

Statutory Review

Report of the Independent
Statutory Review of the *Ageing
and Disability Commissioner Act
2019*

April 2023

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Executive summary

The *Ageing and Disability Commissioner Act 2019* (**the Act**) establishes the Ageing and Disability Commission (**ADC**).

The ADC commenced operations on 1 July 2019. It is an independent agency of the NSW Government that was established to promote the rights of adults with disability and older people, and protect them from abuse, neglect and exploitation.

Section 36 of the Act requires the Minister to commission an independent review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The review was due to be conducted after two years of commencement of the Act and a report on the outcome of the review was due to be tabled in each House of Parliament before 1 July 2022.

I was commissioned in October 2022 to conduct this independent review of the Act by the then Minister for Disability Services, the Hon. Natasha Maclaren-Jones MLC, and the then Minister for Seniors, the Hon. Mark Coure, MP. The Ministers were jointly responsible for the Act.

The Review received 17 submissions from individuals and organisations in response to the discussion paper issued as part of the public consultation. It also considered five submissions to an online survey, three reports on focus groups conducted with people with lived experience and face-to-face and online consultations undertaken with key stakeholders. These submissions and consultations are listed in the **Appendix**.

Most submissions agreed that the objectives of the Act remain valid, and that the terms of the Act generally remain appropriate for achieving them. For example, submissions acknowledged the important work of the ADC in protecting adults with disability and older adults from abuse, neglect and exploitation, while calling for an expansion of its functions.

Some submissions proposed discrete amendments to the Act, including the addition of human rights principles, changes to the appointment process for the Commissioner, extending the circumstances where investigation by the Commissioner may occur without consent, expanding the scope of the Official Community Visitor (**OCV**) and representation of older people on the Ageing and Disability Advisory Board. These matters are discussed in Part 2 of this report. A small number of minor and technical amendments to the Act were also identified by the Review through discussions with stakeholders and by reviewing the Act.

A number of submissions also commented on matters relating to ADC's operations, including resourcing and raising its public profile. These matters are discussed in Part 3. However, as these matters do not fall within the terms of reference of this review, the report does not undertake an in-depth analysis of these issues, but summarises the comments and suggestions made by stakeholders for the Government's consideration.



Alan Cameron AO

List of Recommendations

Recommendation 1

That the NSW Government amend section 12(1)(h) of the Act to reflect that the 'National Disability Strategy' has been replaced with 'Australia's Disability Strategy'.

Recommendation 2

That the NSW Government amend the Act to allow the Commissioner discretion about whether to refer relevant reports to the bodies listed in section 13(8) and to allow the Commissioner a discretion under section 13(9) not to refer reports to the Commissioner of Police or the Director of Public Prosecutions where the Commissioner believes on reasonable grounds that the adult does not wish the information to be reported.

Recommendation 3

That the NSW Government amend the Act to extend the circumstances in which the Commissioner may investigate allegations without the consent of the relevant adult, both:

- a) to cover situations in which the Commissioner cannot obtain access, and
- b) with respect to the issue of the adult's capacity to consent, to:
 - (i) establish a presumption of capacity,
 - (ii) enable the Commissioner to investigate without consent where capacity is relevantly and sufficiently impaired rather than where there is no capacity and
 - (iii) give guidance on when capacity is relevantly and sufficiently impaired.

Recommendation 4

That the NSW Government amend the Act to broaden information sharing under section 14 with a range of organisations and individuals that are either engaged with or are able to provide supports to adults with disability or older people, who hold relevant information that could assist the ADC in handling reports.

Recommendation 5

That the NSW Government amend the Act to permit OCVs to provide information and advice to appropriate regulatory bodies, such as the NDIS and DCJ, to improve regulation of the disability services sector and assisted boarding houses.

Recommendation 6

That the NSW Government amend the Act to require disability service providers to notify the ADC of their contact details and any new visitable services or location changes to existing visitable services they operate to improve the operation and efficacy of the OCV scheme.

Recommendation 7

That the NSW Government not amend the Act to provide for volunteer OCVs.

Recommendation 8

That the NSW Government repeal section 26 as a spent provision.

Recommendation 9

That the NSW Government amend the Act to require that the Ageing and Disability Advisory Board include two or more persons who are older people.

Recommendation 10

That the NSW Government amend the Act to address the internal inconsistencies within section 29 between the responsibilities of the Minister and the Commissioner regarding membership of the Ageing and Disability Advisory Board, and to align it with appointment and remuneration provisions of other similar advisory boards.

Recommendation 11

That the NSW Government amend the Act to appoint or designate a Parliamentary Committee to monitor and review the functions of the ADC.

1 Introduction

1.1 Terms of reference

Section 36 of the Act sets out terms of reference for the conduct of the review of the Act, requiring that the Minister commission an independent review of the Act to determine whether the Act's policy objectives remain valid and whether its terms remain appropriate to secure those objectives.

1.2 Background to the legislation

The ADC was established in response to recommendations made by several reviews and inquiries, most notably:

- the Ombudsman's *Special Report on Abuse of Vulnerable Adults* (November 2018);
- the Law Reform Commission's *Review of the Guardianship Act 1987* (2018); and
- the NSW Parliament Legislative Council General Purpose Standing Committee No. 2 Inquiry into Elder Abuse (2016).

The ADC filled a critical gap in dealing with allegations of abuse, neglect and exploitation of people with disability and the elderly in home and community settings that was not previously addressed by other complaint and investigative bodies in NSW. For example, people with disability could only have recourse to the protections offered by the NDIS Quality and Safeguards Commission if they were accessing services funded by the NDIS, and many people with a disability were not. These complaints were also limited to service providers, not members of family. The Health Care Complaints Commission can only investigate complaints against health practitioners.

