

NSW AGEING AND DISABILITY COMMISSION

SUBMISSION TO THE INDEPENDENT REVIEW OF THE
AGEING AND DISABILITY COMMISSIONER ACT 2019

December 2022

The Ageing and Disability Commission (ADC) welcomes the opportunity to make a submission to the independent review of the *Ageing and Disability Commissioner Act 2019*. While we are still at a relatively early point in our operation, the past three and a half years have enabled us to identify aspects of the legislation that are appropriate for securing the objectives of the Act, and areas that could be strengthened or improved.

Please note that information on the operation and performance of the ADC in implementing the Act can be found in the ADC annual reports and OCV scheme annual reports, located on [our website](#). The [ADC dashboard](#) also provides quarterly and annual data on calls, enquiries and reports to the ADC.

We would appreciate the opportunity to discuss our submission with you. We recognise that there are some areas in which you may want further details or clarification (such as in relation to conciliation and enforceable undertakings), and would be happy to elucidate in a meeting.

Part 1 – Preliminary

Objects (section 4(1))

The ADC considers that the objects are still valid, and the rights-based approach and focus on abuse, neglect and exploitation remain appropriate.

However, given the focus on adults, there is a question as to whether the notion of ‘protection’ is the right framing for the legislation (as distinct from child protection). More contemporary framing of matters relating to the prevention and response to abuse, neglect and exploitation of adults with disability and older people (and, in some jurisdictions, ‘vulnerable’ adults), refers to ‘safeguarding’ rather than protection. There may be benefit in considering whether to amend section 4(1)(b) to replace ‘protect’ with ‘safeguard’.

Principles (section 4(2))

Overall, the ADC considers that the principles are appropriate. However, there would be merit in including a principle that specifically refers to the right of adults with disability and older adults to make their own decisions, and to receive support to make decisions when needed. While it may be intended to be captured under section 4(2)(d) in relation to the right to exercise choice and control, there would be merit in explicitly referring to decision-making and support. We suggest including similar text to section 4(5) of the *Disability Inclusion Act 2014*:

- Adults with disability and older adults have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so, and to be supported in making those decisions if they want or require support.

In this regard, the ADC notes that one of the consistent themes identified through its handling of reports over the past three years has been the failure of external parties (including families and service providers) to adequately recognise and uphold the right of the adult with disability or older person to make their own decisions, and to receive support to do so when needed. At times, this has included service providers that have perpetuated the abuse of the adult with disability or older person by defaulting to the direction and decisions of the subject of allegation (typically a family member or spouse), despite the adult having the ability to make their own decisions/ indicate their own will and preference.

Wishes of the adult (section 4(4))

The inclusion of section 4(4) in the principles of the Act has been important in the work of the ADC. However, we note that contemporary approaches in relation to adult decision-making focus on ‘will and preference’.

Notwithstanding the fact that the Act does not refer to ‘will and preference’, in practice the ADC focuses on understanding the will and preference of the adult, and we regularly report on the proportion of reports in which we have ascertained and/or upheld the adult’s will and preference. To bring the legislation more in line with contemporary approaches and the current practice of the ADC, we consider there would be merit in amending section 4(4) to state that parties must have regard to the will and preference of the adult.

Part 2 – Appointment of Commissioner

The ADC considers that the provisions relating to the appointment process and status of the Commissioner are appropriate.

Part 3 – Functions of Commissioner

Division 1 – General functions

Functions (section 12)

In our view, the functions of the Commissioner are generally suitable to achieve the objectives of the Act, and communicate the breadth of the work of the ADC – incorporating activities to enable change and improvements at individual, community and systemic levels. However, there are a few areas that we believe warrant consideration for inclusion:

Monitoring, assessing and reporting on national plans

Section 12(1)(h) provides for the ADC to monitor, assess and report on the NSW implementation of the National Disability Strategy (NDS). This strategy was a 10-year plan, covering 2010-2020. The NDS was replaced in 2021 by a new 10-year plan, titled Australia’s Disability Strategy (ADS). Out of an abundance of caution, there may be merit in amending the Act to refer to the ADS instead of the NDS, or to identify in the definitions in section 3 that references to the NDS also refer to the ADS and any subsequent equivalent national strategy.

Noting that the ADC has the dual focus cohorts of adults with disability and older people, there may be benefit in considering the inclusion in the Act of a similar function in relation to the National Plan to Respond to the Abuse of Older Australians. That is, to monitor, assess and report on the NSW implementation of the national plan. However, as the current national plan ends in 2023, it would be advisable for the function to apply to the next plan and any subsequent equivalent national plan.

