] I don't know, it's just an enormous frustration.

266. In my view, the absence of an infringements capability has been a serious gap in the range of enforcement options available to the department. Without this option, I consider that the department continues to be restricted in its ability to proportionately escalate its response to non-compliance and to deter repeated non-compliance.

**W**here is the fairness? Why do the elderly need to fight so desperately for the return of their life savings when such an injustice is done?

**Granddaughter of former resident**

<sup>45</sup> A private company that provided infringement and enforcement management services to many Victorian Government agencies.

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## Unconsolidated policies and procedures for monitoring and enforcement

267. A full suite of policies and procedures for the department's compliance and enforcement activities was not available upon the commencement of the SRS Act in 2012. Some of the required policies are still incomplete, for example, authorised officers are unable to issue infringement notices because the systems and policies for issuing these notices have not been finalised.
268. My investigation also identified that a comprehensive manual for authorised officers has still not been completed despite a 2010 consultant's report which rated this task as a 'high priority'<sup>46</sup>. The value of a consolidated manual would be to ensure consistency in compliance and enforcement activities. A senior regional officer told my officers that the current guidance materials produced by the department are insufficient and lack specificity:

A working manual for authorised officers ... we don't have one ... What we have is a collection of documents that come out from [central office] and they get changed from time to time with new versions. So there's things like the guide for authorised officers conducting inspections and that's it, that's the entire document [approximately 10 pages]. A guide to targeted compliance reviews and again, that's the entire document and we've done four or five different targeted compliance reviews now and when one comes out, we get – oh we've also got a regulatory practice framework.

269. At interview, the Director, Ageing and Aged Care said that a consolidated policy document for authorised officers was being finalised, however at the date of interview she had not been provided with a copy for approval.
270. When asked if she had any concerns about the delay in having this document ready by the time the new legislation came into force the officer responded:

No, because the regions already have the regulatory practice framework, the guide for inspections.

## Clarification of the scope of monitoring powers is needed

271. Certain important monitoring powers need to be clarified for authorised officers. For example, an authorised officer stated at interview that the wording of monitoring powers under section 143 of the SRS Act does not allow him to request documents, such as financial records, if they are not located on the premises of an SRS.
272. However, the department's Regulatory Practice Framework notes that in addition to the specific monitoring powers under the SRS Act, authorised officers are:
- able to do anything reasonably necessary for the purpose of the [authorised officer] performing or exercising their functions under the legislation<sup>47</sup>.
273. The appropriate means for requesting 'off-site' financial records was debated between central and regional staff in the Mentone Gardens case, but was not ultimately resolved between them. No advice was sought from the Legal Services Branch.

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46 McDonnell-Phillips (November, 2010) *Supported Residential Services: Review of Regulatory Requirements*, page 56. Commissioned by the department for the purposes of reviewing regulatory practices and arrangements and review of efficiency, effectiveness and consistency of existing SRS regulatory practices.

47 See also section 143(1)(j) of the *Supported Residential Services (Private Proprietors Act) 2010*: an authorised officer who enters any premises under the powers of the Act may 'do any other thing that is reasonably necessary for the purpose of the authorised officer performing or exercising his or her functions under this Act or the regulations'.

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274. Whether authorised officers do or do not have the power to request 'off-site' documents must be clarified. Authorised officers should have a clear and accurate understanding of their powers. If authorised officers are mistakenly 'reading down' their powers, the department might once again find itself in a position where it unnecessarily limits its own ability to investigate financial irregularities in a timely way.

## Unrevised complaint handling manual

275. The 2010 consultant's review also identified that the department's complaints handling procedure had not been updated since 2008<sup>48</sup>. As at the date of my investigation, this had still not been updated, despite a departmental document indicating that a review of the manual would be implemented by December 2011.

276. One regional officer interviewed during our investigation stated:

... in the absence of regular comprehensive complaints handling training and a clear set of guidelines, it's difficult to promote consistency.