The Act bridged 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. Additionally, the Elder Abuse Helpline and Resource Unit became part of the Commission, and is now called the Ageing and Disability Abuse Helpline.

1.3 Conduct of the review

The stakeholder consultation methodology was tailored to reflect the needs of the target audience.

The consultation enabled key stakeholders to have input into the review including:

- people with lived experience of ageing and disability and their families and carers,
- agencies representing the ageing and disability population i.e. peak and advocacy groups, Ageing and Disability Commission,
- agencies representing vulnerable and disadvantaged ageing and disability population groups (Aboriginal, CALD, regional/rural/remote, LGBTQIA+),
- ageing and disability community-based service providers,
- government agencies who have contact with target group, and
- the general public.

Stakeholder consultation was conducted in November and December 2022 and included:

- Focus groups with people with lived experience were held by peak organisations. Two focus groups were held with each of the following target groups: people with disability (Physical Disability Council of NSW), people with intellectual disability (Council for Intellectual Disability) and older people (Council on the Ageing)

- Have Your Say was open from 17 November 2022 – 16 December 2022
<https://www.nsw.gov.au/have-your-say/adc-act-independent-review>
- Key stakeholder email list – a list of over 500 government, NGO and individual key stakeholders who were kept informed throughout the review including when Have Your Say opened and timeframe for the consultation
- Key stakeholder meetings – with the Ageing and Disability Commission, NSW Carers Advisory Council, Ministerial Advisory Council on Ageing, NSW Disability Council, and NSW Official Community Visitors.

A suite of consultation materials were developed to support the Review:

- [Discussion Paper](#)
- [Summary paper](#) a plain English summary version of the discussion paper
- [Easy read paper](#) developed by the Council for Intellectual Disability (CID)
- [Summary paper](#) translated into the top ten community languages based on data showing the highest migrant populations in NSW and new arrivals with lower levels of English proficiency (in this order): Arabic, Simplified Chinese, Traditional Chinese, Dari, Filipino, Greek, Hindi, Italian, Korean, Spanish, Thai and Vietnamese.
- Online survey – anonymous online survey

I also hosted two online information sessions on Monday 28 November 2022 to give people the opportunity to ask questions about the review and to support them or their organisation with their submission.

All information about the Review is now available on the Department of Communities and Justice [webpage](#). Submissions and reports from the focus group consultations (where permission was granted) are published at <https://www.dcj.nsw.gov.au/about-us/engage-with-us/past-consultations/ageing-and-disability-commission-act-independent-review.html>.

2 Proposed changes to the Act

2.1 Changing the definition of ‘older adult’

One stakeholder and one survey participant suggested amending the definition of ‘older adult’ in section 3 to lower the age to 55 or 60 (from 65), or 40 for Aboriginal and Torres Strait Islander peoples (from 50), to combat ageism, particularly in employment contexts.

However, the current age limit is consistent with other laws and policies, such as pension eligibility and NDIS eligibility, which open and close, respectively, at age 65. Moreover, reducing the age at which a person is considered an ‘older adult’ is inconsistent with global trends toward longer life expectancies.

2.2 Objects and principles of the Act

Several stakeholders commented on section 4 of the Act, which contains its objects and principles. Most stakeholders consider the objects and principles of the Act to be appropriate.

One stakeholder suggested changing the language from ‘protect’ to ‘safeguard’ as more contemporary and appropriate to adults. While there is value in considering more contemporary language, the word ‘safeguard’ is in my opinion a direct synonym for the word ‘protect’, and may even be clearer. When introduced in Parliament in 2019, the second reading speech emphasised that the simplicity and directness of the objects of the Act was to reflect the focused and unambiguous purpose of the legislation.

Some stakeholders suggested inserting a right of access to supports and services. However, this is already embodied in section 4(2)(d), under which all persons exercising a function under the Act must have regard to the principle that the cohort has ‘the right to exercise choice and control in the ... planning and delivery of their supports and services’.

One stakeholder suggested the objects should be extended from protecting the cohort from ‘abuse, neglect and exploitation’ to also protect from discrimination. Other legislation, principally the *Anti-Discrimination Act 1977*, covers discrimination, including in the areas of age and disability, and contains protective mechanisms. In those circumstances, I do not consider it necessary, and it may be unhelpful, to extend the focus of the Act to discrimination.

Stakeholders suggested the objects should recognise the intersectional complexities for persons who fall into more than one disadvantaged group. Section 4(3)(b) already addresses this concern.

Several stakeholders suggested the objects should include a right of the cohort to access supported decision-making, rather than substitute decision-making, and that section 4(4) should refer to the ‘will and preference’ rather than the ‘wishes’ of the person. While this may be a preferable formulation, and indeed was recommended by the Law Reform Commission’s *Review of the Guardianship Act 1987* (2018), that review remains under consideration by the Government, and any decision to implement it ought to be taken by Government across a range of related policy areas and statutes in a coordinated and considered manner.

2.3 Appointment of the Commissioner

Part 2 of the Act covers the appointment of the Commissioner. The discussion paper asked stakeholders whether any changes are required to the appointment process or the status of the Commissioner.

Most stakeholders did not comment on this question; several stakeholders did comment but did not consider any changes are required.

Some stakeholders suggested the Act ought to require the Commissioner to have ‘lived experience’, noting that this is a requirement for the NSW Mental Health Commissioner or at least one Deputy Commissioner (*Mental Health Commission Act 2012*, section 8). There may be some merit in a Commissioner having lived experience where the Commissioner’s role is focused on one area (such as mental health), but where the Commissioner is responsible for both older adults and adults with disability, statutorily requiring a Commissioner to have lived experience in one of those cohorts may detract from, or be perceived to detract from, the Commissioner’s role in respect of the other cohort.

