

30 March 2023

 **Our ref:** ADCDOC23/711

The Hon Mark Dreyfus KC MP

Attorney-General of Australia

Via submission uploaded to:

<https://consultations.ag.gov.au/integrity/privacy-act-review-report/consultation/>

Dear Attorney-General

**Submission in response to the Privacy Act Review Report**

The NSW Ageing and Disability Commission (ADC) welcomes the opportunity to make a submission in response to the Privacy Act Review Report, in relation to people experiencing vulnerability (Chapter 17).

***Relevant background***

The ADC was established on 1 July 2019, with the objectives of protecting adults with disability and older people from abuse, neglect and exploitation, and protecting and promoting their rights.

A key role of the ADC is to respond to reports about adults with disability and older people in NSW who are subject to, or at risk of, abuse, neglect and exploitation in their family, home and community, including by providing advice, making referrals, and conducting investigations.

In 2020-2022, the ADC received 10,963 reports, involving a 40% increase over the three-year period. Of the 10,963 reports:

* the majority (77%) involved older people,[[1]](#footnote-1) including older people with disability
* one-quarter (23%) involved adults with disability (who were not older people)
* for older people, the most common alleged abuse involved psychological abuse (40%), financial abuse (28%) and neglect (21%), primarily by their adult children or other family members
* for adults with disability, the most common alleged abuse involved psychological abuse (34%), neglect (26%) and financial abuse (18%), primarily by their parents or other family members
* the most common forms of alleged financial abuse involved financial exploitation, misuse of Power of Attorney/Enduring POA, preventing the adult’s access to their finances, and theft
* for both older people and adults with disability, psychological abuse has commonly been used to enable financial abuse and exploitation, including verbal threats, pressure, blackmail, and harassment.

In addition, in 2021 concerns were raised with the ADC about the circumstances of some older survivors of institutional child sexual abuse with declining decision-making capacity, highlighting the need to improve safeguards for survivors from financial abuse and exploitation, including in relation to National Redress Scheme payments.

In response to these concerns, the ADC held two roundtables with NSW stakeholders in 2021 and 2022 to explore the issues, discuss practical options for strengthening safeguards and mitigating risks, and to consider opportunities for further action.

The submission of the ADC has been informed by our handling of reports about abuse, neglect and exploitation of adults with disability and older people, and the roundtable discussions with key stakeholders. Given the role of the ADC, our submission is focused on improving safeguards for adults subject to, or at risk of, financial abuse and exploitation.

***Chapter 17 – People experiencing vulnerability***

***Proposal 17.1:*** *Introduce, in OAIC guidance, a non-exhaustive list of factors that indicate when an individual may be experiencing vulnerability and at higher risk of harm from interferences with their personal information.*

In the main, the ADC supports this proposal. We agree with the submissions to the review that vulnerability is multifaceted and situational and should not be seen as a fixed trait associated with an individual. We support the focus on factors that indicate when a person **may** be experiencing vulnerability and at higher risk of harm.

***Proposal 17.2:*** *OAIC guidance on capacity and consent should be updated to reflect developments in supported decision-making.*

The ADC welcomes the proposal to ensure that the guidance on capacity and consent reflects developments in supported decision-making. Advancing supported decision-making in NSW is a priority for both the ADC and our Ageing and Disability Advisory Board, and is vital to upholding the rights of people with disability and facilitating appropriate safeguards from abuse.

We support the submissions to the review that have highlighted the need to ensure that third party representation is valid and not a contributing factor to abuse. Our work has highlighted numerous instances in which financial and other abuse of the adult with disability or older person has been facilitated by nominee or other third party representation arrangements – including circumstances in which the adult has decision-making capability and had not nominated the third party (usually family member) as their representative.

We would welcome consideration in the development of the guidance of contemporary thinking in relation to capacity. In particular, moving from ‘capacity’ to ‘decision-making capability’, encompassing ability + supports and accommodations. Supported decision-making is an important element of this approach.

We note that the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability may provide guidance on supported decision-making when it releases its final report in September. The recent research report on *Diversity, dignity, equity and best practice: a framework for supported decision-making* produced by the Living with Disability Research Centre at La Trobe University for the Disability Royal Commission may be helpful for informing the OAIC guidance.

