



PEOPLE WITH DISABILITY  
AUSTRALIA

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# Ageing and Disability Commissioner Act 2019

Submission to the Independent Review of the *Ageing and  
Disability Commissioner Act 2019* in New South Wales

DEC  
2022

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*Ageing and Disability Commissioner Act 2019 – Submission to the Independent Review of the Ageing and Disability Commissioner Act 2019 in New South Wales*

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# About PWDA

People with Disability Australia (PWDA) is a national disability rights and advocacy organisation made up of, and led by, people with disability.

We have a vision of a socially just, accessible and inclusive community in which the contribution, potential and diversity of people with disability are not only recognised and respected but also celebrated.

PWDA was established in 1981, during the International Year of Disabled Persons.

We are a peak, non-profit, non-government organisation that represents the interests of people with all kinds of disability.

We also represent people with disability at the United Nations, particularly in relation to the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

Our work is grounded in a human rights framework that recognises the CRPD and related mechanisms as fundamental tools for advancing the rights of people with disability.

PWDA is a member of Disabled People's Organisations Australia (DPO Australia), along with the First People's Disability Network, National Ethnic Disability Alliance and Women with Disabilities Australia.

DPOs collectively form a disability rights movement that places people with disability at the centre of decision-making in all aspects of our lives.

'Nothing About Us, Without Us' is the motto of Disabled Peoples' International.

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# Introduction and Overview

People with Disability Australia (PWDA) welcomes this opportunity to comment on the Independent Review of the Ageing and Disability Commissioner Act 2019.

PWDA supports the Ageing and Disability Commissioner (ADC) and the important work of the Commission in protecting the rights and providing safeguards for people with disability in NSW.

In this submission, PWDA has responded to each of the questions in the Discussion Paper and provided additional information relating to the Ageing and Disability Commissioner Act 2019 (NSW) (the Act) and the work of the Ageing and Disability Commission.

The Discussion Paper for the Independent Review of the Ageing and Disability Commissioner Act 2019 can be accessed [here](#).

Throughout our responses, PWDA has emphasised the right of the person with disability to privacy and confidentiality of personal information and the imperative to obtain consent when it is necessary to share information.

Equally, the primacy of the individual with disability is paramount, as is the understanding that no assumptions should be made about the capacity of the person with disability to make decisions about their life and information.

PWDA has made comprehensive recommendations about the Official Community Visitors (OCV) Scheme involving its powers within the Act, as well as its ability to exercise those powers and where changes are necessary to improve the outcomes of the Scheme to support and protect people with disability.

# Response to the Discussion Paper

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

PWDA contends that the objects of the Act remain valid.

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

PWDA contends that the principles of the Act are valid and appropriate for older adults and adults with disability but should reflect contemporary practice around supported versus substitute decision making.

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 and their will and preference.

Adults with disability and older adults must have their rights to supported decision making and universal legal capacity upheld, in accordance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

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

In line with best practice in appointment processes, there should be a requirement for merit-based and publicly advertised appointment processes and a clear definition for 'merit-based', in accordance with recent proposed changes to the [Australian Human Rights Commission Legislation Amendment \(Selection and Appointment\) Bill 2022 – Parliament of Australia \(aph.gov.au\)](#).

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

PWDA finds the Commissioner’s functions described in the Act to be comprehensive, practical and contemporary.

**Question 5: Should the Commissioner have discretion in deciding which reports to refer to other identified regulatory bodies and Police? Note, also includes “any other person or body prescribed by the regulations”.**

PWDA acknowledges the concern of the ADC that the mandatory nature of information referrals to other bodies could discourage people from bringing issues to the ADC. PWDA would support the ADC proposal to replace the word ‘must’ with the word ‘may’, if the Regulations clearly prescribed the circumstances under which the Commissioner could decide not to refer. Further, this should only apply to matters that do not reach the benchmark as a legal or criminal offence.

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

The ADC should have the power to conduct investigations without the consent of the adult under certain circumstances.

Firstly, if the matter concerns the actual or perceived safety of the adults or other persons, the Commissioner must have regard to any known will and preferences of the adult, as well as consider critical privacy issues. Additionally, the Commissioner should make every effort to provide decision-making support available to ensure informed consent is provided, and the ADC should be adequately resourced to make decision-making support available.

