

**INQUIRY INTO PROVISIONS OF THE AGEING AND  
DISABILITY COMMISSIONER BILL 2019**

**Organisation:** NSW Government

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**Department of Family and Community Services  
Submission to Social Issues Committee of the Legislative Council  
Inquiry into the provisions of the Ageing and Disability Commissioner Bill 2019  
30 May 2019**

## **Introduction**

As the Minister stated in his Second Reading Speech on 8 May 2019, the Bill is an expression of the Government's commitment to, and responsibility for, the care and protection of people with disability and older people. It builds on the Government's key commitment to ensure that society is inclusive of people of all ages, with or without disability, where all people can live safely and with dignity.

The objects of the Bill are to protect and promote the rights of adults with disability and older adults, and to protect them from abuse, neglect and exploitation. To this end, the Bill establishes the Ageing and Disability Commissioner.

The Bill is intended to cover critical gaps in the service system as highlighted in several recent reports and inquiries including the May 2018 Law Reform Commission Report into the Review of the Guardianship Act, the November 2018 Special Report to Parliament by the Ombudsman, Abuse and neglect of vulnerable adults in NSW – the need for action and the 2016 Report of the Parliamentary Inquiry into Elder Abuse in NSW.

While there are already a number of national and State bodies or initiatives that focus on the welfare and safety of those with disability, or the elderly who are receiving services, there are significant numbers of people with disability and older people who are abused, neglected or exploited who do not qualify for help through existing channels or for whom existing safeguards do not go far enough. For example, people with disability can only have recourse to the protections offered by the NDIS Quality and Safeguards Commission if they are accessing services funded by the NDIS, which many people with a disability are not. The Health Care Complaints Commission can only investigate complaints against health practitioners.

The Elder Abuse Helpline and Resource Unit provides invaluable support, advice, referrals to other services and other assistance for older people but does not have investigative functions. Nor is there a corresponding helpline or resource unit for people with a disability. The Ombudsman offers something of an alternative channel of assistance, but there are serious limitations.

This Bill seeks to bridge these gaps by giving the Commissioner power to deal with allegations about the abuse, neglect or exploitation of people with disability and older adults who are vulnerable to mistreatment in their homes or in community settings by people they know and trust.

The Bill allows for reports to be made alleging abuse, neglect and exploitation in a broad sense, but excludes complaints made against service providers or health practitioners from the Commissioner's remit, to avoid overlap, duplication and forum shopping. The Bill defines an older adult as a person 50 years or over for an Aboriginal or Torres Strait Islander person, and 65 years or over in any other case.

## **Objects and Principles of the Bill**

The objects of the Bill are to protect and promote the rights of adults with disability and older adults, and to protect them from abuse, neglect or exploitation.

The Principles include that adults with disability and older adults must be respected as individuals and live free from abuse, neglect and exploitation. Individuals' right to privacy and confidentiality, and their right to exercise choice and control in their lives are to be respected. When exercising a function under the Bill, the Commissioner must have regard to the wishes of the adult.

## **Independence of the Commissioner**

The Commissioner is a statutory office appointed by the Governor for a term of up to 5 years and may be reappointed for one more term, whether or not those terms are consecutive. Like other statutory office holders, the Commissioner does not directly employ staff but persons may be employed in the Public Service under the *Government Sector Employment Act 2013* to assist the Commissioner exercise the functions of the office and the Commissioner may delegate any of these functions to a member of staff.

The Commissioner will not be subject to the control or direction of the Minister in exercising its functions relating to conducting investigations, advising or making recommendations to the Minister, or with its annual or special reports to the Minister or Parliament.

An Ageing and Disability Advisory Board, with relevant expertise and reflecting community diversity, will advise the Commissioner on issues relating to the abuse, neglect or exploitation of adults with disability and older adults.

## **Functions of the Commissioner**

The Commissioners key functions are to:

- deal with allegations of abuse, neglect and exploitation of adults with disability and older adults, on the basis of a report received by the Commissioner or on its own initiative including by referring the report to appropriate persons or bodies or conducting investigations,
- take further action, following an investigation, as considered necessary, including an application to the Civil and Administrative Tribunal,
- raise awareness and educate the community on issues relating to abuse, neglect and exploitation of adults with disability and older adults,
- provide advice and general assistance to the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults,
- inquire into and report on systemic issues affecting adults with disability and older adults that the Commissioner may investigate,
- consult with the Ageing and Disability Advisory Board,
- advise and make recommendations to the Minister on matters relating to adults with disability and older adults.

