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Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

16 September 2015

Dear Committee Secretary

Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability.

I attach a brief submission in relation to the current inquiry into violence, abuse and neglect of disabled individuals living in institutional or residential settings. This submission argues that the ill-treatment suffered by older Australians living in aged care facilities should be viewed as a violation of their human rights, and that this should be taken into consideration in deciding how to tackle the issue.

I write this submission with the personal knowledge of the mistreatment that occurs in aged care facilities. A relative of mine suffered serious neglect whilst in aged care. Her story is included below. Seeing what happened to her has made me passionate about casting light on the issue.

If you should wish to discuss this submission, please feel free to contact me via the email address supplied above.

Yours sincerely

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**SUBMISSION TO THE SENATE CONCERNING THE INQUIRY INTO
VIOLENCE, ABUSE AND NEGLECT AGAINST PEOPLE WITH
DISABILITY IN INSTITUTIONAL AND RESIDENTIAL SETTINGS,
INCLUDING THE GENDER AND AGE RELATED DIMENSIONS, AND THE
PARTICULAR SITUATION OF ABORIGINAL AND TORRES STRAIT
ISLANDER PEOPLE WITH DISABILITY, AND CULTURALLY AND
LINGUISTICALLY DIVERSE PEOPLE WITH DISABILITY**

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In recent years, countless reports have been made of abuse and neglect against older people living in aged care facilities. Such mistreatment should be considered an infringement on an individual's human rights under international law. A rights-based approach illustrates Australia's international obligations to protect the elderly from these human rights violations. The Australian government needs to adopt such an approach and take positive steps to stop the mistreatment immediately.

The mistreatment of residents in aged care facilities

Abuse and ill treatment undoubtedly occurs in Australian aged care facilities. Very few hard figures have been released, but it is estimated that over 100,000 elderly people are abused each year.¹

Certain instances reported in the media have been particularly harrowing. They indicate the array of ill-treatment that occurs in aged care facilities, as well as its severity. Positive acts of mistreatment have included the bathing of residents in kerosene,² the throwing of urine-soaked sheets at residents,³ verbal abuse,⁴ and inflicting burns.⁵ Nurses and management have also neglected residents by failing to change soiled linen,⁶ administer much-needed pain

¹ G. Kelton, 'Elderly abuse a growing problem', *Sunday Mail*, 21 September 2003 p 14.

² Fiona Reynolds, 'Parliament hears kerosene bath led to death', *PM Project ABC* (online) 8 March 2000, <<http://www.abc.net.au/pm/stories/s108761.htm>>.

³ Margot O'Neill, 'Mistreated nursing home residents 'better off in a concentration camp'', *ABC News* (online), 16 July 2013 <<http://www.abc.net.au/news/2013-07-16/shocking-claims-elderly-being-mistreated-in-nursing-homes/4821492>>.

⁴ Ibid.

⁵ Monique Hore and James Campbell, 'Nursing home probe after woman 'melted to death' by a heater', *The Herald Sun* (online), 8 May 2015 <<http://www.heraldsun.com.au/news/law-order/nursing-home-probe-after-woman-melted-to-death-by-a-heater/story-fni0fee2-1227344540567>>.

⁶ Ibid.

relief, and seek medical assistance for seriously injured residents.⁷ Neglect has in some cases been life-threatening, with patients being left to die asphyxiating on their own vomit.⁸ Residents are therefore at risk of physical injury (such as amputations⁹ or gangrene¹⁰), mental injury (such as distress¹¹), and even death.¹²

Aged care residents have also suffered financial abuse. Theft often includes personal property, such as jewellery¹³ and medication.¹⁴ Money is also frequently reported stolen.¹⁵ Nurses and administration staff are normally the suspects of such actions.

Female residents also face the possibility of being sexually assaulted in aged care facilities. In 2012, 344 instances of unlawful sexual contact were reported in Australian aged care facilities.¹⁶ However, this number is unlikely to accurately reflect the prevalence of the issue, as only around 19 per cent of sexual assaults are reported across the board.¹⁷ It has been suggested that over 2000 sexual assaults in aged care yearly.¹⁸ Most instances have involved assault by fellow residents or staff members. In one case, a resident notified her daughter that she was being sexually assaulted by a nurse at the facility. She was told that he “could do whatever [he] want[ed]” to her.¹⁹ Women in aged care can be particularly vulnerable to such abuse because of a lack of support and guardianship, as well as mental impairment or other disability.

Many people believe that the neglect suffered by aged care residents is due in part to a lack of staffing in aged care facilities. Staff members are reportedly “run off their feet” as aged care

⁷ Margot O’Neill, ‘Mistreated nursing home residents ‘better off in a concentration camp’’, *ABC News* (online), 16 July 2013, <<http://www.abc.net.au/news/2013-07-16/shocking-claims-elderly-being-mistreated-in-nursing-homes/4821492>>.