Secondly, the Commissioner should also have the power to conduct investigations without the consent of the adult where the matter warrants the need to look into systemic failures. In these cases, the Commissioner should take all reasonable steps to protect the person's privacy and de-identify them where possible.

Lastly, where an adult cannot be contacted after reasonable efforts has been made, the ADC should have the power to conduct investigations without the consent of the adult. However, the Act must prescribe that the Regulations outline and define what is meant by “reasonable effort”.

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

The Discussion Paper provides the example of the South Australian legislation that:

*allow[s] an investigation to commence or the Adult Safeguarding Unit to take action without first obtaining consent “if the Adult Safeguarding Unit has not, after reasonable inquiries, been able to contact the vulnerable adult”. “Reasonable inquiries” is not defined in the legislation.*

PWDA agrees with the inclusion of this exemption where reasonable effort has been made to contact the adult. Further, this amendment should prescribe that “reasonable effort” is to be defined in the Regulations to the Act.

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

PWDA notes that the Discussion Paper outlines that Section 14 of the Act provides limitations around the types of information that can be shared by the Commissioner with other government entities. These limitations include information about:

- a) report under this Act,*
- b) the safety, welfare or well-being of an adult with disability or older adult,*
- c) the abuse, neglect or exploitation of an adult with disability or older adult, and*
- d) any other matter prescribed by the regulations.*



PWDA believes the Commissioner's information sharing powers are appropriate, as long as informed consent enabled through adequately resourced decision-making support to share information has been obtained. In the minority of cases where this is not possible or appropriate, strict processes must guide the approval of information sharing.

### **Question 9: Should the Act enable the Commissioner to share information with the organisations and individuals as listed...and any others?**

In providing answers to this question below, PWDA notes that informed consent enabled through adequately resourced decision-making support must be the pre-requisite for sharing information. In the minority of cases where this is not possible or appropriate, strict processes must guide the approval of information sharing.

#### **1. NGO disability and aged care providers?**

Yes, within the current limitations around the types of information that can be shared and for the purposes of assisting the ADC in handling reports. The ADC should consider developing formal information sharing agreements with larger providers. Any ADC information given by the Commissioner to these organisations should be very specific and provided only if absolutely necessary.

#### **2. Private health practitioners such as general practitioners and other allied health practitioners?**

Yes, within the current limitations around the types of information that can be shared and for the purposes of assisting the ADC in handling reports. However, in considering issues of consent and privacy, PWDA is concerned about the nature and extent of personal information not relevant to the matter that could then be added to the adult's electronic Health Record.

Consent must be a paramount consideration when sharing information with health providers. Consent can be complicated by the capacity of the adult to understand the extensive nature of access to the electronic Health Record as well as the adult's grasp of any broader implications of widely shared personal information that could impact their ongoing life choices and preferences.

For this reason, as stated above, decision support must be available if needed to support the consent process. Any ADC information given by the Commissioner to these organisations should be very specific and provided only if absolutely necessary.

### **3. Providers of financial and legal services?**

Yes, within the current limitations around the types of information that can be shared and for the purposes of assisting the ADC in handling reports, on the mutual understanding that any ADC information given by the Commissioner to these organisations should be very specific and provided only if absolutely necessary.

### **4. any others?**

PWDA has no recommendations about other organisations currently. However, we underline the principle that sharing with any other agencies must be with the informed consent of the person with disability whenever it occurs.

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

The Commissioner's powers for investigation appear to be appropriate and adequate. Further, there is a need for strong connections between OCV inquiries and ADC investigations so that OCV reports can trigger appropriate investigative action.

### **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?**

Yes. It is very important to clarify the scope of the Commissioner's authority regarding OCVs. The Commissioner should have manifest legislative and regulated authority to take action in regard to the:

#### **1. removal of an OCV for incompetence, incapacity or misbehaviour**

- Further, the Act can direct that the Regulations must contain more specific guidance/definitions on what is encompassed by incompetence, incapacity or misbehaviour

**2. supervision and management of OCVs who do not meet their quality performance targets for visiting and reporting practice**

**3. Commissioner's disciplinary powers regarding penalties, consequences and other actions for underperforming OCVs**

**4. regular and specific training provided to OCVs that covers trauma informed practice and a contemporary understanding of disability**

- This contemporary understanding should include what is meant by 'choice' and by 'control' and the differences in implementation, and the nature and importance of dignity of risk
- It is also important for OCVs to be aware of best practice in terms of disability inclusion - including awareness that a life dominated by service providers is not providing meaningful opportunities for inclusion in the community.
- Accordingly, it is important for people to develop connections and relationships outside the person's service providers. This will advance the quality and accountability of OCVs as well as the continuous improvement of systemic and individual OCV practice.

