

MACA NSW Review
Review of the Ageing and Disability
Commissioner Act 2019 (the Act)

Ref:

- *Ageing and Disability Commissioner Act 2019 No 7 [NSW] Current version for 23 June 2021 to date*
- *Independent review of the Ageing and Disability Commissioner Act Summary Paper (Communities & Justice)*

MACA NSW committee

- Margie O'Tarpey (chair s/committee)
- Kathryn Greiner: MACA NSW Chair
- Professor Tracey McDonald and Joanna Maxwell

Preamble

The NSW Government has asked Mr Alan Cameron AO to independently review the Ageing and Disability Commissioner Act 2019 (the Act).

The Review is focused on the Act not the overall role and function of the Commissioner and the Commission.

The Committee noted there will be some interplay given the Act's intention and specificity on Objects, Functions and Powers of the Commissioner and the Commission.

It was noted that the Committee is reviewing this in their capacity as MACA NSW Members (not as lawyers or other specialists).

The importance of consulting consumers and those with lived experience in the Act review was highlighted.

It was noted the Commissioner has jurisdiction over people over 55 living at home or in boarding houses. The jurisdiction does not extend to those in Aged Care services as it has its own quality assurance processes.

It was noted that State & Federal jurisdictions need to work more closely with the Commissioner, working across jurisdictions

1. OBJECTS & PRINCIPLES.

These are outlined in section 4 of the Act:

- (a) to protect and promote the rights of adults with disability and older adults, and*
- (b) to protect adults with disability and older adults from abuse, neglect and exploitation.*
- (2) When exercising a function under this Act, the Commissioner or any other person must have regard to the objects of the Act and the following principles—*
 - (a) adults with disability and older adults have the right to respect for their worth and dignity as individuals and to live free from abuse, neglect and exploitation,*

- (b) adults with disability and older adults have the right to respect for their cultural and linguistic diversity, age, gender, sexual orientation and religious beliefs,
- (c) adults with disability and older adults have the right to privacy and confidentiality,
- (d) adults with disability and older adults have the right to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports and services,
- (e) families, carers and other significant persons have a crucial role in the lives of adults with disability and older adults and it is important to respect and preserve those relationships.
- (3) When exercising a function under this Act, the Commissioner or any other person must have regard to the following—
- (a) adults with disability and older adults may face multiple disadvantages and are potentially more vulnerable to abuse, neglect and exploitation,
- (b) a person from any of the following groups who is also an adult with disability or older adult may face additional disadvantages and barriers to accessing supports and services—
- (i) women,
- (ii) Aboriginal and Torres Strait Islander adults,
- (iii) gay, lesbian, bisexual, transgender and intersex communities,
- (iv) adults from culturally and linguistically diverse backgrounds,
- (v) adults living in regional and remote areas.
- (4) When exercising a function under this Act with respect to a particular adult with disability or older adult, the Commissioner or any other person must have regard to the wishes of the adult.
- (5) This section is intended to give guidance in the administration of this Act and does not create, or confer on any person, any right or entitlement enforceable at law.

Q1&2

Are the objects outlined in section 4 of the Act still valid? What changes, if any, should be made? What do you think about the principles? Are they appropriate for older adults and adults with disability?

MACA Response:

Overall the Committee is of the view that the Principles and Objects are valid and appropriate.

Additional comments:

- **Rights:** (a) to protect and promote **the rights** of adults with disability and older adults.

The Act may need to be take a Human Rights based approach. The Act may need to more clearly articulate, define or provide an explanatory note on Rights.

However it was noted that International covenants are only principles (unless legislated); rights have remedies and should not be overly prescriptive. It would be unusual for legislation to spell out these rights - the general idea is that if you have a right, the Commissioner can protect and promote it. Once they spell it out there is a risk new rights or ones that are missed are not covered.