Additional options for dealing with allegations and taking actions after investigations

The following two pages include information about ways in which the ADC does, or is looking to, respond to reports about abuse, neglect and exploitation of adults with disability and older people – including early case coordination; community supports; conciliation; and enforceable undertakings. There would be merit in considering whether sections 12(1)(a) or (b) should be amended to include these options.

Reports to the ADC (section 13)

Mandatory reporting

The Act does not currently mandate the reporting of matters to the ADC. At the time the Ageing and Disability Commissioner Bill 2019 was being debated in Parliament, consideration was given to whether reporting should be mandatory for certain parties, such as service providers. At the time, the decision was made not to include mandatory requirements to report to the ADC, and instead to provide time for the ADC to operate and to see whether such a requirement would be needed.

At this time, we do not support the introduction of any mandatory requirements for parties to report to the ADC. Reports to the ADC have increased each year since commencement, including a further 12 per cent increase in the last financial year. Reports by service providers have increased in response to our engagement activities and direct contact with the ADC in relation to reports. While service providers have consistently accounted for around two-thirds of the reports about adults with disability, they are increasingly also key reporters in relation to concerns about older people. In 2021/22, service providers overtook adult children as the main source of reports to the ADC about older people (29%).

The ADC anticipates that the number of reports will continue to grow, without mandatory reporting. There are many factors that will contribute to continued growth in reports to the ADC, including in response to the ADC's community education and awareness-raising functions; public campaigns about abuse (such as those promoting 1800ELDER Help); the growing number of adults with disability and older people in NSW; and heightened risk factors, including cost of living pressures, lack of affordable housing options, and inheritance impatience.

In a range of cases, the ADC has received reports from service providers (mainly disability providers) to fulfil what they believe to be their 'mandatory reporting' responsibilities. In some cases, this has been associated with providers recognising their responsibilities to report certain serious incidents to the NDIS Commission, and adding the ADC for any other matters. In other cases, the providers have been aware that there are no mandatory requirements to report to the ADC, but have added it as a compulsory step in their organisation's procedures in order to mitigate risk. In circumstances where the provider has already taken or is taking appropriate safeguarding actions with the adult to stop the abuse and prevent recurrence (including reporting to police in relevant matters), reporting to the ADC has resulted in duplication of effort and unnecessary additional work for the ADC and the reporting agency. In the past 18 months, the ADC has undertaken proactive outreach activities with these providers to ensure that there is a shared understanding of when to report to the ADC, and how we can best work together.

Actions the ADC can take in response to a report (section 13(5))

Section 13(5) provides that the ADC 'may do any one or more of the following in respect of a report –

- (a) conduct an investigation,
- (b) make a referral to another person or body,
- (c) decline to take action on the report.'

In practice, the ADC takes a broader range of actions in relation to reports. In particular:

- **Early case coordination and capability building activities with the adults and/or supporters** – e.g. regular engagement with the adult or service provider for up to 12 weeks to provide guidance and support to enable them to take appropriate actions to improve the adult's safety and stop the abuse.

- **Community supports** – working with the adult and others (as appropriate) to enhance/improve supports and safeguards for the adult; and undertake and coordinate activities to improve safety and support. A ‘community supports’ approach incorporates a lot of the work the ADC undertakes to safeguard the adult, including when the matter is unable to be investigated (e.g. where the adult does not consent to an investigation, but is happy for the ADC to take actions to facilitate or enhance supports; or to help address the support needs of the subject of allegation in order to stop the abuse). Actions as part of the community supports approach can include making applications to NCAT (this step is not only taken following an investigation).

Some of the above pathways can involve referrals (and potentially link to section 13(5)(b)); however, this is not always the case.

We appreciate why the focus in the legislation is on investigations and referrals. However, it does not adequately reflect the broader scope of the actions the ADC needs to take in response to reports, taking into account the will and preference (‘wishes’) of the adult. We recognise that section 35(2)(b) of the Act provides for the regulations to be able to make provisions for ‘the manner in which the Commissioner is to deal with a report’, which could enable the ADC to capture the above additional actions we take on reports. However, in our view there would be merit in considering whether section 13(5) should be broadened to more accurately reflect the necessary actions of the ADC in relation to reports.

