

# Response to the ADC Act Independent Review Discussion Paper

15 December 2022



NSW Trustee  
& Guardian

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## 1 Background

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NSW Trustee & Guardian is a statutory agency within the NSW Stronger Communities Cluster.

The agency supports the Chief Executive Officer of NSW Trustee & Guardian and the NSW Public Guardian to protect, promote and support the rights, dignity, choices and wishes of the people of New South Wales. NSW Trustee & Guardian's services help support and protect some of the most vulnerable members of the NSW community, as well as supporting people at vulnerable moments in their life.

NSW Trustee & Guardian is appointed for people with a cognitive impairment that impacts their ability to make decisions in different areas of their lives. The Mental Health Review Tribunal (MHRT) can appoint the NSW Trustee as financial manager. NSW Civil and Administrative Tribunal (NCAT) or the Supreme Court can appoint financial managers and guardians.

NSW Trustee & Guardian provides independent and impartial financial management and guardianship support that helps customers manage their health, lifestyle and financial affairs.

Financial management orders appoint the NSW Trustee where there is no other appropriate option available. The Public Guardian is the 'guardian of last resort' and will only be appointed if it is determined a guardian is needed and an informal support or a suitable private guardian – usually a family member or friend of the person willing to take on the role – cannot be identified.

The decision-making delegations for financial and guardianship functions are separated to ensure the staff employed to make guardianship decisions are different from those who make financial management decisions.

This submission focuses on the NSW Trustee's and the NSW Public Guardian's experience of the *Ageing and Disability Commissioner Act 2019* (NSW) and contains responses to the questions raised in the discussion paper, *Independent Review of the Ageing and Disability Commissioner Act 2019*, November 2022.

## 2 Questions

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### **Question 1: Are the objects outlined in section 4 of the Act still valid? What changes, if any, should be made?**

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The NSW Trustee and Public Guardian consider that the objects of the *Ageing and Disability Commissioner Act 2019* (NSW) (the Act) are still valid and relevant.

### **Question 2: What do you think of the principles? Are they appropriate for older adults and adults with disability?**

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The NSW Trustee and Public Guardian consider that the principles of the Act are appropriate for older adults and adults with disability. We note that the NSW Law Reform Commission's *Review of the Guardianship Act 1987* (2018) recommended the inclusion of additional general principles for Aboriginal people and Torres Strait Islanders and would suggest that this recommendation is considered in this review.

The additional principles are listed at 5.3 of the Law Reform Commission's Report and detailed below:

#### *5.3 Additional general principles for Aboriginal people and Torres Strait Islanders*

*The new Act should provide that everyone exercising functions under this Act with respect to a person in need of decision-making assistance who is an Aboriginal person or Torres Strait Islander must:*

- (a) to the extent that it is practicable and appropriate to do so, act in accordance with that person's customary law, culture, values and beliefs*
- (b) recognise that Aboriginal people and Torres Strait Islanders have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters*
- (c) recognise that many Aboriginal people and Torres Strait Islanders may face multiple disadvantages*
- (d) address that disadvantage and the needs of Aboriginal people and Torres Strait Islanders, and*
- (e) work in partnership with Aboriginal people and Torres Strait Islanders in need of decision-making assistance to enhance their lives.*

### **Question 3: Are there any changes required to the appointment process or the status of the Commissioner?**

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The NSW Trustee and Public Guardian do not recommend any changes to the appointment process of the Commissioner.

### **Question 4: Are the functions of the Commissioner suitable and appropriate to achieve the objectives of the Act?**

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Yes, the NSW Trustee and Public Guardian consider the Commissioner's functions are suitable and appropriate.

### **Question 5: Should the Commissioner have discretion in deciding which reports to refer to the bodies in sections 13(8) and 13(9) of the Act?**

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The NSW Trustee and the Public Guardian would support leaving the current wording in sections 13(8) and 13(9) as it is. Maintaining the current wording reduces the risk of information being siloed and not acted upon by the agencies who hold those specific regulatory functions.

We recognise the importance of maintaining a person's privacy, however, also consider the objects of the Act, including to protect the person from abuse, neglect and exploitation, to be paramount.

If sections 13(8) and 13(9) were to be amended the determination of choosing to refer or not refer a matter should be guided by very clear parameters which are detailed in the Act or its regulations. These are required to minimise the risk of subjectivity in the determination of information being shared, or not shared, with the referenced bodies and to clearly indicate when information must be shared.

### **Question 6: In what circumstances should the Commissioner be able to investigate an allegation without the consent of the relevant adult?**

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See below.

### **Question 7: Should an exemption from the requirement to obtain consent, similar to the one in South Australian legislation, be included in the Act?**

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The NSW Trustee and Public Guardian supports the Act (and regulations) being amended to include exemptions from the requirement to obtain consent for an investigation to occur.

This is particularly important in situations where the person is being socially isolated or is refusing services, meaning an attempt to seek the person's view cannot occur.