- **Discrimination.** (3(a)) adults with disability and older adults may face multiple disadvantages and are potentially more vulnerable to **abuse, neglect and exploitation**

Discrimination should be added to subclause 3. For example, in relation to systematic discrimination by doctors and hospital administrators re provision of services to people with disability and older patients who require longer stays in hospital to recover.

- **Relationships:** *(e) families, carers and other significant persons have a crucial role in the lives of adults with disability and older adults and it is important to respect and preserve those **relationships**.*

The Act may need to more clearly define relationships in terms of “**supportive relationships**”. The extension of 2(e) to identify supportive relationships relates to the potential of a case where an abuser/ relative may be involved.

The Committee noted that the Commission also provides counselling to families and carers.

PART 2 APPOINTMENT OF COMMISSIONER (S5-11)

Q 3. *Are there any changes required to the appointment process or the status of the Commissioner?*

MACA Response:

In general no changes were required with respect to the appointment process or status of the Commissioner.

The Committee noted the exceptional work of the Commissioner and the Commission, given limited resources, particularly in education, stakeholder and agency engagement and transparent reporting and information.

PART 3 FUNCTIONS OF COMMISSIONER (S 12-19)

Q4. *Are the functions of the Commissioner suitable and appropriate to achieve the objectives of the Act?*

MACA Response:

Overall the Commissioner’s functions are suitable and appropriate.

- **Discretion**

Q5. *Should the Commissioner have discretion in deciding which reports to refer to the bodies in sections 13(8) and 13(9) of the Act?* **Sections 13(8) and 13(9) states:**

(8) If the Commissioner is of the opinion that a report, or part of a report, constitutes a complaint that may be made to any of the following persons or bodies, the Commissioner must refer the report, or the part of the report, to the person or body—

- (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](#) of the Commonwealth,*
- (c) the Commissioner of the NDIS Quality and Safeguards Commission under the [National Disability Insurance Scheme Act 2013](#) of the Commonwealth,*
- (c1) the Children’s Guardian under the [Children’s Guardian Act 2019](#),*
- (d) any other person or body prescribed by the regulations.*

(9) If the Commissioner is of the opinion that a report, or part of a report, may provide evidence of the commission of a criminal offence, the Commissioner must refer the report, or the part of the report, to the Commissioner of Police or the Director of Public Prosecutions.

MACA Response:

The Committee was of the view that reporting to the aforementioned agencies should NOT be mandatory; that whether and how the Commissioner reports should be on his/her discretion depending on the context and circumstances.

However the Committee believed that an additional reporting body should be included namely: (e) AHPRA: *Australian Health Practitioner Registration Authority*.

Q6. In what circumstances should the Commissioner be able to investigate an allegation without the consent of the relevant adult?

MACA Response:

The Committee was of the view that there are circumstances when there could be an investigation without the consent of the relevant adult. This would apply if the Commissioner is of the view that there is evidence that the adult is not competent, lacks capacity or where there is difficulty in making contact with or access to the relevant adult. In such cases this may be problematic if a doctor is the subject of the allegation.

Q7 Should an exemption from the requirement to obtain consent, similar to the one in South Australian legislation, be included in the Act?

MACA Response:

The South Australian legislation should be mirrored in this aspect.

Q 8. Are the Commissioner's information sharing powers appropriate and sufficient to achieve the objectives of the Act?

Q9 Should the Act enable the Commissioner to share information with the organisations and individuals listed in paragraph 3.28? Are there any others?

MACA Response:

The Committee was of the view that information sharing powers may need to be broadened.

There was discussion on whether a body such as the *Australian Health Practitioner Registration Authority* (AHPRA) should be within the scope of bodies that would be contacted, if there a complaint involving a professional such as a doctor or allied health worker.

There was discussion on whether information sharing and reporting should then be broadened to authorities that cover lawyers; financial groups; aged care providers.

This may require more consideration and discussion

Q10. Are the Commissioner's investigation and public inquiry powers appropriate and sufficient to achieve the objectives of the Act?

MACA Response:

In general the subcommittee was of the view that the investigative powers are sufficient.