277. My investigation has underlined the importance of sound complaint handling procedures. The clearest signs of financial irregularity at Mentone Gardens were contained in a number of complaints from residents' relatives about problems with securing refunds, but the department did not identify these complaints as a pattern, treating them as isolated events instead.

278. My investigation did not reveal any clear procedures for identifying complaint patterns at an individual SRS level. Not every complaint will necessarily be upheld after an investigation. However, even if individual complaints are resolved, several instances of a similar kind of complaint should raise questions of whether a deeper investigation is required. To the extent that the department is not doing so systematically, its risk profiling of SRS facilities is weakened. As the department has moved to a 'risk-based' regulatory model, it should reassess the way it analyses its complaints data.

## Inadequate processes for assessing financial capacity

279. Under the SRS Act, the department is required to consider whether an applicant has the financial capacity to operate an SRS<sup>49</sup>. Given the nature of the SRS sector and the vulnerability of the residents who choose this option, it is important for the regulator to develop effective assessment processes for financial capacity.

280. The department is rightly concerned about the viability of the SRS sector. SRS facilities fill a significant gap in the provision of residential care, particularly to those whose income is limited. Motivated by this concern, the department has set up the Supporting Accommodation for Vulnerable Victorians Initiative (SAVVI) program and other funding initiatives in order to support the continuing viability of the most marginal 'pension-level' SRS facilities<sup>50</sup>.

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48 McDonnell-Phillips (2010) *Supported Residential Services: Review of Regulatory Requirements*, page 39.

49 Section 15(d), *Supported Residential Services (Private Proprietors Act) 2010*.

50 Mentone Gardens was not a 'pension-level' SRS, as it was an upmarket facility.

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281. However, the SRS sector itself has recognised that it is important to restrict SRS registration to suitable proprietors who can keep their facilities viable. Aged and Community Care Victoria prepared a 2010 report for the department which canvassed the views of SRS proprietors about the regulatory regime. Its research noted a call from proprietors for more robust registration requirements:

The sector itself wishes to protect its own interests and image by preventing situations of substandard care or SRS failure. The registration process needs to be sufficiently robust to avoid registering proprietors who are likely to fail from a viability or quality perspective. Elements of a due diligence approach are needed, even with the best of skill and intention to care, to ensure that prospective proprietors will operate a viable business<sup>51</sup>.

282. With this in mind, the department appears to have the support of the sector in improving its assessment and regulation of SRS financial capacity.

283. My investigation has shown that the department's processes for assessing financial capacity were inadequate. The department needs to look beyond simple financial declarations of the type it has relied upon so far.

284. While financial capacity is a condition of registration, the department should not limit itself to considering this only at the time of registration.

285. In the absence of a renewal of registration process under the SRS Act, it is all the more important for the department to consider financial capacity at any time, if significant concerns are raised during normal monitoring activity.

## Training authorised officers to monitor trust accounts

286. Authorised officers are key to the department's regulatory role. They are the first point of contact with SRS proprietors, have significant powers and must be adequately trained and guided. The authorised officers responsible for assessing financial capacity did not have financial backgrounds or qualifications to do so, and were not provided with specific training on trust account audits until 2014.

287. Training of authorised officers in investigative skills and enforcement action occurred during the 2010-12 period of transition to the SRS Act. However, there was no specific training provided in the audit of trust accounts. At interview, a senior departmental officer said that 'it wasn't seen as necessary'.

288. When asked why training had not been provided, the same officer stated:

... it wasn't seen as the role to ... go into ... depth other than ... to be satisfied that [the trust account] was established [and that it] was reflected in [residential statements].

289. In contrast, after the collapse of Mentone Gardens, the department's Director, Legal Branch, advised the Manager, Residential Services:

... authorised officers should receive training not only in the application of the policy, and enforcement principles in general, but also in areas that relate to offences under the Act. For example, authorised officers will be better placed to recognise poor financial record-keeping practices if they have their own basic understanding of financial record-keeping<sup>52</sup>.

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51 Aged and Community Care Victoria (2010), *Making a difference: An investigation into the Industry Support Needs of Supported Residential Services in Victoria*.