In both the NSW Trustee and Public Guardian's experience we have observed cases where the person may not be able to provide their view, receive information, or be available for a visit because of undue influence or coercive control. A common example is where the person is living with a family member in their own home or in the family member's home, and all other contact and interaction with family and supports is extremely limited, controlled, and overseen by the 'carer'. Another example is where the person is in a relationship with an abusive partner, however due to the impact of emotional, psychological, and other forms of abuse is unable to leave or freely communicate.

### **Question 8: Are the Commissioner's information sharing powers appropriate and sufficient to achieve the objectives of the Act?**

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See below.

### **Question 9: Should the Act enable the Commissioner to share information with the organisations and individuals listed in paragraph 3.28? Are there any others?**

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In principle the NSW Trustee and Public Guardian agrees that broader information sharing could assist the Commissioner in its role. However, if this amendment were to be introduced we question how principle 2(c) would be ensured, i.e., having regard to the person's right to privacy and confidentiality.

We suggest the amendment include that the Commissioner has the authority to also release information to an organisation or person (not already listed in section 13(8)) to assist them in taking any required action in response to a person being subject to, or at risk of, abuse, neglect or exploitation.

If the suggested amendment is implemented the Act should contain clarifying information around what privacy legislation and obligations those additional organisations and individuals would be bound by. For example, NSW public sector agencies are bound by the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records Information Privacy Act 2002* (HRIP Act) (which also applies health organisations and health service providers). Government agencies are also bound by legislation regarding how they collect and store information. However, these Acts do not apply to all those bodies listed such as NGO disability and aged care providers, and providers of financial and legal services.

The Act should also provide guidance as to how breaches of privacy and misuse of personal information will be enforced, for example where the Commissioner shares information with an organisation who is also a service provider, and the service provider uses that personal and private information in a way that was not originally intended.

### **Question 10: Are the Commissioner's investigation and public inquiry powers appropriate and sufficient to achieve the objectives of the Act?**

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The NSW Trustee and Public Guardian consider the Commissioner's powers are appropriate in relation to the principles and objectives of the Act.

### **Question 11: Should the Act clarify the scope of the Commissioner's authority to manage the performance of OCVs and the grounds of removal for OCVs?**

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The NSW Trustee and Public Guardian support this part of the Act being amended to clarify what action the Commissioner can take around an OCV's performance, this should also include clarifying the definition of 'incompetence'.

**Question 12: 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?**

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The NSW Trustee and Public Guardian supports expanded information sharing through the OCV scheme to improve disability regulation.

The NSW Trustee and Public Guardian would also see a need for this in our own substitute decision making roles. For example, in the Public Guardian's decision-making role we may be made aware of concerns about a provider, however, have no other independent information or person involved in the represented person's life that could inform our decision making. Having access to the OCV's report to inform our decision making would assist in ensuring decisions are made in the interests of the person. It would also ensure decision making is not unnecessarily delayed by accessing some alternative assessment.

It is unclear if the information sharing prescribed in section 14 of the Act also applies to OCV sharing information and this should be clarified.

**Question 13: 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?**

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The NSW Trustee and Public Guardian support this as in our experience we find there are regularly new providers that we are unfamiliar with, including their framework of support provision and ability to work with people who have complex needs.

The NSW Trustee and Public Guardian understand it is not part of this review, however, we envisage that if this change was implemented it would require additional resourcing, which we would also support to ensure it is an effective change.

**Question 14: 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?**

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The NSW Trustee and Public Guardian have no objections to move to a nationally consistent approach.

If NSW were to consider adding volunteers to the visitor scheme, significant consideration should be given to how they undertake training, have a clear understanding of their important role and have experience of working with people with disability or in vulnerable communities and other groups such as First Nations people, CALD and LGBTQIA+. We would recommend that there is very strong guidance and safeguarding (both in law and policy) to maintain a strong standard of work in the OCV role.

### **Question 15: Are the matters the Commissioner is required to include in their annual reports appropriate?**

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Yes, and see below.

### **Question 16: Should the Commissioner be required to continue reporting on the outcome of each referral to other agencies?**

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The NSW Trustee and Public Guardian does not consider there is a need for the reporting on the outcome of each of the ADC's referrals to other bodies.

### **Question 17: Is the role and membership of the Ageing and Disability Board appropriate and sufficient to achieve the objectives of the Act?**

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The NSW Trustee and Public Guardian consider the role and membership of the Board appropriate. We do suggest consideration of amending the Act to add the requirement of an older person being on the Board. We also suggest adding to that the Board's membership include representation from communities such as First Nations people, CALD and LGBTQIA+.

### **Question 18: Do you have any other comments about the Act that you would like to raise?**

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The NSW Trustee and Public Guardian have had the opportunity to work with the Ageing and Disability Commissioner, which includes having a Memorandum of Understanding to inform this work. This includes a clear referral pathway which facilitates a timely and effective transfer of information about a person who is potentially at risk. Based on this work and our observations we have found that the Commissioner's work (and the objects of its Act) is extremely important and valued.

If the role and responsibilities of ADC is expanded because of the review of this Act the NSW Trustee and Public Guardian recommends that it should be appropriately resourced to fulfil these roles.