Some stakeholders proposed different appointment mechanisms for the Commissioner, such as an independent selection panel or committee with diverse representation and lived experience, and without links to the care industry, or by ‘eminent individuals’. However, the current appointment process follows DPC guidelines for public and statutory office-holders requiring approval by the Governor, and is consistent with other statutory office-holders, such as the Commissioner of the Health Care Complaints Commission and the Children’s Guardian. Ordinarily, whether lived experience is considered relevant or appropriate as a factor in a recruitment is properly a matter for the selection panel, rather than being specified in legislation.

Some diversity of opinion was offered on the appropriate duration of the Commissioner’s tenure in the role, from three to ten years. On balance, I consider that the current term, of up to five years, with eligibility for reappointment (up to two terms) to be appropriate (s 5).

2.4 Functions of the Commissioner

Part 3 of the Act covers the Commissioner’s functions.

2.4.1 Suggestions to expand the Commissioner’s functions

Numerous suggestions were made to expand the Commissioner’s functions. These included:

- mediation services
- greater education and support for carers and the wider community
- enabling the ADC to respond to a report through conciliation and receiving enforceable undertakings as part of a conciliated outcome (involving a written agreement between the ADC and a subject of an allegation that outlines specific actions they will take to address matters raised in the report)
- making broader recommendations, not limited to abuse, neglect and exploitation, to promote and protect the rights of the cohort
- raising awareness and educating service providers and clinicians about the Commissioner’s role
- including persons with additional vulnerabilities in the protected cohort, such as those with ill health, social isolation, and dependence on others
- reporting on progress toward nationally consistent legislation regulating the use of restrictive practices
- systemic advocacy
- training and education initiatives, including with local councils.

Significant additional resourcing may be required for the ADC to carry out these functions. Some of them overlap with functions available elsewhere or are more appropriate to peak or advocacy organisations rather than the Commissioner. Many of the functions could also be carried out by the Commissioner if the Commissioner considered them appropriate, without statutory amendment.

While the concerns of those with ill health, social isolation and dependence on others are real and worrying, I am not persuaded that they are akin to ageing and disability, nor that the Act is the appropriate vehicle to address those concerns. It is beyond the scope of my role to consider changing the ADC’s scope in so fundamental a fashion, as this review is to consider whether the

objectives of the Act remain valid and whether the Act remains appropriate to secure those objectives.

Requiring the ADC to monitor and report on NSW's implementation of the National Plan to Respond to the Abuse of Older Australians, while similar to the existing function of the Commissioner in section 12(1)(h) 'to monitor, assess and report on the New South Wales implementation of the National Disability Strategy', may not be appropriate as the Commissioner has a role in the delivery of this plan. Even if it were, I do not consider expanding the Commissioner's functions to undertake this additional work warranted, in resource-constrained circumstances.

I note that the National Disability Strategy was a 10-year plan, covering 2010-2020 and was replaced in 2021 by a new 10-year plan, titled 'Australia's Disability Strategy'. I recommend the Act be amended to update this reference.

Recommendation 1

That the NSW Government amend section 12(1)(h) of the Act to reflect that the 'National Disability Strategy' has been replaced with 'Australia's Disability Strategy'.

2.4.2 Reports by the Commissioner

Section 13 of the Act requires the Commissioner to refer reports in some circumstances. Under subsection 13(8), the Commissioner *must* refer a report to the following persons or bodies if the Commissioner considers it constitutes a complaint that may be made to them:

- a. the Health Care Complaints Commission under the *Health Care Complaints Act 1993*,
- b. the Commissioner of the Aged Care Quality and Safety Commission under the *Aged Care Quality and Safety Commission Act 2018* (Cth),
- c. the Commissioner of the NDIS Quality and Safeguards Commission under the *National Disability Insurance Scheme Act 2013* (Cth),
- d. the Children's Guardian under the *Children's Guardian Act 2019*,
- e. any other person or body prescribed by the regulations (no person or body has been prescribed).

Under subsection 13(9), the Commissioner must refer a report to the Commissioner of Police or the Director of Public Prosecutions if the Commissioner considers the report may provide evidence of the commission of a criminal offence.

The discussion paper asked whether the Commissioner should have discretion in deciding which reports to refer under these subsections, rather than it being required. Stakeholder views were mixed on this issue, with several supporting Commissioner discretion, others supporting the current mandatory reporting language, and one stakeholder supporting discretion in the Act only if modified by a Regulation mandating reporting in some circumstances. Similarly, some focus group participants felt guidelines would assist the Commission to determine when to refer reports.

NSW is the only jurisdiction with mandated referral requirements. The other jurisdictions either do not have this specified in their legislation or the legislation says that they *may* refer to other bodies (South Australia).

With respect to the list of agencies set out in section 13(8), I consider that the Commissioner should have a discretion in all those instances whether to refer reports to those agencies. That will bring NSW into line with all other jurisdictions, and I am confident the Commissioner will continue to report serious matters of which the relevant agencies should be aware and with respect to which they may need to take action.

The ADC has submitted that complying with the mandatory requirement under section 13(9) has resulted in matters being reported to police against the wishes of the adult, and duplication of effort for the ADC and police. I acknowledge that there may potentially be tension between the express

wishes of the person concerned, the Commissioner's own assessment of the best interests of the person, and the Commissioner's duty to refer a report under section 13(9).

There is a general obligation under section 316 of the *Crimes Act 1900* to report serious indictable offences to appropriate law enforcement agencies. That requirement is narrower than the requirement under section 13(9) to refer any report that may provide evidence of the commission of a criminal offence. However, section 316(1A) provides, with respect to a sexual or domestic violence offence, that a person has a reasonable excuse for failing to bring information to the attention of NSW Police Force or other appropriate authority if the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police or another appropriate authority.