In our view, the OAIC guidance should be informed by people with disability and key stakeholders, including the ADC and representatives of the other State and Territory adult safeguarding agencies.

***Proposal 17.3:*** *Further consultation should be undertaken to clarify the issues and identify options to ensure that financial institutions can act appropriately in the interests of customers who may be experiencing financial abuse or may no longer have capacity to consent.*

We support this proposal. In light of the significant impact of financial abuse on older people and adults with disability, including survivors receiving NRS payments, we consider that early action should be taken to progress the consultation.

It is critical that actions are taken as early as possible in response to identified or suspected financial abuse of older people and adults with disability. This includes parties being able to safely contact the adult to discuss the concerns and safeguarding options, and in relevant cases to refer matters to adult safeguarding bodies who may be able to investigate. However, the restrictive provisions in the Privacy Act present a barrier to key parties, including banks and other financial institutions, taking necessary actions to support adults subject to, or at risk of, financial abuse.

The ADC notes the submission by the Australian Banking Association (ABA) and consumer representatives to the review, identifying that there are limited circumstances in which banks are able to use or disclose personal information for the purposes of reporting suspected financial abuse, without express and informed consent of the individual.

Under section 16A, Item 1 of the Privacy Act, a permitted general situation for an APP entity collecting, using or disclosing personal information includes when:

* it is unreasonable or impracticable to obtain the individual’s consent to the collection, use or disclosure, and
* the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety or any individual, or to public health or safety.

However, this does not adequately cover financial abuse. The Office of the Australian Information Commissioner (OAIC) APP Guidelines identify that threat to life, health or safety ‘can include a threat to a person’s physical or mental health and safety. It could include a potentially life threatening situation or one that might reasonably result in other serious injury or illness. The permitted general situation would not ordinarily extend to a threat to an individual’s finances or reputation.’[[2]](#footnote-2)

In our experience, the impact and effects of financial abuse are devastating, with significant and ongoing consequences for the adult with disability or older person. All efforts should be made to remove barriers to enable banks and financial institutions to take necessary actions, including to provide information to adult safeguarding and other investigative agencies, where they identify or suspect that the customer may be subject to financial abuse, and it is unreasonable or impracticable to obtain the customer’s consent.

Section 13(4) and section 15 of the *NSW Ageing and Disability Commissioner Act 2019 [NSW]* provides protections for persons who make a report to the ADC in good faith, including that they are not liable to any civil or criminal action, or any disciplinary action, for making the report. However, notwithstanding these protections, in our experience banks are reluctant to make reports even where there is reasonable suspicion that financial abuse is occurring, due to the current restrictions of the Privacy Act and the APP Guidelines.

In our view, there are a number of ways this issue could be resolved, including (but not limited to):

* amending the APP guidelines to include financial abuse within the scope of a ‘serious threat to an individual’s life, health or safety’ under section 16A
* amending the Privacy Act to ensure that serious threat to an individual’s financial circumstances is included in section 16A.

Given the issues, in our view the further consultation recommended in proposal 17.3 should include the ADC and representatives of the other State and Territory adult safeguarding agencies,[[3]](#footnote-3) and should occur as a matter of priority.

Thank you for the opportunity to make a submission on this important issue. Please do not hesitate to contact Rory O’Neill, Principal Projects Officer, on 9407 1825 or rory.oneill@adc.nsw.gov.au if you have any questions or would like to discuss.

Yours sincerely



Robert Fitzgerald AM

**NSW Ageing and Disability Commissioner**

1. Under the *Ageing and Disability Commissioner Act 2019* [NSW], ‘older adult’ means a person who is aged 65 years and older, or aged 50 and older if the person is Aboriginal or Torres Strait Islander. [↑](#footnote-ref-1)
2. OAIC APP Guidelines, Chapter C: Permitted general situations, p5 [↑](#footnote-ref-2)
3. ACT Human Rights Commission, Queensland Public Guardian, and SA Adult Safeguarding Unit [↑](#footnote-ref-3)