We note that the recent independent review of the legislation governing the work of the Adult Safeguarding Unit (ASU) in South Australia found that the ASU ‘should have the flexibility to take the appropriate safeguarding response that is best tailored to the individual’s circumstance’,¹ and recommended amending the legislation to increase flexibility and better reflect the work of the ASU.²

In addition to early case coordination and community supports, the ADC considers that there are two further potential pathways for dealing with reports that there may be merit in including. Namely:

- **Conciliation** – involving the ADC helping the parties to the conciliation to endeavour to resolve matters raised in the report, including the ability to require a party to attend the conciliation. (The *Human Rights Commission Act 2005 [ACT]* provides an example of a relevant potential conciliation model).
- **Enforceable undertakings** – involving a written agreement between the ADC and a subject of allegation that outlines specific actions they will take to address matters raised in the report. Enforceable undertakings may form part of a conciliated outcome. There would be penalties for breaching the undertakings. Currently, in relevant matters the ADC reaches agreement with the subject of allegation about actions they will take, and may monitor compliance with the agreement. However, there are no penalties for breaching the agreement.

Referral of reports to complaint handling/ regulatory bodies (section 13(8))

The Act currently requires the ADC to refer reports to the Health Care Complaints Commission (HCCC), Aged Care Commission, NDIS Commission, and the Children’s Guardian where we are of the opinion that the report constitutes a complaint that may be made to those agencies (section 13(8)). There is no discretion in the Act for the ADC not to directly refer those matters to the relevant agency. This means that the ADC is having to make direct referrals of reports to the agencies, irrespective of the wishes of the reporter.

¹ South Australian Law Reform Institute (2022) ‘*Autonomy and Safeguarding are not Mutually Inconsistent*’: A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA), page xxviii.

² *Ibid*, page xxxvii.

In a range of cases, we make a warm referral via telephone while the reporter is on the line. However, if the reporter does not want a warm referral, or the agency is not available to pick up the call, the Helpline makes a written referral of all of the relevant information to the agency. Given the volume of calls and reports to the Helpline, the investment of time to prepare and send the written referrals, in circumstances in which the reporter has indicated they do not want the ADC to make the referral or are able to make the referral themselves, does not appear to be warranted.

More broadly, the ADC has a ‘no wrong door’ approach – if we receive a report that relates to matters that are under the jurisdiction of another agency and the reporter needs or would like assistance to get the matter to the right place, we do so. The difference with the agencies captured under section 13(8) is that there is no option to take into account and respect the wishes of the reporter.

We recognise that there are good reasons for the ADC to ensure that certain matters are referred to the listed agencies – in particular, information relating to high risk, and current or recent abuse. Amending the provision to ‘may refer’ instead of ‘must refer’ would still ensure that critical matters are referred by the ADC to the listed agencies, while providing some flexibility for the ADC not to be the direct referrer in lower-level matters where the reporter indicates a preference to separately contact the relevant agency. Pursuant to section 13(10), the ADC would still have the option to conduct an investigation into a report it has referred to the listed agencies if we are of the opinion that this may be necessary to protect an adult with disability or older person from abuse, neglect or exploitation.

Referral of reports to Police (section 13(9))

Section 13(9) of the Act requires that, if the ADC receives a report (or part thereof) that may provide evidence of the commission of a criminal offence, we **must** refer the report (or part) to NSW Police or the Director of Public Prosecutions (DPP).

Complying with this mandatory requirement has presented some difficulties for the ADC and for some of the adults with disability/ older people in the reports. In particular, it has resulted in matters being reported to police against the wishes of the adult, and duplication of effort for the ADC and police.

In this regard, we note that to comply with the legislative provision, the ADC refers information to NSW Police irrespective of whether:

- the adult with disability or older person has indicated that they do not want the matter to be reported to police
- NSW Police has already received a report about the alleged commission of the criminal offence and has all of the relevant information
- the alleged commission of the criminal offence relates to historical matters that have been previously dealt with by NSW Police
- the alleged criminal offence relates to relatively minor matters (such as a family member pushed the adult, causing no injury; a person threw an object at the adult such as a remote control, that did not hit them).

It is important to recognise that some adults with disability and older people and other parties are contacting the Helpline to obtain information, support and guidance to help inform their next steps. Knowing that the ADC will refer information to police regardless of the adult’s wishes works against the other aspects of the Act that are designed to encourage reporting, and acts to dissuade adults and others from contacting the Helpline to get the help they are seeking. We note that, for some adults, we have a small window to provide assistance – they are contacting us while they are in a safe position to do so, and at

a point that they are open to talking about their situation and getting help. A blanket requirement to refer information that *may* provide evidence of the commission of a criminal offence to police makes it more challenging to gain the trust of the adult, and reduces the likelihood that they will recontact us, or continue to engage with us.

In addition, in the experience of the ADC, referrals of lower level matters, or matters that police have previously received (without new information), does not receive a favourable response from police. The ADC is concerned that the cumulative impact of these mandatory referrals will result in police diminishing the importance of ADC referrals, and adversely affect the response to the more serious criminal matters.