Consistent with other jurisdictions and given the approach reflected in the *Crimes Act* reporting requirements, I consider that it is appropriate for the referring provisions to be discretionary, rather than mandatory. The Commissioner should have a discretion under section 13(9) not to report when the Commissioner believes on reasonable grounds that the adult does not wish the information to be reported to the Commissioner of Police or the Director of Public Prosecutions. (It may need to be clarified that this provision overrides section 316 to the extent of any conflict.)

Recommendation 2

That the NSW Government amend the Act to allow the Commissioner discretion about whether to refer relevant reports to the bodies listed in section 13(8) and to allow the Commissioner a discretion under section 13(9) not to refer reports to the Commissioner of Police or the Director of Public Prosecutions where the Commissioner believes on reasonable grounds that the adult does not wish the information to be reported.

2.4.3 Investigations - consent required

Section 13 of the Act also generally requires the Commissioner to obtain the consent of the adult with disability or older adult before investigating an allegation of abuse, neglect or exploitation of that adult. However, the adult's consent is not required if the Commissioner is of the opinion that:

- a. the adult is incapable of giving consent despite having been provided with the appropriate support for the purposes of making such a decision, or
- b. it is not necessary to obtain consent due to the seriousness of the allegation or the risk to the personal safety of the adult, or
- c. any other circumstances prescribed by the regulations exist (to date, no regulation has been made under this paragraph).

Some stakeholders have suggested that the circumstances in which the Commissioner can investigate allegations of abuse, neglect or exploitation without the consent of the relevant adult should be expanded. Various circumstances were suggested, most notably those falling into two categories:

- **access** — where the relevant adult cannot be contacted (for example, an alleged perpetrator may be blocking access) or cannot be spoken to in a safe and confidential setting in order to seek consent (for example, where there may be coercive control or undue influence); and
- **capacity** — where the adult lacks capacity to consent, has a mental impairment, or is unable to speak for herself or himself.

The second of these — capacity — is addressed by section 13(11)(a). The first of them — access — is considered by several stakeholders to be a significant issue affecting the Commissioner's ability to investigate and is not presently addressed by the Act.

By comparison, the *Ageing and Adult Safeguarding Act 1995* (SA) (**SA Act**) also generally requires consent before an investigation (s 24(1)) but allows the Adult Safeguarding Unit to take action

without first obtaining consent if the Director approves the taking of the action (s 24(4)(b)) in one of the following circumstances (s 24(4)(a)):

- i. the vulnerable adult's life or physical safety is at immediate risk; or
- ii. the risk of abuse to which the report relates consists of an allegation that a serious criminal offence has been, or is likely to be, committed against the vulnerable person; or
- iii. the vulnerable adult has impaired decision-making capacity in respect of a decision to consent to action of the relevant kind being taken; or
- iv. the Adult Safeguarding Unit has not, after reasonable inquiries, been able to contact the vulnerable adult; or
- v. in any other circumstances declared by the regulations to be included in the ambit of this paragraph; and

That is, the SA Act covers the **capacity** issue with the words 'has impaired decision-making capacity in respect of a decision to consent...' (s 24(4)(a)(iii) of the SA Act), whereas the Act requires the Commissioner to be satisfied that 'the adult is incapable of giving consent despite having been provided with the appropriate support for the purposes of making such a decision' (s 13(11)(a) of the Act). The SA Act further expands on the meaning of 'impaired decision-making capacity' in section 5, as follows:

- (1) For the purposes of this Act, a person will be taken to have *decision-making capacity* in respect of a particular decision unless the person has impaired decision-making capacity in respect of the decision.
- (2) For the purposes of this Act, a person will be taken to have *impaired decision-making capacity* in respect of a particular decision if —
 - (a) the person is not capable of —
 - (i) understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or
 - (ii) retaining such information; or
 - (iii) using such information in the course of making the decision; or
 - (iv) communicating his or her decision in any manner; or
 - (b) if the person has given an advance care directive in which the person sets out when they are to be considered to have impaired decision-making capacity (however described) in respect of a decision of the relevant kind — if the person has impaired decision-making capacity as so set out.
- (3) For the purposes of this Act —
 - (a) a person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a technical or trivial nature; and
 - (b) a person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time; and
 - (c) a person may fluctuate between having impaired decision-making capacity and full decision-making capacity; and
 - (d) a person's decision-making capacity will not be taken to be impaired merely because a decision made by the person results, or may result, in an adverse outcome for the person.

The approach in the SA Act to the issue of capacity seems to have several differences from the NSW approach:

- it sets a lower default threshold level of incapacity (impaired decision-making capacity in respect of a decision, rather than incapacity to give consent despite having been provided with appropriate support) and is therefore more enabling of an investigation without the adult's consent;
- it gives considerable guidance on assessing capacity;
- it assumes capacity unless incapacity is made out; and
- it allows an adult in the cohort to depart from the default test of incapacity by specifying when the adult is to be considered to have impaired decision-making capacity in an advance care directive, which better respects the individual wishes of the adult and places the decision as to when the adult lacks capacity in that adult's hands.

This approach seems to offer some advantages over the NSW approach, although it may also offer some disadvantages, chiefly whether the general principle that an adult's consent is required to an investigation is too easily overcome, with associated risks to privacy¹.

On balance, I consider the approach of the SA Act to the issue of capacity to have some distinct advantages over the approach currently taken in the Act.