52 This advice was provided in a memorandum from the Director, Legal Branch, to the Manager, Residential Services, dated 22 November 2013, following a review of the draft SRS Compliance and Enforcement Policy.

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290. The department has recently engaged the services of a consultant to provide targeted training, in the areas of investigation of trust monies and trust accounts. This included training about the new statutory provisions in the following areas:

- trust account obligations
- the definition of a trust account
- planning for a TCR
- asking the right questions during the inspection
- basic information regarding accounting ledgers.

291. The consultant was also previously engaged by the department in May 2014, to assist authorised officers to undertake an inspection of a sample of five SRS<sup>53</sup> to ascertain compliance with the legislative provisions relating to trust accounts<sup>54</sup>. The inspection found only one of the five SRS sampled was paid funds required to be placed in a trust account. For that SRS, the review identified legislative breaches and poor practices as follows:

- a failure to deposit money into a trust account within seven days<sup>55</sup>
- a failure to provide evidence of money being put into the trust account within the required seven days<sup>56</sup>

- a failure to provide prescribed statements relating to security deposits<sup>57</sup> and in some cases failure to provide prescribed statements in relation to security deposits received prior to the commencement of the Act<sup>58</sup>
- a failure to provide a condition report to residents who had paid a security deposit<sup>59</sup>
- poor record-keeping, i.e. incomplete resident files, information in the residential and services agreements not accurately completed
- insufficient notice given about changes of fees to residents<sup>60</sup>.

292. The department should be given credit for providing this specialised training to its authorised officers, as it will go some way to addressing the skills gap that existed previously. However, in my view this training should have been provided to authorised officers before the commencement of the new SRS Act – especially considering that the new trust account provisions were among the most publicised of the new protections in the new legislation.

**M**y grandmother is 103 years old. She is of perfectly sound mind although her body is not as strong as it once was. She regularly asks me if she is a 'financial burden to the family'. It tugs at our hearts to know that she struggles with this thought daily. It is not fair. My grandmother should not carry this burden.

**Granddaughter of former resident**

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53 Five of a total of 11 SRS identified by the department that appeared to receive money from residents that the SRS Act requires to be placed into a trust account.

54 Specifically, Part 5, Division 3, section 216 and 217 of the SRS Act.

55 Section 95 of the SRS Act.

56 Section 95 of the SRS Act.

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57 Section 94 of the SRS Act.

58 Section 217 of the SRS Act.

59 Section 100(1) of the SRS Act.

60 Section 48(3) of the SRS Act.

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## Poor relationship between central and regional offices

293. The 2010 external review also found that there was confusion amongst regional authorised officers about the lines between their roles and responsibilities and those of central office, including:

- disagreement over whether the central office should have primary responsibility for briefing the Minister
- dissatisfaction from regional offices with having to obtain legal advice via the central office, rather than being able to seek this directly from the Legal Services Branch
- lack of clarity over roles and responsibilities for prosecutions and the appointment of administrators to SRS.

294. The review recommended that:

- the department revisit its organisational structure with respect to the most effective allocation of authorised officers between rural and metropolitan areas.
- there be improved clarity of decision-making roles, responsibilities and accountabilities between the central and regional offices.
- the central office develop and implement an internal culture change/ relation building strategy to improve internal co-operation/collaboration.

295. My investigation found that the relationship between the central and regional offices was strained. A regional officer stated that:

The relationship is often difficult ... There are times when the advice given is either not clear or not explained or appears to be technically wrong or inconsistent with the guidelines they've given us ... and individuals don't like being challenged.

296. The department has not implemented any cultural change or relationship-building program to improve the relationship as recommended by the review. While the central office has developed some materials to clarify the decision-making roles of regional directors and the procedures for authorised officers undertaking TCRs, these have not been consolidated.

297. A working committee set up to resolve central-regional differences over policies and procedures has not met regularly. Regional officers told my investigators that the meetings of this committee have been repeatedly postponed by the central office.