It is worth noting that, pursuant to a Memorandum of Understanding between the ADC and NSW Police, certain officers in the ADC have had read-only access to the NSW Police Computerised Operational Policing System (COPS) since May 2021. In relation to referrals, access to COPS enables the ADC to identify whether police have already received the report and all relevant information, and the actions being taken by police in response to the report.

The mandatory referral to police in section 13(9) reflects the need to ensure that adults with disability and older people who are subject to, or at risk of, abuse, neglect and exploitation have access to justice, and that abuse of these cohorts is appropriately recognised as a crime. It is critical that the ADC ensures that relevant criminal allegations are reported to NSW Police. However, amending the legislation to state that the ADC ‘may refer’ instead of ‘must refer’ would provide some scope for informed ADC judgement and discretion about the matters we need to refer, and the timing of the referral.

Grounds to investigate without consent (section 13(11))

The Act appropriately requires the ADC to obtain the consent of the adult to conduct an investigation into an allegation of abuse, neglect and exploitation. Section 13(11) currently provides for the ADC to commence an investigation without the adult’s consent in two circumstances – where the ADC is of the opinion that:

- a) the adult is incapable of giving consent despite being provided with support to make the decision, or
- b) it is not necessary to obtain consent due to the seriousness of the allegation or the risk to their personal safety.

In practice, there are many cases in which the ADC is unable to have direct contact with the adult in order to seek their consent – typically because the subject of allegation is always with the adult and/or is blocking access. Where the ADC is able to form a view that the matter meets the criteria of section 13(11)(b), we can proceed with an investigation, and gain access to the adult. However, reports that primarily involve allegations of financial abuse (or some psychological abuse) do not always meet this criteria.

We note that the *Ageing and Adult Safeguarding Act 1995 [SA]* includes provision for the South Australian Adult Safeguarding Unit (ASU) to commence an investigation/ take action without first obtaining the consent of the adult if the ASU has not, after reasonable inquiries, been able to contact the adult. A similar provision in the ADC Act would enable the ADC to commence an investigation and ascertain the will and preference of the adult in matters where our attempts to be able to have direct (and safe) contact with them have been unsuccessful.

Exchange of information (section 14)

Scope of ‘relevant agency’ (section 14(8))

The exchange of information provisions under section 14 of the Act are very important to the ADC’s work in responding to reports. Section 14 information sharing arrangements are limited to ‘relevant agencies’. In the past year, the ADC expanded the range of public sector agencies that are listed in the Act or Regulation as a ‘relevant agency’ – this included the addition of some Commonwealth government agencies such as Services Australia.

However, the ADC had sought to include non-government organisations (such as aged care and disability providers), and private practitioners (such as private health practitioners, and financial and legal services), within the scope of a relevant agency, as they are the parties that are primarily involved with adults with disability and older people, and who the ADC relies on in our day-to-day work in responding to reports and addressing abuse. We were not able to bring them in as relevant agencies as we were advised by DCJ that this was not considered to be in the scope of ‘person or body’ in section 14(8)(f).

The limitation of ‘relevant agency’ to primarily public sector agencies does not accurately reflect the nature of the work of the ADC and the key parties that are able to provide a service, take action, and support the adults in reports to the ADC (consistent with section 14(1) of the Act). We are keen to resolve this issue as soon as possible, through legislative change or any other pathway that is identified in this review.

Broader information sharing provisions to promote safety

The NSW Ombudsman’s report to Parliament on abuse and neglect of vulnerable adults in 2018 included the recommendation that, as part of the establishment of the ADC, the NSW Government should ‘introduce legislative provisions to enable agencies that have responsibilities relating to the safety of vulnerable adults to be able to exchange information that promotes the safety of vulnerable adults.’³

While section 14 of the Act enables the ADC to share information with relevant agencies, this requires the ADC to be at the centre of the information exchange. In our view, it is vital that prescribed agencies are able to provide and receive information to promote and improve the safety of the adult at risk without the ADC having to facilitate all of the information exchange.

Given the focus is adults, we do not propose to have provisions that are as broad as Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (i.e. safety, welfare and wellbeing). We believe it should relate to the *safety* of adults with disability and older people.

In previous consultations on this with the disability sector by the Ombudsman’s office, there was strong support for information sharing arrangements that focus on safety. In recent consultations by the ADC with key aged care providers/peak agencies, there was also strong support for information sharing provisions.

The ADC previously raised this issue with DCJ and was advised that the Act places a high importance on the consent of the adult where that is possible, and permissive information sharing that is not centred around the consent of the individual is a departure from that policy position.

