Ageing and Disability Commission

NSW GOVERNMENT

NSW AGEING AND DISABILITY COMMISSION

SUBMISSION TO THE CONSULTATION ON THE EXPOSURE DRAFT AGED CARE BILL 2023

MARCH 2024

1. Background and focus of our submission

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

A key role of the ADC is to respond to reports about older people (65 years and over or, if Aboriginal and/or Torres Strait Islander, 50 years and over) and adults with disability (18 years and over) 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.

The submission of the ADC has been informed by our handling of reports about older people and adults with disability. Guided by this experience, the focus of our submission is on strengthening safeguards and ensuring that the Act adequately supports actions to prevent and address abuse, neglect and exploitation of people receiving, or eligible to receive, aged care services.

ADC data snapshot

Between 1 July 2019 and 31 December 2023, the ADC received 16,500 statutory reports about abuse, neglect and exploitation of older people and adults with disability.

- Over three-quarters of the reports (12,682) involved older people, including older people with disability.
- In relation to older people, the most common allegations involved psychological abuse (39%), financial abuse (29%), and neglect (21%), primarily by their adult children or other family members.

Allegations in reports to the ADC about older people, 1 July 2019 – 31 December 2023

Form of abuse	No. allegations in reports about older people	% of all allegations in reports about older people
Psychological abuse Mainly: - verbal abuse - preventing or restricting access to family/ others - preventing or restricting access to supports/ services - making excessive or degrading demands	7,759	39%
Financial abuse Mainly: - financial exploitation - misuse of Power of Attorney/ Enduring POA - theft	5,753	29%
Neglect Mainly: - failure to meet the person's support needs - medical neglect - clothing/food	4,153	21%
Physical abuse	1,588	8%

Mainly: - hitting/kicking/punching - threat of harm - pushing/shoving/grabbing/shaking		
Sexual abuse Mainly: - sexual assault - sexual touching	118	<1%
Other	393	2%
Total allegations in reports about older people	**19,764**	**100%**

More data relating to reports to the ADC about abuse, neglect and exploitation of older people and adults with disability in NSW is available on the Tools and Resources section of our website: www.adc.nsw.gov.au.

2. Summary of key points

- There should be provision for an individual to have both a supporter and a representative. There should also be automatic recognition by the System Governor of representatives appointed under a state or territory decision-making order to make decisions in line with their appointed functions.
- To minimise barriers to individuals getting necessary support, it is critical that the Act enables applications for access to aged care services, and reassessments of support needs, to be made by another party on the individual's behalf.
- Where an adult safeguarding agency provides information to the System Governor to inform its decisions (including in relation to a current or proposed supporter or representative, access application, or request for reassessment), the agency should be notified of the decision that is made.
- Greater consideration should be required to be given to the risks to the individual prior to the System Governor making a decision to close an access application, deem the application to be 'withdrawn', or revoke an access approval.
- There is a need for greater safeguards to be included in the assessment process to maximise the likelihood that eligible individuals will be assessed to receive supports and reduce the risk of abuse.
- Provisions relating to the disclosure and use of protected information need to be amended to enable:
    - disclosure of information to adult safeguarding agencies, such as the ADC
    - disclosure to avert or report serious threat to an individual associated with financial abuse or exploitation
    - disclosure to worker screening systems in relation to child-related employment.
- There is a need to ensure that people who *propose* to make a complaint or report an incident are protected from retributive action.
- There should be alignment between the restrictive practices arrangements for the aged care and disability sectors, and a shift away from a consent-based approach.

3. Supporters and representatives

The ADC welcomes provisions in the Exposure Draft Bill that seek to apply the support for decision-making principles recommended by the Australian Law Reform Commission.

We are keen to ensure that the inclusion of provisions on supporters and representatives in the Act does not translate in practice to an expectation that an individual must have a supporter or representative. We welcome the prominence in the Statement of Rights of the right of individuals to make their own decisions and note that this is also reflected in the final draft of the strengthened aged care quality standards.

Scope to appoint a supporter and a representative

The Bill identifies that more than one supporter may be appointed, and more than one representative may be appointed, but a supporter and representative cannot be appointed simultaneously. It is not clear to us why this position has been taken. In our view, it is reasonable to expect that an individual could have a supporter in certain areas (such as in relation to their health needs and the way aged care services are delivered) and a representative in certain areas (such as in relation to financial decisions about aged care).

Appointment of representatives

Overall, we are concerned about the interplay between the proposed appointment process in the Exposure Draft and existing state and territory laws for appointing representatives.