298. Certain powers of the Secretary have been delegated to both regional directors and to the central office's Director, Ageing and Aged Care. These delegations concern important powers, including variation of registration, requesting registration statements and issuing compliance notices and undertakings. Where a delegation has been given to both the central office director and the regional directors, there is potential for confusion about roles.

299. Central/regional relationships are often a source of tension in large organisations. However, these tensions must be structurally and culturally addressed, as the quality of this relationship is crucial to the effectiveness of the SRS regulatory regime.

# Conclusions

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300. This report outlines how the department failed to comply with its legislative obligations to monitor and regulate Mentone Gardens in a number of respects, including:

- a. continuing to renew the registration of Mentone Gardens despite ongoing breaches of its obligations in the operation of the SRS and failure by Mentone Gardens to meet the requirements of the registration process, and
- b. inadequate responses to clear indications that Mentone Gardens was not dealing appropriately with residents' funds and was in financial difficulty.

301. This report also outlines how the department has still not taken the necessary steps to ensure that it is in a position to adequately meet its obligations to regulate SRS providers in the future.

302. In light of the department's failings, I am of the opinion that the department acted in a manner which was wrong within the meaning of section 23 of the *Ombudsman Act 1973*. My recommendations therefore address:

- a. the department making an ex gratia payment to residents who lost funds, and
- b. the department ensuring that vulnerable residents of SRS facilities are better protected in the future.

# Recommendations

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I recommend that the State Government:

## Recommendation 1

Make ex gratia payments to people, or their estates, who lost bonds, deposits or unspent fees paid in advance as a result of Parklane being placed into liquidation. That the payment be made by 30 June 2015, subject to the provision by those people of the necessary evidence of their loss, in accordance with the guidance on ex gratia payments under the *Financial Management Act 1994*.

### ***In response to my draft recommendations, the department stated:***

*Accept in principle.*

*The Department acknowledges the Ombudsman's concern at the financial loss that some residents have incurred, and the impact in light of their age and frailty.*

*The recommendation for ex-gratia payments will need to be considered by the government, having regard to whole-of-government policies and guidelines for such payments, and considered in light of responsible expenditure priorities for government made on behalf of the community.*

## Recommendation 2

Amend the SRS Act to require proprietors of an SRS to:

- a. provide an audited set of financial accounts to the department every two years to confirm financial capacity to operate.
- b. (for those SRS who receive monies subject to the trust provisions under the SRS Act) have those trust accounts audited by a registered CPA or Chartered Accountant and produce a copy of that report to the department for inspection<sup>61</sup>.

### ***In response to my draft recommendations, the department stated:***

*Accept in principle.*

*The Department notes that currently almost all proprietors are subject to the trust account provisions under the Supported Residential Services (Private Proprietors) Act 2010, because they receive the relevant kinds of payments in respect of their residents. Due to the limitations set out in the current legislation and regulations, very few proprietors hold large sums of money that have been received from residents.*

*However, the Department accepts what it takes to be the intent of the recommendation – that is, to protect large lump sum payments made by residents, either before the introduction of the Supported Residential Services (Private Proprietors) Act or subsequently under s92(2), and will advise government on the necessary processes to achieve the desired objectives.*

I recommend that the Department of Health and Human Services:

## Recommendation 3

Develop comprehensive procedures for the regulation of SRS to include:

- a. guidelines for implementing and escalating enforcement action in accordance with the powers provided under the Act
- b. a centrally managed repository of legislation, policies and procedures, tools and instruments, taking into consideration the findings of the 2010 review which reported that these measures would be helpful in improving consistency in the application of policies and procedures in the regional offices
- c. an updated complaints handling manual

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<sup>61</sup> In accordance with section 8.1 of the Accounting Professional & Ethical Standards Board APES 310 *Dealing with Client Monies*.

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- d. a policy for analysis of complaint data at both a regional and central office level to identify trends and patterns in complaints and factor this into the risk assessment framework, taking into consideration the findings of the 2010 review which recommended that there be best practice use of available data (including information on adverse outcomes and complaints) to focus regulatory activity
  - e. ongoing training for staff on the above.