⁸ Margot O’Neil, ‘Aged care workers cite abuse and neglect of nursing home patients’, *Lateline* (online), 13 August 2013 <<http://www.abc.net.au/news/2013-08-13/aged-care-understaffed-as-nursing-home-patient-numbers-rise/4884056>>.

⁹ See e.g. K. Hannon, ‘Bishop under fire again: nursing home disgrace’, *The Advertiser*, 10 August 2001, p1.

¹⁰ See e.g. Margot O’Neill, ‘Mistreated nursing home residents ‘better off in a concentration camp’’, *ABC News* (online), 16 July 2013, <<http://www.abc.net.au/news/2013-07-16/shocking-claims-elderly-being-mistreated-in-nursing-homes/4821492>>.

¹¹ See e.g. Margot O’Neill, ‘Hundreds of dementia assaults going unreported’, *ABC News* (online), 12 April 2013 <<http://www.abc.net.au/news/2013-04-11/nursing-home-dementia-assaults-going-unreported/4624374>>.

¹² See e.g. Fiona Reynolds, ‘Parliament hears kerosene bath led to death’, *PM Project ABC* (online), 8 March 2000 <<http://www.abc.net.au/pm/stories/s108761.htm>>.

¹³ See e.g. Rohan Smith, ‘Ring allegedly stolen from finger of dying woman at South Australian nursing home’ *News.com.au* (online), 10 April 2015 <<http://www.news.com.au/national/crime/ring-allegedly-stolen-from-finger-of-dying-woman-at-south-australian-nursing-home/story-fns0kb1g-1227297135836>>.

¹⁴ See e.g. Dan Box ‘Nursing home inquest told killer may have stolen patients drugs’ *The Australian* (online), 2015, <<http://www.theaustralian.com.au/news/nation/nursing-home-inquest-told-killer-may-have-stolen-patients-drugs/story-e6frg6nf-1227255692090>>.

¹⁵ See e.g. Ben Pike, ‘Nurse Myrta Cruz ‘robbed elderly patient’ in her care’, *The Daily Telegraph* (online), 3 February 2015 <<http://www.dailytelegraph.com.au/news/nsw/nurse-myrta-cruz-robbed-elderly-patient-in-her-care/story-fni0cx12-1227205803687>>.

¹⁶ Julia May, ‘Shocking numbers of elderly women being abused in aged care homes’, *The Age* (online), 7 July 2014 <<http://www.theage.com.au/victoria/shocking-numbers-of-elderly-women-being-abused-in-aged-care-homes-20140706-3bg9w.html>>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Rosemary Mann, Philomena Horsley, Catherine Barrett and Jean Tinney, ‘Norma’s Project’, Australia Research Centre in Sex, Health and Society, 7 August 2014, p. 5.

homes continue to cut jobs and increase the demands placed on each carer.²⁰ There is currently no mandatory staff-to-patient ratio that aged care facilities must comply with.²¹ Low numbers of staff at any given time makes mistreatment of residents even more likely.

A case study of an aged care resident

Lilly Callaghan was my great aunt. She lived in an aged care facility for the last three years of her life. During her time there, I became aware of the fact that she was not being looked after properly. The ways in which she was neglected, both physically and psychologically, were shocking and unacceptable. Her story below shines a light on the experiences of many individuals in aged care facilities.

LILLY CALLAGHAN'S STORY

Lilly was placed in a Victorian aged care facility in 2008. Soon after her arrival, she lost her zest for life – her appetite diminished, she cried daily, and she stopped being active. Nurses administered anti-depressants, but her mood did not improve. Nothing else was done to try to improve Lilly's mental wellbeing.

In 2009, Lilly fell and broke her hip. Despite being in agony, the facility chose to delay her treatment. Instead of calling a locum, management told Lilly to lie down in bed. A medical examination did not take place until hours later.

After returning from hospital, the facility ensured Lilly remained bedridden. They lowered her bed to the floor so that she could not get up to eat, drink, sit, walk, leave her room, or go to the toilet. It was rare to see Lilly doing anything but lying at ground-level.

Being constantly bedridden meant that Lilly developed pressure sores. She also lost weight, as she was not eating. Lilly developed skin tears as a result of this.

Soon after, management decided to take a palliative care approach with Lilly. Under this approach, they chose to stop administering medication to treat Lilly's atrial fibrillation and hypercholesterolemia.

In early 2011 Lilly had a sore on one of her legs. A swab of the infection tested positive for staphylococcus aureus (or 'golden staph'). This sore was not treated.

Lilly died in June 2011. When funeral directors visited, it became visible that Lilly's leg was liquefactive, and that one or two of her toes were black. At this time, it appeared that Lilly's lower leg and toes were gangrenous. Knowing that Lilly had suffered such ill-treatment has traumatised family and friends.

²⁰ Monique Hore and James Campbell 'Nursing home probe after woman 'melted to death' by a heater', *The Herald Sun* (online), 8 May 2015 <<http://www.heraldsun.com.au/news/law-order/nursing-home-probe-after-woman-melted-to-death-by-a-heater/story-fni0fee2-1227344540567>>.