In particular:

- It is not clear why a party appointed as a representative/substitute decision-maker for the individual under a state or territory order would not be automatically recognised by the System Governor as a representative for the individual in relation to their appointed functions. As it stands in the Exposure Draft, the System Governor could opt not to appoint a state or territory Tribunal-appointed representative (for example, if the individual was opposed to the appointment) – presenting significant problems.
- While we support the proposed duties of representatives as outlined in the Exposure Draft, they are at odds with current guardianship legislation in NSW, which remains focused on the individual's 'best interests' rather than their will and preference.

We consider that there would be merit in exploring how representatives appointed under a state or territory decision-making order could be excised from the appointment process in the Bill. We note the suggestion of the Queensland Public Advocate to limit requirements relating to the appointment of representatives to people 'who do not already hold relevant decision-making power under a state or territory law'.[1]

The automatic recognition of Tribunal-appointed representatives in relation to their appointed functions would not prevent the individual from having a separate representative(s) for other decisions if they wished or if necessary. However, it is important that the existing orders are automatically recognised to enable the appointed representative to make decisions in line with their functions.

Notification of appointment, suspension or cancellation

The ADC welcomes provisions for the System Governor to suspend and cancel the appointment of a supporter or representative in circumstances that include where the

[1] Australian Ageing Agenda, 'More work needed on aged care bill', 22 January 2024.

supporter or representative has caused, or is likely to cause, abuse or neglect to the individual. Consistent with the ADC's role and functions, there will be occasions in which we provide relevant information to the System Governor about an existing or proposed supporter or representative, to inform decisions about appointment, suspension and/or cancellation.

The Bill outlines the parties that are to be notified of the decisions of the System Governor in relation to appointment, suspension and cancellation, such as the individual, the affected party, and current registered providers. Where an adult safeguarding body such as the ADC provides information to the System Governor about a current or proposed supporter or representative, it will be important to ensure that the adult safeguarding body is also notified of the System Governor's decision. This is critical information that directly affects safeguarding activities, including decisions about additional or alternative measures that may be needed to protect the individual.

At a minimum, the Act needs to specifically provide for the disclosure of protected information to adult safeguarding agencies (see section 5 of this submission). However, clear guidance for the System Governor will also be needed to support consistent practice.

4. Access to aged care services

It is vital that the legislative arrangements for access to aged care services are simple, inclusive and do not present barriers to vulnerable people gaining and retaining the supports they need.

Applying for access

There are many older people who need and want aged care services but require direct assistance to apply. In our experience, this can be for a range of reasons, including that the older person does not know how to apply and/or they are being prevented from applying by a family member or other party.

The current wording of the Bill states that an individual can access a funded aged care service if they make an application in an approved form (section 37(a), section 38). Unlike the existing Aged Care Act, there is no reference to an application being able to be made on the person's behalf by another party.[2] To minimise the barriers to individuals obtaining necessary support, including in circumstances of abuse, it is critical that there remains the ability for another party to make an application on behalf of the individual, and that this is not limited to appointed representatives. In this regard, we note that:

- on many occasions the ADC has needed to directly apply to My Aged Care for an older person subject to, or at risk of, abuse, and this will continue to be required in relevant cases
- the ability to apply on behalf of an individual is also needed by important formal and informal supports, including (among others) care finder services, General Practitioners, social workers, family and friends.

In our view, the legislation should specifically refer to applications being able to be made by another party on the individual's behalf.

[2] See section 22.3(3), *Aged Care Act 1997*.

Follow-up on the application

An area of concern to the ADC is the current practice in which applications for access to aged care services can be closed by My Aged Care (MAC) without contact with the individual or referring party.

In a range of cases handled by the ADC, the ADC or other key third party such as a GP has made the application to MAC on behalf of the older person, but MAC has subsequently closed the application without any contact with the individual and/or the ADC or GP. In the main, the closure has occurred due to MAC being unable to contact the older person within three phone attempts. MAC has then closed the application without any attempt to contact the referring party to confirm the older person's contact details, advise of the difficulty in reaching them, or to advise that the application would be closed. In situations where the older person is subject to, or at risk of, abuse, the action to close the application without contact increases the risk to the individual and fails to alert the key parties who can follow-up to ensure the individual's safety.

In our view, the application process (whether via the Act, Rules, or guidelines) should require greater consideration to be given to the risks to the individual prior to the System Governor making the decision to close the application or deem that the application is 'withdrawn', including requiring, where the individual cannot be contacted:

- contact with the third-party applicant
- where the individual was the applicant, contact with their supporter or representative
- where the application has been made in the context of risk of abuse, neglect or exploitation, or the individual is vulnerable, contact with the state/territory adult safeguarding body and/or care finder service.

The legislation also requires adequate scope in its information sharing provisions to enable disclosure of protected information to the relevant party, including third party applicants (see section 5 of this submission).