## **Reports made to the Commissioner**

Anyone may make a report to the Commissioner if they have reasonable grounds to believe an adult with disability or older adult is subject to, or at risk of, abuse, neglect or exploitation, including the adult with disability or older adult themselves. The report does not have to be written.

Reporters who make reports in good faith are not liable to any civil, criminal or disciplinary action and their identities are protected from disclosure unless the reporter consents, or if disclosure is necessary for the purposes of law enforcement.

### *Children*

The Bill does not give the Commissioner power to receive and investigate reports of abuse and neglect of children with disability. This is because there are already, and quite appropriately, a number of national and State agencies charged with responsibilities to promote and protect the safety, welfare and wellbeing of children and young people, including children with a disability, not least of which is the child protection agency, the Department of Family and Community Services, and the system of mandatory reporting of abuse of children under which it operates.

There are also a number of agencies who have oversight of and responsibility for promoting the best interests of children and young people, including the NSW Ombudsman, the NSW Children's Guardian, the Advocate for Children and Young People and the Kids Helpline. Extending the jurisdiction of the Ageing and Disability Commissioner to children would have the effect of diluting the ability of the Commissioner to focus on the critical gaps in our service system. It would also create confusion over responsibilities for children, duplication of resources and competition for available funds

### *Consent*

In most circumstances the Commissioner will only investigate an allegation of abuse, neglect or exploitation of an older adult or person with disability with the consent of the affected person, unless the Commissioner is of the opinion that:

- the adult is incapable of giving consent, or
- the allegation is so serious that it is not necessary to obtain consent,

The threshold for this consideration is intended to be high. Adults with disability and older adults have the right to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports and services. The Bill also requires the Commissioner to have regard to the wishes of the affected adult. If the Commissioner, after preliminary enquiries, formed the view on reasonable grounds that a vulnerable adult was withholding consent because they were fearful, or because they did not feel able to speak freely, or were afraid of negative repercussions, or were being unduly influenced, and the Commissioner considered their safety and welfare to be at serious risk, the Commissioner is empowered to take action despite the absence of consent.

### **Actions the Commissioner may take on receipt of a report**

On receipt of a report or on its own initiative, the Commissioner may do any one or more of the following three in respect to that report:

- conduct an investigation into the allegations;
- refer a report to an appropriate person or body; or
- decline to take any action on a report.

Commissioner must refer a report if the subject matter constitutes a complaint that can be made to the Commissioners of the NDIS Quality and Safeguards Commission or Aged Care Quality and Safety Commission, the Health Care Complaints Commission or any other person or body prescribed by regulations (none proposed at present).

### *Investigations*

If the Commissioner decides to conduct an investigation on the basis of a report received, or on the Commissioner's own initiative, the Commissioner can require a person to attend a meeting with, or produce relevant documents or things to, the Commissioner.

The Commissioner may also apply for a search warrant if the Commissioner has reasonable grounds for believing that an adult with disability or older adult is on the premises and is subject to, or at risk of, *serious* abuse, neglect or exploitation.

### **Actions taken by the Commissioner following an investigation**

Clause 12(1)(b) of the Bill provides wide general powers to the Commissioner to take further action following an investigation into a report as the Commissioner considers appropriate in all the circumstances. This includes making an application to NCAT for a guardianship order or a financial management order, or for a review of any such existing order. The Commissioner may also provide information and assistance to the affected person about services that may be available to the person to promote their safety, health and wellbeing.

The policy goal of the Commissioner is not intended to mirror a court or tribunal or even a regulatory body but to provide a strengths-based framework focusing on supporting families and individuals and resolving issues of concern in a timely and expeditious manner. Abuse of older adults and adults with a disability is under reported and an overly punitive model for the Commissioner was not seen as conducive to promote reporting and raising awareness.