The SA Act also includes the additional issue of **access**, which is not addressed in the Act (s 24(4)(a)(iv) of the SA Act). Stakeholders commented that this is a real limitation to the Commissioner's ability to carry out his function, since carers and others in the life of the older adult or adult with a disability may obstruct an investigation by blocking access to the adult, thereby preventing the Commissioner from obtaining the adult's consent. In such a case, the Commissioner would only be able to investigate if satisfied of the seriousness of the allegation or the risk to the personal safety of the adult.

I consider it appropriate to enable the Commissioner to investigate allegations without the consent of the relevant adult in circumstances where the Commissioner has not, after reasonable inquiries, been able to contact the vulnerable adult.

Recommendation 3

That the NSW Government amend the Act to extend the circumstances in which the Commissioner may investigate allegations without the consent of the relevant adult, both:

- a. to cover situations in which the Commissioner cannot obtain access, and
- b. with respect to the issue of the adult's capacity to consent, to:
 - (i) establish a presumption of capacity,
 - (ii) enable the Commissioner to investigate without consent where capacity is relevantly and sufficiently impaired rather than where there is no capacity and
 - (iii) give guidance on when capacity is relevantly and sufficiently impaired.

Some stakeholders also suggested other circumstances in which the Commissioner ought to be able to investigate allegations without the relevant person's consent:

- where another body such as the police would investigate without consent in the same circumstances.
- if a criminal act occurred, or where the Act's principles had been breached.

¹ I note that there are no statutory advance care directives in NSW and the common law applies. The Law Reform Commission's *Review of the Guardianship Act 1987* (2018) recommended recognising advance care directives in legislation noting there is uncertainty in the medical profession and the wider community about the validity of common law advance care directives. As discussed earlier, given the review remains under consideration I do not recommend this aspect of the SA Act be replicated in NSW.

- where the individual is a minor or does not hold the cognitive ability.
- where the matter warrants the need to look into systemic failures.

I do not recommend amendments to the Act to provide for these circumstances for the following reasons:

- Police investigations never require consent, and if a police investigation were warranted, the matter should be referred to Police.
- The Act does not apply to minors.
- Cognitive ability is already covered by both the existing section 13(11)(a), which refers to the adult being incapable of giving consent (which could include reasons of cognitive ability) and the SA Act provision on which I suggest paragraph (a) could be remodelled (see especially section 5(2) of the SA Act). Therefore, an explicit reference to cognitive ability is not required.
- Statutory principles cannot be ‘breached’ – they exist to guide the exercise of statutory functions, but allowing the Commissioner to investigate without consent, where, for example, a person exercising a function under the Act did not have regard to the principle that adults in the cohort have a right to respect for cultural diversity, is too vague as to be meaningful and would be a significant shift in the parameters for an investigation to occur without consent.
- The Commissioner already has the power to investigate systemic issues under section 12(1)(e), whereas section 13(11) relates to investigations into specific circumstances affecting an identified adult in the cohort. I therefore do not consider any further exception to the general principle of section 13(11) that the Commissioner’s investigations must generally be conducted with the consent of the relevant adult, is warranted.

2.4.4 Exchange of information

Several stakeholders submitted that the information-sharing provisions in section 14 of the Act should be broadened to include all groups in paragraph 3.28 of the discussion paper. That is, disability and aged care providers, health practitioners, financial and legal services providers. Some privacy concerns were raised with information-sharing, noting that the relevant person’s consent should be paramount in some circumstances, such as regarding a person’s health records.

Section 43 of the SA Act enables information sharing between prescribed agencies of prescribed information and documents where an agency reasonably believes that the provision of the information or documents would assist another agency:

- to perform official functions relating to the health, safety, welfare or wellbeing of a vulnerable adult or class of vulnerable adults; or
- to manage any risk to a vulnerable adult or class of vulnerable adults that might arise in the agency’s capacity as an employer or provider of services.

Recent reports on adult safeguarding in Queensland and Victoria have also highlighted the importance of information sharing provisions for prescribed agencies in relation to abuse, neglect and exploitation of ‘at-risk adults’². In relation to the provisions in privacy legislation to share information without consent where it is necessary to lessen or prevent a serious threat to the life, health or safety of an individual, the Victorian Public Advocate noted that there is a lack of certainty about whether it encompasses financial harm³.

² Adult Safeguarding in Queensland, Volume 2: Reform recommendations, Queensland Public Advocate 2022
Line of sight: Refocussing Victoria’s adult safeguarding laws and practices, Office of the Public Advocate 2022

³ Line of sight: Refocussing Victoria’s adult safeguarding laws and practices, Office of the Public Advocate 2022, page 58

I consider the expansion of information-sharing powers, with limits, is consistent with facilitating the Act's objectives of protecting persons in the cohort. As proposed by the ADC, given the focus is adults, such information should relate only to *safety* of adults and not be as broad as chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*, which relates to 'safety, welfare and wellbeing' of children.

Recommendation 4

That the NSW Government amend the Act to broaden information sharing under section 14 with a range of organisations and individuals that are either engaged with or are able to provide supports to adults with disability or older people, who hold relevant information that could assist the ADC in handling reports.

2.4.5 Investigation and public inquiry powers

Part 3, Division 2 of the Act sets out the investigations and public inquiry powers of the Commissioner. Stakeholders generally consider that these powers are appropriate and sufficient to achieve the objectives of the Act. I agree and recommend no change to this Division.

2.4.6 Suggestion to clarify scope of ADC's powers

One stakeholder made a range of recommendations, including that the Act (or regulations):

- provide clear delineation between the safeguarding role of the Commission, versus that of the National Disability Insurance Authority (NDIA),
- clarify the scope of Commissioner's ability to investigate allegations of abuse by government for instance across public education, health, or corrective services,
- clarify whether the Commission's powers are contained to state-based services or should instead be interpreted more broadly.