³ NSW Ombudsman (2018) *Abuse and neglect of vulnerable adults in NSW – the need for action*, page 4 (see also pp32-33).

We note that section 43 of the *Ageing and Adult Safeguarding Act 1995 [SA]* 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.

The importance of information sharing provisions for prescribed agencies in relation to abuse, neglect and exploitation of 'at-risk adults' has also been highlighted in recent reports on adult safeguarding in Queensland and Victoria, including:

- The Queensland Public Advocate has recommended a legislative provision, modelled on that in South Australia, to enable certain prescribed agencies 'to provide personal information about at-risk adults to other prescribed agencies in circumstances where the provider of the information reasonably believes that the information will assist the recipient:
 - to exercise an official function concerning the safety or wellbeing of an at-risk adult; or
 - to address a concern about the safety or wellbeing of an at-risk adult that has arisen in the course of the provision of services to the adult.'⁴
- The Victorian Public Advocate has noted that privacy obligations are generally poorly understood and 'may have the unintended consequence of inhibiting information-sharing'.⁵ 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 Public Advocate noted that there is a lack of certainty about whether it encompasses financial harm.

Division 2 – Investigations and public inquiries

Overall, the investigation and public inquiry powers are appropriate and sufficient to achieve the objectives of the Act.

While the ADC has not yet had to apply for or execute a search warrant, this is because to date we have employed alternative options for gaining direct access to the adult with disability or older person, and identifying their need for health or medical intervention. These options have included using section 16 notices to require the attendance of the adult (and the subject of allegation where appropriate) to attend a meeting with us or another party, such as a medical practitioner; and calling for an ambulance to attend the adult's home to assess their need for medical intervention or treatment. We recognise that entering the premises where the adult is located under a search warrant is likely to be distressing for them and others; if we can achieve the necessary outcome through less intrusive means we prefer to do so.

However, there continues to be a need for the ADC to have the power to apply for and execute a search warrant in relevant cases. There have been a couple of matters in which we have been about to take this step when another option proved to be successful; there will be a need to use these powers in the near future. We note that the fact that we have these powers can also be an effective tool to gain the compliance of the subject of allegation through less intrusive means.

⁴ Queensland Public Advocate (2022) *Adult Safeguarding in Queensland, Volume 2: Reform recommendations*, p43.

⁵ Office of the Public Advocate (2022) *Gaps in Victoria's safeguards for at-risk adults*, page 58.

Part 4 – Official Community Visitors

Appointment of Official Community Visitors (section 21)

Commitment to relevant objects and principles (section 21(1)(b))

In light of the rights-based focus of the OCV scheme and the ADC Act, and the fact that the majority of the visitable services provide support to people with disability, there is merit in considering whether one of the requirements to be an OCV should be a commitment to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). We appreciate that one of the objects of the *Disability Inclusion Act 2014* (listed at section 21(1)(b)(iv)) is support for the purposes and principles of the UNCRPD. However, given the importance of the UNCRPD, there may be benefit in specifically referring to it as part of the criteria for appointment.

Other employment (section 21(1)(d))

Section 21(1)(d) of the Act identifies that an OCV cannot be employed within DCJ. This is to ensure the independence of OCVs and to avoid actual or perceived conflicts of interest, noting that DCJ plays a regulatory role in relation to assisted boarding houses in NSW. However, the sole focus on DCJ fails to recognise that other agencies have regulatory responsibilities in relation to disability services and the NDIS – namely, the NDIS Quality and Safeguards Commission and the National Disability Insurance Agency. In our view, individuals employed by either agency should also be ineligible to be an OCV.

Terms of appointment (sections 21(2) and (3))

The Act provides for OCVs to be appointed for no more than six years (two consecutive three-year terms). The limited terms of appointment is important – among other things, it reduces the likelihood of regulatory capture and/or bias of OCVs; and reduces the likelihood that OCVs will experience burn-out.

The above situations are not hypothetical; the OCV scheme has experienced OCVs who have (particularly towards the end of their second term):

- become biased in favour of or against providers of their allocated visitable services
- become desensitised to the issues and fail to recognise critical matters that need to be brought to the attention of the ADC and/or relevant regulators
- experienced vicarious trauma and become increasingly distressed in their visiting and discussions about the work.

The ADC has put in place strategies to mitigate the risks of the above, including spot-checks of visit reports, and funded support for OCVs (including regular clinical supervision for OCVs visiting out-of-home care settings). However, the limited terms of appointment is an essential tool for managing the risks to OCVs and the scheme.