The Review should consider whether it would be useful for the Commissioner to appoint a Deputy Commissioner or other senior position to oversee/administer legislative and regulated powers in the OVC Scheme.

**Question 12: Should OCVs be permitted to provide advice and information to the NDIS Commission and the Department of Communities and Justice, to improve regulation of the disability services and assisted boarding houses?**

Yes. To ensure appropriate and seamless regulatory responses, OCVs must have legislative authority to share information with other regulatory bodies, including broader information about providers of concern, provider trends and patterns, the conduct of providers and premises, and any other matters affecting the safety and wellbeing of people

in visitable services. Due consideration must be given to the right of privacy and confidentiality of the person and consents must sought where appropriate.

**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?**

Yes, providers must supply information to the ADC about new services and/or new premises so that visits by OCVs can be appropriately prioritised based on current information.

Providers should also be required to give information to the ADC about:

1. changes in the resident profile of existing visitable services, where this potentially results in additional risk for adults, including the entry of a person with high and/or complex behavioural, communication and/or medical needs
2. increases in the number of resident adults in a service or on a premises or at a location
3. any increase in the intensity or complexity of supports required by or provided to a resident adult, including an increase in the number and type of supports provided
4. all adults who do not have non-provider significant personal relationships. This can include where:
  - a. an adult has no family or friends
  - b. a parent or spouse has died and the adult has no other personal networks or supports
  - c. the adult is distant from family/friends for the purposes of decision-making, personal visits and check-ins
  - d. the family does not attempt to visit or make contact with the adult.

**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?**

Yes. The OCV Scheme should be aligned with a nationally consistent Community Visitors Scheme including the following caveats/requirements/stipulations:

1. Official Community Visitors must not be volunteers
2. OCVs must have the regulated statutory authority to visit adults in vulnerable circumstances and be remunerated accordingly (see further comments under the *Resourcing the role of OCVs* section in response to Q18 below).

PWDA acknowledges the role of volunteers who visit people in aged care for the purpose of social contact and friendship support. These volunteers can be an important part of a person's health and wellbeing.

However, OCVs undertake regulated statutory oversight for the purpose of safety, protection and standards of service provision to adults who could be in high-risk situations. Accordingly, the NSW OCV Scheme, and any nationally consistent Community Visitors Framework or Scheme must adequately remunerate and train OCVs and must not include volunteers.

OCVs must retain the power to enter premises without the consent of family or providers or proprietors.

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

PWDA agrees that the annual report content noted as required in the discussion paper is appropriate:

- a) *any recommendations for administrative action or changes in the laws of the State that the Commissioner considers necessary,*

- b) the number of reports referred to other bodies and the outcome of each referral,*
- c) the number of investigations where consent was not given, and*
- d) if a member of the Ageing and Disability Board was removed during the reporting period, the reasons for removing the member.*

PWDA further recommends that the Act requires the Commissioner to include in the Annual Report the protective and preventative strategies carried out to address the factors or drivers that give rise to issues and matters brought to the ADC.

PWDA suggests the Act could require the Commissioner to regularly review and update the content of the Annual Report in response to contemporary requirements for information and trends, as well as for public accountability.

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

There are some concerns that dropping the requirement for the ADC to report on referral outcomes could represent an increased risk for some adults with complex matters, particularly where a matter has several lines of inquiry by several different agencies.

The perceived danger is that if one agency decided to discontinue their inquiry, this could adversely impact on the continuing inquiries of other agencies, and therefore on outcomes for the adult.

PWDA recommends that the ADC continues to be required to report on the outcomes of referrals to other agencies, particularly in significant or high-risk matters. Referral agencies should be asked to provide appropriate updates and to report on the outcome when the matter is closed.

Therefore, it is critical that the ADC receives adequate resourcing to report the outcomes of referred matters so that the resulting administrative workload does not reduce or impact the capacity of the ADC to conduct its own inquiries and investigations.