People with disability can have recourse to the protections offered by the NDIS Quality and Safeguards Commission if they are accessing those services funded by the NDIS, which many people with a disability are not accessing. The objects of the Act make it clear that it seeks to protect any adult with disability and not just NDIS participants; there is nothing in the Act that suggests that the Commissioner's powers are limited in relation to government services; and the legislation's ambit is confined by the State's jurisdictional limits, as with all State legislation. I am of the view that the Act is sufficiently clear on the scope of the Commissioner's powers (section 12(1)) and no change is required to clarify the scope of the ADC's powers.

2.5 Official Community Visitors

Part 4 of the Act covers the role of Official Community Visitors (**OCVs**), in the context of adults. There were mixed views among stakeholders as to whether the Act needed to be clarified regarding the Commissioner's authority in relation to managing performance and the grounds of removal for Official Community Visitors.

Section 21(5) allows the Minister, on the Commissioner's recommendation, to remove an OCV from office, but only for incompetence, incapacity or misbehaviour. The OCVs noted that the term 'misbehaviour' is unusual in legislation, and that 'misconduct' is more appropriate. I do not disagree, but the difference is slight and I doubt the need to amend the statute for that one word.

While the OCVs agreed that the criteria for performance should be clarified, they also submitted that this is an internal ADC management matter, rather than a matter requiring changes to or definitions in the Act. I agree.

The grounds for removal of an OCV appointed under the Act mirror the grounds for removal of an OCV appointed under the *Children's Guardian Act 2019 (CG Act)*. The Office of the Children's Guardian has commenced its statutory review of the CG Act. Therefore, I recommend no change to this section of the Act be considered until the outcome of that review, it being desirable to maintain consistency between the two schemes.

Under section 22(1)(i) of the Act, OCVs can refer grievances or concerns affecting persons using visitable services to the NDIS Commission and DCJ as 'other appropriate bodies' but cannot provide these agencies with broader information that could inform their regulatory activities – such as information about providers of concern, or trend and pattern information about providers and visitable services. To address this issue, the ADC recommended amending sections 22(1)(d) and (e) of the Act to add the NDIS Commission and the Secretary of DCJ as specific parties to which OCVs may provide 'advice or information relating to the conduct of the premises', and whom they may inform of 'matters affecting the welfare, interests and conditions of persons using visitable services'.

Some submissions submitted that OCVs must have legislative authority to share information with other regulatory bodies to ensure appropriate regulatory responses while one focus group participant submitted that information from the OCVs should only be passed back to the Commissioner who then decides what to do or who to share with.

I note that the 2018 Westwood Spice Review of Community Visitor Schemes⁴ recommended that the NDIS Commission and states and territories should agree to share information to support the Community Visitor Schemes' interface with the NDIS Commission. Accordingly, I recommend the Act be amended to allow OCVs to share information with regulatory bodies such as the NDIS Commission and DCJ to improve information sharing in the sector and ensure appropriate regulatory responses.

Recommendation 5

That the NSW Government amend the Act to permit OCVs to provide information and advice to appropriate regulatory bodies, such as the NDIS and DCJ, regarding the conduct of premises and on matters affecting the welfare, interests and conditions of persons using visitable services.

Some stakeholders suggested requiring disability providers, including Supported Independent Living (**SIL**) providers, to give information to the ADC about new visitable services or changes to existing visitable services they operate. That is because otherwise there is no mechanism under which the OCV scheme is kept apprised of new services or changes to the addresses of services.

⁴ Community Visitor Schemes Review, Department of Social Services for the Disability Reform Council, Council of Australian Governments 2018

In addition to information about new services and new premises, some stakeholders suggested that providers should be required to give information about a range of other matters, including changes in the resident profile of existing visitable services, any increase in the intensity or complexity of supports required by or provided to a resident adult, residential closures, organisational structural changes etc. I do not recommend these details should be required to be provided. The primary impetus for the information provision is to ensure the ADC has accurate and current information about all potential visitable services for the OCV scheme, so the more granular information is not warranted and will be unduly burdensome on providers.

In Queensland, registered NDIS providers are required to provide the Public Guardian (which has equivalent regulatory functions as the ADC) their name, contact details and the address of each visitable site at which the registered NDIS provider provides services or supports⁵. The registered NDIS provider must give the Public Guardian this information, in the way and at the times prescribed by regulation unless the provider has a reasonable excuse. The maximum penalty for non-compliance is 25 penalty units.

I recommend a requirement similar to the Queensland legislation that requires disability service providers, including SIL providers, to notify the ADC of their contact details and any new or changed visitable services they operate, with the purpose of improving the operation and efficacy of the OCV scheme.

Recommendation 6

That the NSW Government amend the Act to require disability service providers to notify the ADC of their contact details and any new visitable services or location changes to existing visitable services they operate to improve the operation and efficacy of the OCV scheme.

One stakeholder suggested requiring OCVs to commit to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Section 21(1) already requires that the Minister may appoint OCVs, on the recommendation of the Commissioner, if in the opinion of the Minister, they have appropriate knowledge *and* a commitment to the objects and principles of this Act and a number of Acts including the *Disability Inclusion Act 2014*, *National Disability Insurance Scheme Act 2013* and *Guardianship Act 1987*, which incorporate elements of UNCRPD. I believe that should be sufficient.

It was also suggested that individuals employed by the NDIS Quality and Safeguards Commission and the NDIA should be ineligible to be OCVs under section 21(1)(d) of the Act, in the same way as DCJ employees, as these agencies have regulatory responsibilities in relation to disability services and the NDIS. Historically, OCVs could not be employees of DCJ (and preceding agencies) as OCVs visited services that were being operated by the then Ageing, Disability and Home Care, Department of Family and Community Services and Juvenile Justice. I do not consider there is a case for including NDIA and NDIS employees under section 21(1)(d), as the same conflict of interest issues do not arise for persons employed by these agencies, since they do not operate or run such services, but are regulators.