It is important to note that the limited terms of appointment does not preclude OCVs from returning to the scheme after a break. Our policy is to require an OCV to have at least 12 months out of the scheme before they seek to return. We have had a number of OCVs who have completed two consecutive three-year terms, had a break, and then returned for another six years (and repeated this pattern). The breaks from the scheme have been a critical factor in the success of these OCVs.

In our experience, longer or ongoing terms of appointment would not be conducive to effective visiting practice, and would increase the risks to OCVs and the scheme.

Management and removal of OCVs (sections 21(5) and (6); section 23)

A key difficulty consistently experienced by the agencies administering the OCV scheme relates to managing the performance of OCVs. The legislation provides for the administering agency to have a 'general oversight and coordination' role in relation to OCVs, and to recommend their removal from office 'for incompetence, incapacity or misbehaviour'. However, it has never been clear the extent to which the coordinating agency can manage the performance of OCVs. Historically, the independence of OCVs and their ministerial appointment has meant that the administering agencies have taken a soft approach to addressing quality and performance issues.

In the history of the scheme, the administering agencies have acted in relation to potential or alleged misconduct, and it is clear how this feeds into a potential recommendation to remove an OCV from office (in relation to 'misbehaviour'). However, where the issues relate to poor quality visiting practice (such as consistently undertaking very short visits; failing to identify issues; raising only minor issues; or submitting poorly written visit reports), it is not clear:

- a) how directive the administering agency can be; or
- b) what is encompassed in the scope of 'incompetence' to enable their potential removal.

From our discussions with the Principal Visitor of the NSW Mental Health Official Visitor scheme, it is evident that they have a different approach. They are more directive with their Visitors regarding sub-par quality and practice, and they performance manage the OVs. This appears to be supported by their legislation, as Part 3 of the *Mental Health Act 2007* provides for the Principal Visitor to have a broader range of functions in relation to the OVs.

The OCV scheme has always been financially lean. To better enable us to make the best use of scant resources, we believe there is a need for the Act to strengthen the ADC's authority to manage the performance of OCVs and to clarify the grounds for their removal.

Functions of Official Community Visitors (section 22)

Information sharing

The NDIS Commission and DCJ are key regulatory agencies for disability services and assisted boarding houses respectively. Currently, OCVs can refer grievances or concerns affecting persons using visitable services to the NDIS Commission and DCJ as 'other appropriate bodies' under section 22(1)(i) of the Act, 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.

In our experience, there is a need to amend sections 22(1)(d) and (e) of the Act to add the NDIS Commission and the Secretary of DCJ as specific parties OCVs can provide 'advice or information relating to the conduct of the premises', and inform 'on matters affecting the welfare, interests and conditions of persons using visitable services'.

Receiving information about visitable disability services

A large volume of new services have become registered providers of supported independent living (SIL) supports under the NDIS. Currently, the OCV scheme does not have a mechanism to obtain regular information about new providers (or new outlets) that may be visitable services. The NDIS Commission knows the service providers but does not have details of their outlets; the NDIA knows the locations of participants but does not necessarily know the providers.

In Queensland, section 49A of the *Public Guardian Act 2014 [Qld]* requires relevant registered NDIS providers to give the Public Guardian ‘required information’ (comprising the provider’s name, contact details, and address of each visitable site). There are penalties for non-compliance.

In our experience, there is a need to include in the Act a similar provision (and penalty) to that in the Queensland legislation, to require NDIS providers registered to provide SIL supports to notify the ADC of any new/changes to visitable services they operate.

Alignment of Community Visitor Schemes

The ADC does not object to the proposal to amend the Act to provide flexibility for the alignment of the NSW OCV scheme with a nationally consistent Community Visitor Scheme for the NDIS that may be agreed in the future. However, we note that:

- The OCV scheme in the Act is not confined to NDIS funded accommodation. While some assisted boarding houses receive some NDIS funds, this is not the case for all, and not all residents are NDIS participants. The ADC would not support amendments to the Act that would result in weakened safeguards for people living in assisted boarding houses, such as no longer being covered by the OCV scheme (or equivalent).
- It is not clear why there is a particular focus on volunteer Visitors. In the ADC’s recent review of CV schemes across Australia, we identified that most of the existing schemes are paid schemes (NSW, Queensland, ACT and Northern Territory), and the States operating volunteer schemes (SA and Victoria) have higher operating costs than the NSW OCV scheme, associated with the larger number of paid personnel required to manage the scheme and support the volunteer Visitors. All of the CV schemes pay their Visitors in some way, including the volunteer schemes, which pay at least an annual honorarium.