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

The Board appears to encompass an appropriately high level and diverse membership.

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

**1. Specialist and independent individual advocacy**

PWDA supports the full implementation of the recommendations from the ADC Review into Disability Advocacy in NSW 2019. Specialist and independent disability advocacy is essential to support people with disability to exercise their rights, to access services and supports, to facilitate equitable opportunity and to raise and resolve issues arising from adverse circumstances that people with disability may experience.

In addition to welcoming the very necessary NSW Disability Advocacy Futures Program, PWDA recommends that the ADC works to facilitate and enable stronger and smoother connections, coordination and information sharing between Commonwealth and state government agencies that could be involved in the life of a person with disability.

The ADC should set the example as a disability responsive agency by continuing to align NSW government principles, policy and practice with national approaches and international leading practice. Critical to this is the continuing support for and expansion of quality, easily accessible and available individual advocacy for the person and systemic advocacy for people with disability.

**2. ADC employment of people with disability**

Tables 17 and 18 Workforce diversity in the ADC Annual Report 2021-22 indicate there are 0% employees with disability or employees with disability requiring reasonable adjustments. While PWDA understands the ADC does employ people with disability, the [NSW Premier's Priorities](#) include set a target of 5.6% for the representation of people with disability in the public service.

PWDA recommends that the ADC should act as an exemplar for the employment, inclusion and promotion of people with disability in society and in local communities, and for the NSW Government.

### 3. Resourcing the role of OCVs

The ADC Act should be amended to expand the role and coverage of OCVs and to ensure adequate resources are provided to enable the OCV Scheme to protect and uphold the rights and safety of people living in vulnerable circumstances

In his Message from the Ageing and Disability Commissioner in the OCV Annual Report 2021-22, Robert Fitzgerald said that recurrent resourcing levels for OCVs are unsustainable.

In the 2021-22 Annual Report, Table 1 on page 21 shows changes over ten years in the number and proportion of eligible services known to the ADC that were allocated for visits by OCVs. In 2016-17, 78% of visitable services were allocated to OCVs (lower than in each of the previous three years). This compares to 2021-22 when 49% of visitable services were allocated, a drop of 37% over just five years.

The OCV Annual Report for 2012-13 provides useful indicators of changes in the workload of OCVs in the past decade. Figure 2 on page 23 shows there were 7,235 children and adults in services that were visited by OCVs while Table 2 page 22 of the 2021-22 Annual Report shows 9,409 people in visited services. This represents an increase of over 30% of people living in visited services over the past ten years.

Commissioner Fitzgerald also cites “the increasing number of services eligible to be visited and requiring the allocation of a community visitor”. The 2021-22 Annual Report Table 1 on page 21 reports there were 1,424 visitable services registered with the OCV Scheme in 2012-13 compared to 2,394 visitable services known to the OCV Scheme in 2021-22. This represents an increase of 68% in the number of visitable services over 10 years.

The OCV Annual Report 2021-22 on page 6 says:



*'OCVs visit accommodation services where residents are in the full-time care of the service provider, including:*

- children and young people in residential out-of-home care (OOHC)*
- people with disability living in supported accommodation operated by providers funded under the National Disability Insurance Scheme (NDIS)*
- assisted boarding houses.'*

The vulnerability of support circumstances for people with disability is not limited to the listed accommodation services. There are concerns about General Boarding Houses that operate with two or more people with disability without registering as an Assisted Boarding House.

There are also non-accommodation disability services such as day programs and Australian Disability Enterprises that assist people with very high support needs who may rely on a single service provider. PWDA recommends that these and other services where there is a high susceptibility to risk for people with disability should be included as visitable under the OCV Scheme.

PWDA acknowledges that several factors have reduced the number of OCVs available in 2021-22 and notes that OCVs visit allocated services an average of twice per year, typically for three hours per visit.

PWDA is concerned that people living in disability supported accommodation, children with disability and others living in the out of home care sector, and people with disability in Assisted Boarding Houses have additional risk factors for their safety and wellbeing and may not have the capacity or ability to speak up on issues of concern. OCVs are essential to raise and address individual and systemic issues and to protect the rights and safety of people in visitable services.