However, I do consider there would be a conflict of interest if providers or employees of visitable services, or those with interests in visitable services, were to be OCVs. Although this was not the subject of consultation and there was no submission made regarding this issue, the Government may wish to clarify this in the Act.

The OCVs submitted that the legislative limitation under section 21(3) of two consecutive three-year terms is short sighted in terms of retaining OCVs who are experienced and performing well in the role. For OCVs who have a proven track record of fulfilling the requirements of the role, it was suggested consideration could be given to an ongoing appointment, or at least the option of a third and perhaps a fourth term. OCVs in other jurisdictions are also appointed for three-year terms, but

⁵ *Public Guardian Act 2014* (Qld), section 49A and *Public Guardian Regulation 2014* (Qld), clause 4.

only Victoria, South Australia and Northern Territory allow a second term, while ACT and Queensland do not allow re-appointment. The ADC emphasised the importance of limited terms of appointment for addressing bias, burnout and vicarious trauma. I share these concerns and note that the longer the appointment of an OCV, the greater the risk OCVs become overly familiar with the providers they visit and may be captured by the interests it is their role to monitor.

Submissions generally supported, or did not object to, NSW OCVs aligning with a nationally consistent Community Visitors Scheme. This is a matter of government policy, and no legislative change is required.

Several submissions strongly disagreed with the inclusion of volunteer OCVs in NSW. OCVs emphasised that any move to incorporate volunteers as OCVs into the NSW OCV Scheme would be a retrograde step in terms of safeguarding the human rights of the people OCVs visit. I agree and recommend no change to the Act regarding this aspect of the OCV scheme.

Recommendation 7

That the NSW Government not amend the Act to provide for volunteer OCVs.

Some stakeholders recommended including general boarding houses (with two or more people with disability, that are not registered as an assisted boarding house), non-accommodation disability services and other services where there is a high susceptibility to risk for people with disability, as visitable premises under the OCV scheme. I consider that this would expand the scheme very considerably, perhaps unsustainably, and would have significant resource implications. I do not recommend such an expansion.

2.6 Annual reports and special reports

Part 5 outlines the reporting obligations of the Commissioner. Stakeholders generally consider the matters the Commissioner is required to include in annual reports under section 25 are appropriate. I agree and recommend no change to this provision.

One stakeholder recommended that the Act require the Commissioner to include in annual reports the strategies carried out to address the factors giving rise to issues brought to the ADC. It also suggested that the Act could require the Commissioner to regularly review and update the annual report content. These matters can be addressed by the ADC, without legislative change.

Most stakeholders agreed the Commissioner should be required to continue reporting on the outcome of each referral under section 25(3). One stakeholder noted that referring matters to other appropriate agencies and following up on outcomes of those referrals is an important strand of the ADC's core business and the data on outcomes should be included in the annual report so it is in the public domain.

However, the ADC and the NSW Trustee and Public Guardian did not agree, due to the administrative burden of following up all referrals, and another stakeholder suggested refining the parameters for reporting on referral outcomes in relation to the outcome of the report, to alleviate the administrative burden on the ADC.

Despite the administrative burden on the ADC of outcome reporting on referrals, I consider this to be an important function of the Commissioner, based on section 12(1)(a) of the Act. Since this report recommends that the Commissioner's referrals should be discretionary rather than mandatory, the Commissioner will presumably focus on referring those matters considered sufficiently serious to warrant further investigation and it is appropriate that the ADC monitor any outcomes of those referrals, consistent with the Commissioner's other functions under section 12, including to take *further* action and to inquire into and report on systemic issues. Noting the strong stakeholder support for this requirement, I do not recommend any change to section 25(3).

As a drafting matter, there does seem to be some overlap between the requirement in section 25(3) that the annual report contain information about the number and outcome of section 13 referrals,

and the requirement in section 25(4)(b) that the annual report include information on the number of referrals made elsewhere and to whom, although the latter may be intended to cover referrals to independent advocacy services under section 12(1)(d). The Government may wish to clarify this drafting matter when amending the Act.

The ADC suggested that section 26 be repealed since the ADC has fulfilled the reporting requirement about disability advocacy in 2019. I agree and recommend this section be repealed as it is spent.

Recommendation 8

That the NSW Government repeal section 26 as a spent provision.

2.7 Miscellaneous

Part 6 of the Act sets up an Ageing and Disability Advisory Board to advise the Commissioner on any matter related to adults with disability and older adults that it considers appropriate or that the Commissioner refers to it. Section 29 provides that the Minister must ensure that the Board reflects the diversity of the community and is framed as including the following groups:

- two or more persons with disability,
- a representative of independent specialist advocacy, information and representative organisations for people with disability in New South Wales,
- a representative of independent specialist advocacy, information and representative organisations for older adults in New South Wales,
- one or more persons representing persons employed in the provision of disability services or services for older adults.

Submissions generally agreed that the role and membership of the Ageing and Disability Advisory Board is appropriate and sufficient but also suggested adding representation of:

- a. older persons
- b. specific communities such as First Nations people, CALD and LGBTQIA+
- c. a director with knowledge and expertise about mental illness and psychosocial disability related to older people
- d. the Hunter Valley
- e. those with lived experience of neglect and abuse.