Part 5 – Annual reports and special reports

Reporting on referrals (section 25)

Section 25(3) of the Act requires the ADC to report on the outcome of our referrals – this includes our mandatory referrals and all other referrals. While this may be designed to provide some transparency as to the agencies/parties the ADC is making referrals to, and the effectiveness of those referrals/agencies, this is not achieved in practice.

Reporting on the outcome of referrals has required the ADC to implement individual arrangements with the mandatory referral agencies to obtain this information on a regular basis. It is a significant amount of additional work for the ADC and those agencies on an ongoing basis, for no readily identifiable benefit.

In practice, the ADC tracks the outcomes of referrals in relevant matters and with particular agencies because it is necessary for our handling of the report and our work – such as referrals to NSW Police.

In the ADC’s view, section 25(3) of the Act should be amended to remove the requirement to report each year on the outcome of each referral made under section 13.

Report about disability advocacy (section 26)

Section 26 of the Act pertains to a requirement on the ADC to prepare and provide a report on the funding arrangements for disability advocacy services in NSW by 31 December 2019. The ADC fulfilled this requirement in 2019. This section could now be repealed.

Part 6 – Miscellaneous

Ageing and Disability Advisory Board (section 29)

Section 29(9) of the Act enables the Commissioner to remove an appointed member from the Board at any time ‘and must provide a report on the removal to the Presiding Officer of each House of Parliament.’ Section 25(4)(d) requires the ADC’s annual report to include ‘if a Board member has been removed under section 29(9) during the reporting period, the reasons for removing the member.’

It is not clear whether the requirement for the Commissioner to provide a report on the removal of a Board member to the Presiding Officer of each House of Parliament is just referring to the annual reporting requirement, or necessitates a separate report. It would be helpful to amend section 29(9) to clarify that the reporting requirement is via the annual report.

Other matters

Joint Parliamentary Committee

The ADC reports directly to NSW Parliament, but does not currently have any oversight by a Parliamentary Committee. While we are a small agency, we consider that there would be merit in the accountability afforded by a standing Joint Parliamentary Committee. Part 7 of the *Advocate for Children and Young People Act 2014* provides a useful guide for a potential equivalent provision in our Act.

Authorisation of restrictive practices

The NDIS Quality and Safeguarding Framework stipulates that states and territories are responsible for the authorisation of restrictive practices used by registered NDIS providers. This principle is reflected in the Bilateral Agreement between the Commonwealth and New South Wales on the National Disability Insurance Scheme, which states that NSW is responsible for policy and any related legislation, the authorisation and consent arrangements for restrictive practices in NSW.

Currently, this function is performed by DCJ (Housing, Disability and District Services) and is based on two policy documents – the NSW Restrictive Practices Authorisation Policy and NSW Restrictive Practices Authorisation Procedural Guide.

The draft Persons with Disability (Regulation of Restrictive Practices) Bill 2022 provides for the regulation of the authorisation of restrictive practices by NDIS providers in NSW, with oversight by the Ageing and Disability Commission (ADC). The Central Restrictive Practices Team (CRPT) in DCJ has been co-located with the ADC since 2020, to support transition planning ahead of the introduction of the Bill. However, the Bill has not been introduced to Parliament, and there is no current schedule to do so.

DCJ Legal has previously advised that, while the powers of the ADC are broad and could be said to cover monitoring and regulating the use of restrictive practices by NDIS providers, the ADC could not currently exercise these functions in relation to children and young people as the powers of the ADC apply only to adults.

The current arrangements are unsatisfactory. Among other things, they prevent the ADC from undertaking key activities that would support service improvement and action on issues relating to restrictive practices in NSW. In particular, the current situation:

- prevents the ADC from making necessary structural changes to best support the work of the CRPT and the ADC

- does not enable the ADC to identify and act on common issues arising in relation to registered NDIS providers through both the RPA function and Official Community Visitor (OCV) scheme
- does not enable the ADC to best use information holdings in relation to the use of restrictive practices in NSW amassed through the RPA function, the OCV scheme and reports to the ADC, to inform and influence activities to reduce and eliminate the use of these practices.

Against this background, the ADC considers that there would be merit in amending the Act to enable the ADC to take over responsibility for the interim restrictive practices authorisation (RPA) model from DCJ, pending introduction of a Bill and commencement of associated legislation.

It would be important to ensure that any extension to the scope of the Act to include children and young people with disability does not include the functions of the ADC in relation to dealing with allegations of abuse, neglect and exploitation (sections 12(1)(a) and (b)). This would duplicate the child protection responsibilities of DCJ and other parties under the *Children and Young Persons (Care and Protection) Act 1998*.