***In response to my draft recommendations, the department stated:***

*Accepted*

*The Department accepts the recommendation, and welcomes the intent to continue to improve policies and regulatory practice. It will address all 5 elements of this recommendation as a priority.*

*Some enhancements to the regulation of the sector, through the Supported Residential Services (Private Proprietors) Act 2010, have already been introduced including:*

- *Accommodation and personal support standards re-framed in terms of expected outcomes for residents;*
- *Regular renewal of registration replaced by clearer application requirements and risk based monitoring and enforcement processes;*
- *Prescribed staffing requirements, including minimum staff numbers and training requirements;*
- *Prescribed reportable incidents process introduced for serious incidents;*
- *Proprietors' complaints system must be consistent with principles of the Act;*
- *Strengthened requirements for management of residents' fees and other monies paid; and*
- *New provisions governing residential and service agreements.*

*The new legislation has provided an opportunity to work with proprietors, Community Visitors, interested agencies and resident advocates across a range of areas that affect resident amenity, safety and wellbeing.*

*The Department has also already undertaken a number of reviews and enhancements of its regulatory approach. All guidelines, policies and procedures, inspection tools and instruments will continue to be routinely reviewed and revised and will incorporate the findings from the Ombudsman's investigation.*

*In relation to specific parts of the recommendation:*

- a. *The Department is producing a set of guidelines to underpin the current compliance and enforcement policy, which will provide clear guidance for implementing and escalating the enforcement powers provided under the legislation.*
- b. *The Department is enhancing the systems required to centrally manage the repository of these updates which will support improvements in procedures in regional offices. The Department intends to implement key findings of the McDonnell-Phillips review, and subsequent advice from external reviewers, as well as the recommendations made by the Ombudsman.*
- c. *A revision of the complaints handling manual has commenced and its implementation will include specific complaints management training for all staff who have responsibility for the regulation of the supported residential services sector.*
- d. *The Department recognises the need to strengthen policies and procedures in place for analysis of complaints data. This is already factored into the risk profile of supported residential services to a large extent. The Department intends to implement key findings of the McDonnell-Phillips review, and subsequent advice from external reviewers.*

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- e. *The Department has an annual training program for staff involved in regulatory activity and these areas will be a focus for the ongoing training program.*

*The Department welcomes the Ombudsman's suggestions for continuing improvement of the policies, guidelines and procedures underpinning regulation of the supported residential services sector.*

# Appendix 1: The aged care sector and the role of government

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In Australia, there are several accommodation options available to people seeking aged care. These include:

1. Commonwealth funded residential aged care (RAC)
2. Private accommodation services such as SRS which are not funded by the Commonwealth or State
3. Home support/Home and community care (HACC)
4. Other support programs.

## Commonwealth funded residential aged care (RAC)

The operation of RAC, previously known as nursing homes and hostels, is principally a Commonwealth function administered through the *Aged Care Act 1997*. Residential aged care services provide accommodation and care for those who can no longer be assisted to stay at home. Under the Act, the Commonwealth provides subsidies to approved providers of residential care to ensure residents receive quality personal care, access to services such as nursing, and sound outcomes that meet the Accreditation Standards. The care and services for each resident are funded through a combination of subsidies provided by government and resident contributions.

Providers of residential care must provide care and services in a way that meets the Accreditation Standards. They must also be accredited by the Australian Aged Care Quality Agency to ensure continuity of subsidies.

The Report on Government Services defines government funded aged care as 'formal services funded and/or provided by governments that respond to the functional and social needs of older people, and the needs of their carers'. The Commonwealth Government provides subsidies to approved providers. RAC services are subject to Commonwealth regulatory requirements and in Victoria ownership is divided between the:

- private-for-profit sector (51.5 per cent)
- not-for-profit sector (36.5 per cent) and
- Victorian public sector, operated in the main by public hospitals (12 per cent).

Under the Commonwealth system, residents may be required to pay contributions to their accommodation costs. This is subject to their financial circumstances. If required to contribute for accommodation, residents may choose to do so by way of:

- lump-sum payment, called a 'refundable accommodation deposit'
- regular rental-type payment called a 'daily accommodation payment' or
- a combination of both.