#### 4. Increasing and adequately resourcing the OCV Scheme in NSW

Given the drop in the proportion of eligible services visited by an OCV (37%), the increase in the number of people living in the services visited by an OCV (30%), and the rapid growth in the disability services sector leading to an increase in the number of services eligible to be visited (68%), PWDA strongly recommends an immediate and significant increase in funding for the OCV Scheme to provide appropriate resourcing for:

1. **Remuneration:** PWDA notes a recent increase in OCV pay rates but recommends an increase in order to attract qualified and experienced candidates
2. **Geographical coverage:** PWDA is concerned about OCV coverage in regional areas, including but not limited to Western NSW, where distances are large and services can be geographically isolated. OCV visits in these areas may be more expensive regarding travel to services, travel time and accommodation, and each visit could take longer. Funding must be adequate to overcome resource constraints limiting OCV work across NSW, especially in rural and regional areas.
3. **Number of OCVs:** There has been effectively no rise in the number of OCVs while the visitable sector expands, resulting in an alarming drop in the proportion of visitable services allocated to an OCV. Consequently, PWDA strongly recommends an immediate increase in the number of OCVs engaged by the Scheme. More OCVs are urgently needed to visit more visitable services more regularly.
4. **Allocated Visitable services:** PWDA contends that the ADC Act should specify that the number of allocated visitable services does not fall below 85%. PWDA contends that 100% of all eligible services should be visited by an OCV.

5. **Visits:** PWDA recommends that the number of visits per year to each visitable service be increased to ensure safety, protect rights and to oversee quality of services to people living in them.
6. **Return visits:** OCVs must have the capacity to go back to check on a provider or premises where the OCV has made recommendations for changes, safeguarding or improvement. These return visits must be separate from and in addition to the regular schedule of OCV visits and must not impact or reduce the planned schedule of visits for OCVs. The OCV Scheme must be appropriately resourced to enable these necessary return visits.
7. **Scope:** Additional funding is required for the OCV Scheme to expand its scope of visitable services to include support situations of high susceptibility to risk, at least including people with disability using a single service provider, and general Boarding Houses with residents with disability.

## 5. ADC and restrictive practices

PWDA recommends the ADC provides clarity on its website and in its publications about when and how the ADC can act to respond to people with disability who are subject to restrictive practices.

As part of Australia's Disability Strategy 2021-2031, the Safety Targeted Action Plan "sets out the key actions to strengthen system design and supports to enable people with disability to receive high quality and safe services."

Under NSW Objective 4 Action 4.5 on page 18, the ADC will receive reports from relevant government agencies on how NSW will align state-based restrictive practices authorisation arrangements with a nationally consistent approach. PWDA recommends that the ADC be required to report on progress and achievement towards the nationally consistent authorisation of restrictive practices.

PWDA supports the ADC proposal, in the Safety Targeted Action Plan Objective 5 NSW Action 5.1 on page 20, to increase the number of disability abuse prevention

collaboratives, including in regional areas, across local government areas in NSW by 2023.

PWDA notes that of the 18 existing collaboratives only one is on people with disability. PWDA cautions the ADC that any work to increase the number of collaboratives should take into account how the voices of people with disability will be included in their regular business.

## **6. Working with the NSW Disability Council**

Under Australia's Disability Strategy 2021-2031, the Community Attitudes Targeted Action Plan describes key actions to improve community attitudes towards people with disability. NSW Actions Objective 4 Action 4.3 on page 8 says the NSW Disability Council will hold forums with local government to promote rights, build community awareness and increase public awareness of disability inclusion.

PWDA suggests that the ADC should work with the NSW Disability Council to ensure that safeguarding forms part of any continuing and future training and education initiatives and that the voices of people with disability are engaged to deliver safety and rights-based training to local councils and to the general community at the local level.

## **7. Disability Inclusion Action Plan**

PWDA recommends that the ADC is required to develop and implement a Disability Inclusion Action Plan (DIAP). PWDA understands that, unlike other NSW Government bodies, the ADC is not required to prepare a DIAP and is "considering" this and other similar government requirements.



## PEOPLE WITH DISABILITY AUSTRALIA

People with Disability Australia (PWDA) is a national disability rights and advocacy organisation made up of, and led by, people with disability.

For individual advocacy support contact PWDA between 9 am and 5 pm (AEST/AEDT) Monday to Friday via phone (toll free) on **1800 843 929** or via email at [pwd@pwd.org.au](mailto:pwd@pwd.org.au)

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