Revoking an access approval

Sections 53 and 54 of the Bill provide for the System Governor to revoke an access approval if requested by the individual. It appears that it is an automatic process – if the individual requests revocation of the access approval, the System Governor *must* revoke it within 28 days.

Revoking an access approval for an individual who needs aged care supports is a significant action that can have serious ramifications for them, particularly when they are already at high risk and/or subject to abuse, neglect or exploitation. In a range of cases handled by the ADC, the individual's representative (the subject of allegations) would be highly likely to request revocation or withdrawal of the application or approval in order to increase their control over the individual, increase the individual's dependence on them, and financially benefit from the situation. Alternatively, the individual may make the request(s) under duress.

Consistent with our broader comments in relation to applications and assessments, in our view it is vital that:

- a decision as to whether to revoke an access approval is not automatic, and is informed by consideration of all relevant information about risks to the individual, and

- consideration is given to safeguarding actions that may be required, such as referral to a care finder service to enable a check on the person, and/or an adult safeguarding body to explore what assistance may be needed.

Assessment and reassessment

Determining that it is 'not reasonably possible' to undertake an assessment

Consistent with the previous section, we consider that there is a need for greater safeguards to be incorporated into the assessment process to maximise the likelihood that eligible individuals will be assessed to receive necessary supports and reduce the risk of abuse.

In this regard, we note that under section 43(2)(b) of the Bill, an aged care assessment must not be undertaken if the System Governor 'is satisfied it is not reasonably possible for an approved needs assessor to undertake the assessment'. The example provided is 'where the individual does not provide consent to the assessment.'

While we strongly support actions and decisions that uphold the will and preference of the individual, we are concerned about the potential for section 43(2)(b) to be used to prevent vulnerable individuals from having contact with an approved needs assessor. In particular, we would have significant concerns about any of the following being deemed to be circumstances in which it 'is not reasonably possible' to undertake an assessment:

- where the individual cannot be reached by telephone
- where an individual was the applicant but another party declines the assessment
- where the individual lives in a rural or remote area
- where the individual does not provide consent to the assessment but there are concerns about their decision-making (such as concerns about undue influence or duress)
- where the individual has declined a needs assessment but the information identifies high support needs and inadequate informal supports.

In our view:

- wherever possible, an eligible individual should be linked to an aged care needs assessment – the acceptable reasons for an assessment not being 'reasonably possible' should be very narrow and well-defined
- in the event that it is deemed that it is not reasonably possible to undertake an assessment in relation to an individual, consideration should be given to all relevant information about risks to the individual to inform other actions (such as, but not limited to, referral to an adult safeguarding body or other party that can explore what assistance may be needed).

Aged care needs reassessment

Section 46 identifies that, for the System Governor to decide whether a reassessment of an individual's need for aged care services is required, the individual has to make 'an application in an approved form'.

Consistent with our feedback in relation to the application process, it will be important to ensure that:

- there is specific provision in the legislation for third parties to be able to request a reassessment for an individual, and
- where a third party requests the reassessment and the System Governor decides that the reassessment is not required, the third party should be notified of this

decision, including the reasons for the decision and the option to apply for reconsideration of the decision.

5. Disclosure of protected information

The ADC has concerns about the current provisions in relation to the authorisation of recording, use or disclosure of protected information (Chapter 7, Part 2, Division 3).

Disclosure for worker screening

The Exposure Draft Bill currently provides for a person to disclose protected information 'for the purpose of facilitating the performance of a function or duty, or the exercise of a power, under an aged care worker screening law or an NDIS worker screening law' (section 332). We support the disclosure of protected information for this purpose; however, it is not clear why this provision does not extend to worker screening law in relation to working with children. It is important that there are effective information sharing arrangements between worker screening bodies for aged care, NDIS and child-related employment, noting the significant mobility of workers of concern across these fields of work.

Recording, use or disclosure to avert or report serious threat to individual

We appreciate the inclusion in the Exposure Draft Bill of a provision to enable the recording, use or disclosure of protected information by any person if they believe it is necessary 'to lessen, prevent or report a serious threat to the life, health or safety of an individual seeking to access, or accessing, funded aged care services' (section 333). We recognise that this aligns with a permitted general situation in section 16A of the *Privacy Act 1988*.

However, the ADC understands that the scope of the provision in the Privacy Act does not ordinarily extend to threat to an individual's finances. As a result, we are concerned that the current wording of section 333 will not permit the use or disclosure of protected information to lessen, prevent or report a serious threat to an individual's life, health or safety associated with financial abuse or exploitation.

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

Disclosure for state or territory adult safeguarding functions

We are concerned that the Exposure Draft Bill does not currently appear to enable disclosure of protected information to state or territory adult safeguarding agencies, such as the ADC. We note that the Bill provides for:

- disclosure by the System Governor or Commissioner to an agency whose functions include enforcement of criminal law or a law imposing a pecuniary penalty, or protection of the public revenue (section 337), and
- disclosure by the Commissioner 'to a person or body that has under a law of a State or Territory a function of dealing with complaints or information about the provision of health or community services' (section 343).