The provider can use refundable accommodation deposits to support the development of aged care infrastructure. Providers are required to publish their maximum refundable accommodation deposits and charges. Protections apply to deposits collected under the Commonwealth system, including the requirement that the provider submits an annual statement of compliance, accompanied by verification by an independent auditor, to the Department of Social Services (Cwlth).

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In addition, the Commonwealth operates an Accommodation Refundable Deposit/Bond Guarantee Scheme, whereby the government guarantees the repayment of refundable deposit funds in the event that the provider becomes insolvent, bankrupt, or defaults on its obligations to refund the balance of deposit monies to the resident.

## **Private accommodation services such as SRS**

Refer Background section of this report.

## **Home Support/Home and Community Care (HACC)**

The Commonwealth's *HACC program* provides aged care services such as home help, personal care, meals and services. Many of the organisations funded by the Commonwealth for these services also provide disability services under funding from State Governments. Services for people aged 65 years and older through HACC are transitioning to full Commonwealth funding and control under COAG agreement and most jurisdictions have passed responsibility in respect of aged services to the Commonwealth. Victoria is finalising negotiations for a future transition.

## **Other support programs**

Victoria funds and manages a number of independent programs for the aged, including Personal Alert Victoria and the Dementia Services program, which complement Commonwealth provision. Victoria also provides many health services that focus on the complex and multifaceted needs specific to older people, such as the Geriatric Evaluation and Management program.

## Appendix 2: Chronology

<b>18 February 1991</b>	First registration of Mentone Gardens to operate an SRS.
<b>1 January 1993</b>	First renewed for three years from 1 January 1993 to 31 December 1995.
<b>2 June 1995</b>	Prosecution of Parklane by the department for breaches in the care of a resident relating to record-keeping, personal hygiene and mobility standards, adequate staffing numbers and care plans. The company pleaded guilty to the charges. It was fined \$4,800 and ordered to pay the department's legal costs of \$8,000 within six months. Parklane does not pay the costs on time.
<b>5 January 1996</b>	Registration renewed for the period from 1 January 1996 to 31 December 1998.
<b>6 December 1998</b>	Registration renewed by the department for the period from 1 January 1999 to 31 December 1999.
<b>1 January 2000</b>	Issued renewal of registration certificate to 30 June 2001
<b>8 March 2000</b>	Prosecution of Parklane by the department for care plan and accident record breaches. Parklane pleaded guilty to these charges. It was fined a total of \$1,500 and ordered to pay legal costs of \$3,000.
<b>18 April 2000</b>	The Manager, Residential Care Registration and Compliance, emails the Regional Director, setting out his view 'that Parklane and its directors are not fit and proper to be involved in the operation of a SRS'.
<b>28 July 2000</b>	Departmental officers hold a meeting with the proprietor, providing an opportunity to respond to the department's concerns.
<b>August 2000</b>	An authorised officer seeks legal advice from the department's legal branch about whether to refuse renewal of registration. In response, legal advice dated 31 August 2000 states that the department would have difficulty establishing that renewal of registration criteria had not been satisfied, should the matter be appealed to the Victorian Civil and Administrative Tribunal. During a care audit on 31 August, authorised officers identify: <ul style="list-style-type: none"> <li>• non-compliant residential statements</li> <li>• non-compliant administration of medication</li> <li>• no written authority to handle residents' money</li> </ul>
<b>5 September 2000</b>	Registration renewed by the department for the period from 5 September 2000 to 20 June 2001. Conditions placed on Mentone Gardens registration following concerns about being 'fit and proper' to operate an SRS.
<b>November 2000</b>	Authorised officers receive a complaint about Parklane's failure to return a \$1,900 'bond'.
<b>March 2001</b>	Authorised officers identify non-compliance with residential statements.
<b>1 July 2001</b>	Registration renewed by the department for the period 1 July 2001 to 31 July 2002.
<b>June 2002</b>	Authorised officers identify: <ul style="list-style-type: none"> <li>• non-compliant residential statements</li> <li>• no written authority to handle residents' money</li> <li>• non-compliant administration of medication.</li> </ul>
<b>14 March 2003</b>	Registration renewed by the department for the period 1 August 2002 to 31 March 2005.
<b>September 2004</b>	Authorised officers identify a failure to notify doctor or next of kin of resident falls.
<b>October 2004</b>	Authorised officers identify: <ul style="list-style-type: none"> <li>• breach of residents' medical privacy</li> <li>• non-compliant administration of medication</li> </ul>