It is appropriate that the Ageing and Disability Advisory Board should include two or more persons who are older people (as it already requires two or more persons with disability). Otherwise, section 29 already requires that the Board reflect the diversity of the community. Since 'older adult' is defined in the Act to mean a person aged (a) 50 years or over, in the case of an Aboriginal or Torres Strait Islander person, or (b) 65 years or over, in any other case, it may be appropriate that one of the two persons who are older people should be Aboriginal or Torres Strait Islander. However, this may be overly prescriptive or difficult to satisfy, given the size of the two sub-cohorts within this group (there are roughly 55,000 Aboriginal and Torres Strait Islander persons over 50 in NSW, compared to roughly 1.4 million other persons over 65 in NSW). Otherwise, I do not consider more prescriptive language is required to ensure specific groups of people are represented.

Section 29(9) allows the Commissioner to 'remove an appointed member from the Board at any time' and requires the Commissioner to 'provide a report on the removal to the Presiding Officer of each House of Parliament'. The ADC suggested that this be amended to clarify that the requirement for the Commissioner to provide a report to the Presiding Officer of each House of Parliament on the removal of a Board member be made via the annual report given under section 29(4) (rather than

necessitating a separate report). I do not consider this appropriate. The phrasing of section 29(9), linking the ability to remove ‘at any time’ with the requirement to provide the report to Parliament, suggests Parliament intended a temporal connection between the power and the report that I consider apt. Given the Commissioner is currently responsible for appointment of Board members as well as removals, for a Board whose function is to advise the Commissioner, this amendment has the potential to detract parliamentary scrutiny from board removals and, if the Commissioner is to retain the power of removal, I do not recommend any change to the reporting requirement.

More generally, I consider that it is anomalous that the Minister has responsibility under section 29(4) to ensure the diversity of the membership of the Ageing and Disability Advisory Board, while the Commissioner is responsible for a range of other matters under section 29 including determining appointments, removals, fees and allowances. This is inconsistent with appointment and remuneration processes of similar advisory boards such as the Carers Advisory Council, the Disability Council and the Mental Health Community Advisory Council⁶ .

Accordingly, I recommend that the NSW Government consider amending section 29 to address the inherent inconsistencies within the provision, and to align it with appointment and remuneration provisions of other similar advisory boards.

Recommendation 9

That the NSW Government amend the Act to require the Ageing and Disability Advisory Board to include two or more persons who are older people.

Recommendation 10

That the NSW Government amend the Act to address the internal inconsistencies within section 29 between the responsibilities of the Minister and the Commissioner regarding membership of the Ageing and Disability Advisory Board, and to align it with appointment and remuneration provisions of other similar advisory boards.

Some stakeholders proposed that the ADC should have oversight by a Joint Parliamentary Committee with similar functions as those operating for similar organisations. For example, the Ombudsman is monitored and reviewed by a Joint Committee known as the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, the Health Care Complaints Commission is reviewed by the Standing Committee on Health Care Complaints Commission and the Children’s Guardian is monitored and reviewed by the Standing Committee on Children and Young People. Such a committee would give the ADC a higher public profile and allow for the emergence of a bipartisan group of well-informed champions and advocates for adults and young people with a disability at parliamentary level.

I agree that there is a case for a Parliamentary Committee to have oversight of the ADC. Whether this should be a dedicated committee or an existing one is a matter for Parliament.

⁶ Carers Advisory Council members are appointed by the Minister under section 11 of the *Carers (Recognition) Act 2010*, and Minister may determine term and remuneration of members paid according to the *Classification and Remuneration Framework for NSW Government Boards and Committees* as outlined in Premier’s Memorandum (NSW Government framework); Disability Council members are appointed by the Governor under section 16 of the *Disability Inclusion Act 2014*, and paid by Minister according to NSW framework; Mental Health Community Advisory Council members are appointed by the Minister on recommendation of the Mental Health Commission under section 10 of the *Mental Health Commission Act 2012* and fees and allowances as the Minister for Mental Health may determine consistent with NSW Government framework.

Recommendation 11

That the NSW Government amend the Act to appoint or designate a Parliamentary Committee to monitor and review the functions of the ADC.

3 Other issues raised by stakeholders outside the scope of review

3.1 Funding and public profile of the ADC

Several submissions have called for appropriate funding of the ADC and the OCV scheme as a matter of priority. These stakeholders submit that sustainable resourcing of the Commissioner at an appropriate level is critical, particularly to ensure that persons attempting to make a report may do so without delay, but also to support the Commissioner's reporting functions.

Some submissions and focus group participants suggested raising the public profile of the ADC as, it is said, many people are unaware of its work, especially people with disability and older people. Stakeholders suggested a formal public launch of the ADC (an opportunity which may have been lost across the pandemic), and a targeted campaign on elder abuse and the abuse of people with disability, coupled with promotion of the Commission's role across a variety of channels, including TV, Radio, internet, and other forms of media, would increase community awareness of the Commission and enhance its overall effectiveness.

Appendix: Consultation

Submissions to the Review

- Settlement Services International
- Law Society of NSW
- Physical Disability Council of NSW & Family Advocacy
- Council for Intellectual Disability
- Carers NSW
- NSW OCVs
- Combined Pensioners & Superannuants Association (CPSA)
- Speech Pathology Australia
- Ageing and Disability Commission (ADC)
- NSW Carers Advisory Council
- NSW Public Guardian & NSW Public Trustee
- NSW Ministerial Advisory Council on Ageing (MACA)
- People with Disability Australia (PWDA)
- Multicultural NSW
- Disability Council of NSW
- NSW Police Force
- Mental Health Coordinating Council
- Five anonymous online surveys

Reports on focus groups

- Report from Physical Disability Council of NSW from focus groups with people with physical disability
- Report from Council on Intellectual Disability from consultation with people with lived experience with intellectual disability
- Report from Council on the Ageing from focus groups with older people