However, neither of these provisions would include adult safeguarding agencies such as the ADC.

It is imperative that the System Governor, Commissioner, aged care providers and other parties are able to disclose protected information to a person or body that has, under a law of a state and territory, a function of dealing with allegations of abuse, neglect or exploitation of older people and adults with disability. We note that adult safeguarding agencies typically deal with allegations of abuse, neglect and exploitation of adults in their family, home and community (such as by family members) – these are not matters that are covered by the Commissioner's functions.

From our reading, the information sharing provisions in the Exposure Draft Bill would enable protected information to be provided to a person carrying out research into funded aged care services, but not to adult safeguarding agencies that can protect an individual from abuse.

While we recognise that section 344 provides for other disclosures to be prescribed by rules, in our view the disclosure of information to adult safeguarding agencies should be included in the Act.

6. Protections for whistleblowers and complainants

The ADC welcomes provisions in the Exposure Draft Bill to protect whistleblowers from victimisation, including civil penalties outlined in Chapter 7, Part 5. Consistent with good practice in whistleblower protections (and protection of complainants from retribution), the protections extend to parties who have made a disclosure as well as those who 'intend to make' a disclosure.

However, there are aspects of the Bill that appear to be inconsistent in the protections for whistleblowers and/or complainants. A critical aspect of whistleblower protections lies in the messages it sends to both potential whistleblowers/complainants and parties engaging in wrong or inappropriate conduct. Abundant clarity is required to ensure that people who are concerned about wrongdoing feel confident and supported to speak up when they encounter it.

Conditions of registration – incidents and complaints

The Bill identifies that it is a condition of registration that a registered provider must not victimise or discriminate against anyone for reporting an incident (section 95(c)) or making a complaint or giving feedback (section 96(c)).

While we welcome the inclusion of these sections, it is not sufficient to limit the conditions only to victimisation or discrimination against a party who *actually* reports an incident or makes a complaint. It is critical that the protection also extends to parties who *propose* (or intend) to make a report or complaint. Without this extension, it will be possible for a provider to take retributive action against a party (such as intimidation, threats) that dissuades the party from making a complaint or reporting an incident, and it would not contravene the conditions of registration.

Importantly, extending these sections to parties who *propose or intend* to report an incident or make a complaint also aligns with the whistleblower protections in section 358.

Disclosures qualifying for protection

Section 355(c) identifies that a disclosure of information by an individual qualifies for protection under this section if 'the discloser has reasonable grounds to suspect that an entity may have contravened a provision of this Act'.

However, section 144(a) enables parties to make a complaint to the Complaints Commissioner about both (i) compliance with the Act and (ii) a provider acting in a way that is incompatible with the Statement of Rights. From our reading, it appears that whistleblower protections only apply to the former; a party who discloses information about a provider acting in a way that is incompatible with the Statement of Rights would not be afforded the same protection. In our view, there would be merit in considering whether there is sufficient alignment between the complaints provisions and whistleblower provisions.

7. Restrictive practices

The ADC has concerns about the current, and proposed continuing, consent-based approach to the authorisation and use of restrictive practices in aged care. While we recognise that the detail of the requirements relating to restrictive practices are intended to be covered in rules to be developed in the future, we are concerned that the Bill provides a framework that will maintain the existing consent-based regime.

In comparison to the current requirements for the use of restrictive practices in the *Quality of Care Principles 2014*, the requirements in the Bill do not refer to behaviour support or behaviour support plans. There is also no reference to key safeguarding elements, such as assessments prior to the use of restrictive practices, or the involvement of independent experts, and no indication that the rules will identify restrictive practices that are prohibited from use.

In our view, there is a need for further work to reform the arrangements for the authorisation and use of restrictive practices across disability and aged care services, including to:

- ensure alignment in the approaches, noting key similarities in the populations, including a high proportion of older people with disability in aged care
- enhance safeguards and outcomes for individuals
- reduce and streamline administrative requirements, informed by a risk proportionate approach.

In relation to consent, we generally support the suggestion of the Queensland Public Advocate that the Bill should 'simply require that restrictive practices can only be used where they are authorised according to the "applicable law of the state or territory in which the care recipient is provided with aged care" services'[3]. We recognise that there is significant work required by states and territories in this regard, including consideration of, and response to, the Disability Royal Commission recommendation to establish a senior practitioner authorisation model.

The ADC will be keen to feed into the development of the rules and further discussions on restrictive practices in aged care.

[3] Australian Ageing Agenda, 'More work needed on aged care bill', 22 January 2024.