<b>May 2005</b>	<p>Authorised officers receive a complaint from a former resident's wife about difficulty obtaining a refund from Parklane, alleging:</p> <ul style="list-style-type: none"> <li>• proprietor falsely claimed to have provided high care</li> <li>• proprietor overcharged for high care that was not given.</li> </ul> <p>Authorised officer inspects facility in response to the complaint. No residential statements for any resident were available at time of authorised officer's inspection. Authorised officer requests that all residential statements be made available by 24 May 2005, but this is not followed up.</p>
<b>12 July 2005</b>	Registration renewed by the department for the period 1 April 2005 to 31 August 2007.
<b>October 2005</b>	Person who made complaint in May 2005 makes a further allegation that the proprietors altered documents provided to a VCAT hearing and may also have forged her husband's signature on his residential statement.
<b>November 2005</b>	<p>Authorised officers identify:</p> <ul style="list-style-type: none"> <li>• non-compliant residential statements</li> <li>• failure to notify doctor or next of kin of resident falls.</li> </ul>
<b>May 2006</b>	Authorised officers receive a complaint from a hospital about substandard care given to a Mentone Gardens resident following a fall. No record of a complaint investigation.
<b>February 2007</b>	<p>Authorised officers identify:</p> <ul style="list-style-type: none"> <li>• non-compliant residential statements</li> <li>• no written authority to handle residents' money</li> <li>• non-compliant administration of medication.</li> </ul>
<b>July 2007</b>	Authorised officers identify non-compliant residential statements.
<b>15 August 2007</b>	Registration renewed by the department for the period 31 August 2007 to 31 August 2010.
<b>September 2007</b>	Authorised officers identify non-compliant residential statements.
<b>May 2009</b>	Authorised officers receive complaint from Royal District Nursing Service about substandard knowledge and referral at Mentone Gardens following the death of a resident who developed a pressure sore.
<b>August 2010</b>	Authorised officers identify non-compliant residential statements.
<b>3 September 2010</b>	Registration renewed by the department for the period from 1 September 2010 to 31 August 2013.
<b>November 2010</b>	Authorised officers receive a complaint from relative of a former resident about a proprietor's failure to repay bond money within two months. Inspection finds that residential statements have not been complied with.
<b>February 2011</b>	Authorised officers identify non-compliant residential statements.
<b>June 2011</b>	Authorised officers identify non-compliant administration of medication.
<b>December 2011</b>	Authorised officer receive complaint from husband of a former resident about the proprietor's failure to refund \$23,000 within two months.
<b>January 2012</b>	Authorised officers receive complaint about repayment of \$55,000. Authorised officers identify non-compliant residential statements.
<b>7 May 2012</b>	Department notifies SRS regarding new legislative and regulatory requirements effective 1 July 2012.
<b>1 July 2012</b>	Certificate of Registration provided to Parklane (under new legislation and regulations).
<b>7 November 2012</b>	Commencement of SRS Targeted Compliance Review for November 2012 and February 2013 focussing on SRS Trust Accounts.