Resourcing of the ADC and OCV scheme

The existing recurrent budgets of the ADC and OCV scheme are insufficient to meet current and increasing demand, and present ongoing sustainability issues and significant risks to the ability of the ADC and OCVs to meet their legislated functions.

ADC

The original budget proposed by DCJ for the ADC was \$29m over four years, and represented the minimum required for establishment and operation. However, ahead of the start of the ADC, the final approved budget was reduced to an annual budget of \$3.2m (\$13.9m over four years).

To support the ADC to undertake its legislated obligations, the then Minister requested and approved the provision of additional funding by DCJ to the ADC in 2019/20 (\$500k) and in 2020/21, 2021/22, 2022/23 (\$1m p.a.). This viability supplementation ceases at the end of this financial year.

Since the original provision of additional grant funds in 2019/20, demand has continued to grow – including a 73% increase in statutory reports – but the financial viability of the ADC remains unresolved.

Expenditure Review Committee budget bids by the ADC have been unsuccessful to date. A Demand Funding Model (DFM) has been developed to calculate the necessary funding required by the ADC to mitigate significant financial, community and reputational risks from the expected future growth. A DFM was required as:

- demand for ADC services has continued to increase at rate that was not originally costed
- the ADC's forward budget position is unsustainable, and is facing a fiscal cliff when time-limited DCJ grant funding expires at the end of 2022/23
- efficiencies achieved by ADC are not fully recognised by Treasury as the benefit is swamped by demand growth.

In 2021, the then Minister's office confirmed its support for the DFM for the forward budgets of both the ADC and the OCV scheme. Despite increasing reports and caseloads being dealt with by the ADC evidenced in the demand funding model, no budget

enhancements were granted. Based on the demand funding model for the ADC's operations (excluding the OCV scheme) there will be a budget shortfall for forward years: 2023/24 – \$2m, 2024/25 – \$2.3m, 2025/26 – \$2.6m.

The ADC will be unable to fulfil its statutory obligations from 1 July 2023 without incurring sustained and increasing deficits. The ADC's ability to safeguard vulnerable adults will be significantly compromised.

OCV scheme

The OCV scheme has urgent sustainability problems that need to be addressed. In the last financial year, the recurrent OCV scheme budget was at its lowest since 2012/13, and restricted the allocation of OCVs to 49% of all visitable services, instead of the minimum responsible allocation of 80% of visitable services (comprising 100% of visitable out-of-home care (OOHC) services and assisted boarding houses, and 80% of disability supported accommodation services). The 49% allocation of visitable services in 2021/22 represented the lowest allocation rate for at least 12 years, and involved the allocation of 70% of residential OOHC services, and 49% of disability supported accommodation services.

The continuing reduced service allocation has been due to the combination of a reduction to the recurrent budget as a result of efficiency dividends, together with an increasing and continuing growth in the number of visitable services across NSW:

- The OCV scheme was transferred from the NSW Ombudsman's office to the ADC in 2019/20 with a budget deficit. The Ombudsman's office applied efficiency dividends for 2019/20 and forward years across all of its program areas, including the frontline OCV budget. The NSW Ombudsman passed on budget savings in perpetuity, which significantly reduced the OCV scheme budget.
- Since 2012/13, there has been a 68% increase in the number of visitable services in NSW – increasing from 1,424 visitable services in 2012/13 to 2,394 visitable services in 2021/22. On average, the number of visitable services has increased by 5%, mainly associated with a steady increase in the number of disability supported accommodation locations, as well as a smaller increase in residential OOHC locations.

In November 2021, the then Minister wrote to the ADC confirming support for an OCV remuneration increase, following a review of the OCV scheme, to reflect contemporary practice of a seven-hour work day applied to the published daily rate. This reflected a new hourly rate of \$34.14 (a 14.3% increase in the hourly rate). A one-off grant of \$400k was provided by DCJ in mid-2021/22 to support the increased remuneration and increase visiting. The OCV scheme has not received an increase in its recurrent budget to support the increased remuneration or growth in demand.

The ADC's Expenditure Review Committee budget bids (on behalf of the OCV scheme) have been unsuccessful to date. A Demand Funding Model has been developed to address future budget gaps for the OCV scheme as demand is increasing, and the way demand is serviced is out of the control of the scheme.

Based on the demand funding model prepared for the OCV scheme, there will be a budget shortfall for forward years: 2023/24 – \$0.6m, 2024/25 – \$0.7m, 2025/26 – \$0.8m. Without additional funding, the rate of allocation of visitable services will continue to fall, undermining the integrity of the OCV scheme, and compromising the wellbeing and safety of residents of disability services, assisted boarding houses and out-of-home care services.