### **Powers of Referral**

The Commissioner has broad powers under clause 13(5) of the Bill to refer matters to 'any other person or body' for action as he or she considers appropriate. This clause is very broad, and it includes referring a matter to the Commissioner of Police. If a person is considered to be in need of a protection order, the Commissioner may refer the matter to Police.

The power is not confined. The Commissioner may also refer matters to other persons or bodies that may have an interest or a role to play in managing a situation. There will be guidelines and policies to assist the Commissioner and its staff about what matters are to be referred to the Police and other persons or bodies, as appropriate, in light of all the circumstances.

The Commissioner has an obligation under section 316 of Crimes Act to report serious indictable offences and this will be captured in the operations of the Commissioner. The Commissioner will work collaboratively with NSW Police and in particular, with the 6 new Elder and Disability Abuse Prevention Officers who have been deployed across local area commands. Protocols will be agreed between the Commissioner and the Commissioner of Police about these arrangements to ensure timely and effective collaboration between the agencies.

### **Exchange of Information**

The Bill enables the exchange of relevant information between the Commissioner and relevant agencies, and provides for the Commissioner to enter into information sharing arrangements with such agencies detailing these arrangements.

Under the Bill, the Commissioner may provide certain information to a government sector agency, NCAT, a hospital or health facility (including a private health facility) or any other person or body prescribed in the regulations for the purpose of enabling or assisting that agency to provide a service to, or take or make a decision or assessment of, or otherwise take action in respect of the safety, welfare and well-being of the person with disability or older adult.

The information can also be given to the other agency to take action in respect of the safety, welfare or well-being of adults with disability or older adults generally.

For the purposes of undertaking an investigation, the Commissioner may also require any person to attend a meeting or produce information that is relevant to the investigation.

### **Inquiries**

The Commissioner will have the power to inquire into and report on systemic issues of abuse, neglect and exploitation of adults with disability and older adults. The Minister may also request the Commissioner to undertake an inquiry.

The core role of the Commissioner however will be to support individuals and families and provide them with timely and appropriate assistance to ensure the safety and welfare of the older adult or adult with disability.

The people that the Commissioner will be supporting are some of the most vulnerable people in society and there are often great difficulties within a family unit where abuse, neglect and exploitation are issues and public hearings may not be the best forum to investigate and resolve these matters. However, there is nothing in this Bill that prohibits the Commissioner from holding public inquiries which may be appropriate (for example, with respect to matters concerning systemic abuse).

### **Governance and accountability**

The Commissioner must prepare, and provide to the Presiding Officer of each House of Parliament, annual reports that include a report on the Commissioner's activities and the activities of Official Community Visitors during the relevant year and the Commissioner's recommendations, if any, for administrative action or changes in the State's laws.

The Commissioner is also to prepare a special report on any matter requested by the Minister, which report the Commissioner may provide to the Presiding Officer of each House of Parliament.

The Commissioner may also, of his or her own volition and at any time, prepare a special report on any matter relating to the Commissioner's functions. This report may also be given to the Presiding Officer of each House of Parliament, provided the Minister has first been given a copy.

### **Consultation**

There has been extensive consultation with key government stakeholders; including the Department of Prime Minister and Cabinet, the Department of Justice, the Department of Health, the Ombudsman, the Police, the Civil and Administrative Tribunal of NSW, the Trustee and Guardian, the Children's Guardian, the Public Guardian, the Information Commissioner and the Privacy Commissioner. All feedback received was considered and resulted in a number of key changes being made to the Bill.

In addition, a Project Control Group was established to guide the development of the operating model, including members from FACS, Department of Premier and Cabinet, NSW

Treasury, NSW Department of Justice, NSW Public Guardian, NSW Police, NSW Ombudsman and NSW Ministry of Health.

Consultations also occurred with the three Ministerial Advisory Councils - NSW Ministerial Advisory Council on Ageing, Disability Council NSW, and NSW Carers Advisory Council.

A forum has been held in Sydney with ageing and disability peak organisations and other key stakeholders. Five community stakeholder forums have been held in May in several metro and regional locations: Liverpool, Blacktown, Kempsey, Newcastle and Wagga Wagga.

These reforms are historic. It is imperative that the Commission commence its work on 1 July this year. The Government has proposed a review of the functions and operations of the Commission and Commissioner after three years to ensure a comprehensive evaluation of actions and results.

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