<b>January 2013</b>	<p>Authorised officers receive:</p> <ul style="list-style-type: none"> <li>• notification from a relative of a deceased resident that they are pursuing repayment of \$100,000 in bond money.</li> <li>• notification from family of another resident that they are pursuing repayment of \$65,000 in bond money.</li> </ul>
<b>April 2013</b>	Authorised officers receive notification of another failure to repay \$200,000 in bond money after the death of a resident.
<b>26 April 2013</b>	Department letter to Parklane requesting compliance with act and discrepancies identified during site inspection be rectified.
<b>May 2013</b>	Authorised officers receive notification of another failure to repay \$30,000 in bond money.
<b>3 May 2013</b>	Concerns in department about Parklane's non-compliances, complaints received concerning their failure to refund monies totalling \$365,000. Senior Authorised Officer recommended to Director that information about the proprietor's financial position be requested.
<b>6 May 2013</b>	Departmental letter to Mentone Gardens' proprietor highlighting numerous concerns. Request made for financial statements to assess current financial position; demonstration of sufficient trust account monies; evidence of suitable arrangements for ongoing SRS management; and a request for contact within 7 days to arrange an 'urgent meeting'.
<b>7 June 2013</b>	Inspection notes non-compliances not adequately addressed.
<b>12 June 2013</b>	Parklane is placed into voluntary administration.
<b>3 July 2013</b>	Department requests urgent legal advice regarding potential breaches of the <i>Supported Residential Services (Private Proprietors) Act 2010</i> and <i>Health Services Act 1988</i> by the proprietor and any legal risks, responsibilities, and recommended actions by the department.
<b>18 July 2013</b>	Legal advice provided and notes Parklane's sole Director is 99 years old and in a nursing home and prosecution was not recommended.
<b>September 2013</b>	Parklane placed in liquidation.
<b>September 2013</b>	Mentone Gardens SRS facility is sold.
<b>January 2015</b>	The Australian Securities and Investments Commission (ASIC) advises my officers that it is investigating this matter.

Source: From departmental records.

## Appendix 3: The department's response

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The supported residential services sector operates on a private proprietor model, with regulation of proprietors through legislation that establishes specific requirements for proprietors. During the period of time covered within the report of the Victorian Ombudsman, the prevailing legislation was the *Health Services Act 1988* until 1 July 2012, at which time the *Supported Residential Services (Private Proprietors) Act 2010* took effect.

The Department's priority is necessarily on resident care and safety, given that the aim of the legislation applicable at that time, through imposing Government regulation on these businesses, as expressed in the Health Services Act was 'to ensure quality service provision; and in the Supported Residential Services (Private Proprietors) Act as to protect the safety and wellbeing of residents through providing for minimum standards of accommodation and personal support for residents' care and wellbeing.'

In keeping with Victoria's contemporary approach to regulation, the Department focuses on assisting proprietors to understand their obligations under the legislation. This approach recognises that most proprietors want to be compliant and 'do the right thing' for their residents, and was the reason why substantial departmental resources were allocated to the Getting Ready strategy for implementation of the new Supported Residential Services (Private Proprietors) Act in July 2012. This support and guidance function is a vital complement to the monitoring and enforcement role.

Under the Health Services Act the Department did not have a role to intervene in arrangements whereby residents or their families paid monies to proprietors for the fees and expenses that were payable by the resident for accommodation or services provided by the proprietor, under the private agreements reached between the resident and the proprietor. Such transactions were covered in contract law by the general responsibility of parties to assert and protect their own rights and obligations.

In any regulatory system, issues of concern are likely to be identified in relation to matters that fall outside a Department's regulatory remit or which lead to a better understanding of regulatory practice.

However, the Department also has the interests of residents at the core of its concern, and therefore placed great importance on the impact that the financial failure of this supported residential service has had on former residents. The Ombudsman has made recommendations in relation to those former residents, and also to propose continued improvements to the monitoring and regulation of the whole sector. The Department appreciates these recommendations and has provided specific responses.

The Ombudsman has also posed the question as to whether the Department is prepared to deal with a similar occurrence. A number of actions have been taken in this regard. The Supported Residential Services (Private Proprietors) Act introduced new provisions limiting the amount that could be taken for lump sum payments (except with the explicit agreement of the resident in the case of fees in advance) and requiring that prior and new lump sum payments be retained in a trust account. The department has also taken further action as set out [in response to the recommendations].