PART 4 OFFICIAL COMMUNITY VISITORS: OCV. (S20-24)

This was considered an important part of the review.

Q11. Should the Act clarify the scope of the Commissioner's authority to manage the performance of OCVs and the grounds of removal for OCVs?

MACA Response:

The Commissioner has an appointing role but the Act is silent on the issue of ongoing management and performance of the OCV.

The Committee believe the Commission and the Commissioner needs to have greater oversight over the ongoing role and performance of OCV. Examples of current concerns with OCV include poor performance related to inadequate short visits; poor reporting outcomes or visitors having "other agendas" that may influence their contact with adults.

Q12. Should OCVs be permitted to provide advice and information to the NDIS Commission and Department of Communities and Justice, to improve regulation of the disability services sector and assisted boarding houses?

MACA Response:

The Committee did *not* support OCV having a role in providing advice and information other than through the channel of reporting back to the Commission and or the Commissioner.

Lines of communication and command need to be uncomplicated. If a complaint is to be lodged, a separate mechanism needs to be available

Q13. Should disability service providers be required to give information about new or changes to existing visitable services they operate to the ADC? If so, what information should the providers be required to give?

MACA Response:

The Committee considered that requiring information for disability service providers should be limited and staged. For instance to capture sites to be visited so that the site review can then capture the necessary and relevant information.

At the moment, the OCV scheme does not have a mechanism to obtain regular information about new providers (or new premises) that may be visitable services. As a result the OCV scheme does not accurately capture all potential visitable services, and undue time is spent seeking updated information from providers about service locations. Information on staffing and appropriate qualifications need to be lodged regularly. Change of key personnel needs should be lodged at the time. Incidents involving staff, visitors and others needs to be

reported to ADC. This would allow the ODC scheme data to be updated in a timely fashion. The legislation may also reflect a specific time frame for notification to be given to the ADC.

Q14 Should the ADC Act be amended to provide flexibility for alignment of the NSW OCVs with a nationally consistent CVS which may be subsequently agreed by the Disability Reform Ministers' Council, including the potential for volunteer visitors as per some other state schemes?

MACA Response:

The Committee strongly agreed that there should be national consistency and payment to the OCV.

However there was some reservations. The privacy issues are a double-edged sword. Too many visitors can compromise privacy – too few can increase the risk of abuse. Consistency could be included but a mechanism for monitoring and acting on any unforeseen abuses of privilege need to be in place.

PART 5 ANNUAL REPORTS AND SPECIAL REPORTS (S25-28)

Q15. Are the matters the Commissioner is required to include in their annual reports appropriate?

Q16. Should the Commissioner be required to continue reporting on the outcome of each referral to other agencies?

MACA Response:

The Committee was of the view that the Annual Report was appropriate and of value, with good examples and relevant information, with respect to reporting on issues pertaining to the Commission's role and function.

It was considered that the continued reporting on the outcome of each referral is somewhat onerous, resource intensive and needs to be tested against the desired benefit of such reporting.

PART 6 MISCELLANEOUS: (s29) AGEING AND DISABILITY ADVISORY BOARD.

Of particular note is **S 29 (4)**

(4) The Minister must ensure that the composition of the Board reflects the diversity of the community, and include the following—

(a) 2 or more persons with disability,

(b) a representative of independent specialist advocacy, information and representative organisations for people with disability in New South Wales,

(c) a representative of independent specialist advocacy, information and representative organisations for older adults in New South Wales,

(d) 1 or more persons representing persons employed in the provision of disability services or services for older adults.

Q 17. Is the role and membership of the Ageing and Disability Board appropriate and sufficient to achieve the objectives of the Act?

MACA Response:

The Committee was of the view that in general the Board reflects a good representation from the relevant communities of interest.

Other comments about the Act that you would like to raise?

The area of disability is particularly vulnerable to medical neglect and some abuse from doctors. Doctors are in positions of power over access to services and support and reporting incidents of abuse by doctors is difficult when they control hospitals, primary care and government policy forums.