²¹ Margot O'Neill 'Aged care workers cite abuse and neglect of nursing home patients' *Lateline* (online), 13 August 2013 <<http://www.abc.net.au/news/2013-08-13/aged-care-understaffed-as-nursing-home-patient-numbers-rise/4884056>>.

A human rights issue

This neglect and mistreatment of aged care residents breaches several United Nations ('UN') Conventions.

The International Covenant on Civil and Political Rights ('ICCPR') states in Article 6 that every human has the inherent right to life, and that this right should be protected by law.²² Article 7 also states that humans shall not be subject to torture or to cruel, inhuman or degrading treatment or punishment.²³ The UN Human Rights Committee has noted that cruel, inhuman or degrading treatment occurs in nursing homes where there are deficiencies in living conditions and the levels of care provided to residents.²⁴ It has since noted that state parties should pursue efforts to improve the situation of elderly residents.²⁵

The International Covenant on Economic, Social and Cultural Rights ('ICESCR') has also been breached. Article 11 states that State Parties recognise the right of every human to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living conditions.²⁶ This therefore places the obligation on State Parties to move immediately towards this goal.²⁷ At the very least, State Parties need to ensure that most individuals are not deprived of essential foodstuffs, primary health care, basic shelter and housing, and basic forms of education.²⁸ Arguably, Australia fails to discharge this obligation as a significant number of residents are deprived of basic levels of care, such as adequate food and water or medical care.²⁹

Article 12 reinforces Article 11. It states that humans should be given the highest attainable standard of physical and mental health. The UN Human Rights Committee has explicitly noted that this Article naturally applies to older persons. However, they go further by noting that, if older people require special measures to be taken in order to enjoy the full range of rights in the Covenant, State Parties are required to address them to the maximum of their available resources.³⁰ In 2010, the Committee noted that there was insufficient health care in Dutch nursing homes, due to a lack of staff and training.³¹ It was found that this was due to the state's failure to address the standard of physical and mental health requirements of aged

²² *International Covenant on Civil and Political Rights* art 6.

²³ *Ibid* art 7.

²⁴ Human Rights Committee, *Germany: Fifth Periodic Report*, UN Doc CCPR/C/CEU/2002/5 (13 November 2002) [113].

²⁵ Human Rights Committee, *Concluding Observations: Germany*, UN Doc CCPR/CO/80/DEU (4 May 2004), [17].

²⁶ *International Covenant on Economic, Social and Cultural Rights* art 11.

²⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations*, (14 December 1990), [9].

²⁸ *Ibid.* at [10].

²⁹ 'In Defence of Dignity - The Human Rights of Older People in Nursing Homes.' Northern Ireland Human Rights Commission (March 2012).

³⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No 6: The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995 [30].

³¹ UN committee on Economic, Social and Cultural Rights, *Concluding Observations: The Kingdom of the Netherlands*, 9 December 2010, UN Doc E/C 12/NDL/CO/4-5 [29].

care nursing homes by the State. A similar finding could be found in Australia, particularly because of the widespread acceptance of staffing deficits.³²

The UN Convention on the Rights of Persons with Disabilities ('CRPD') may also apply. Article 1 states that the purpose of the Covenant is "...to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." 'Persons with disabilities' include "...those who have long-term physical, mental, intellectual or sensory impairments in which interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

This convention is likely to apply to the majority of aged care residents, particularly because it is believed that over 50% of these individuals suffer from dementia.³³ Dementia is very likely to be considered a disability under this Covenant, as it has previously been found that dementia is a mental disability within the meaning of human rights law.³⁴ The Diagnostic and Statistical Manual of Mental Disorders 5 ('DSM-5') also lists dementia as an illness, which further confirms the status of dementia as a disability among clinicians.³⁵

Articles 9, 16, 20, 25 and 26 of the CRPD are also potentially engaged here. These Articles require State Parties to take appropriate measures to (i) ensure persons with disabilities have equal access to the physical environment; (ii) protect persons with disabilities from exploitation, violence and abuse; (iii) ensure personal mobility with the greatest possible independence; (iv) ensure access the highest attainable standard of health without discrimination because of a person's disability; and (v) enable persons with disabilities to attain and maintain maximum independence, full physical, mental social and vocational ability, and full inclusion and participation in all aspects of life. The Australian government fails to meet these requirements by not ensuring that aged care residents are looked after in the above ways.

Australia has also failed to obey the Convention on the Elimination of all Forms of Discrimination Against Women ('CEDAW'). This Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." As women make up approximately 70% of aged care residents in Australia,³⁶ CEDAW is

³² Brett Holmes 'Nursing homes need nurses: losing them would undermine residents' care', *The Age* (online), 25 May 2015 <<http://www.theage.com.au/comment/nursing-homes-need-nurses-losing-them-would-undermine-residents-care-20150525-gh8top.html>>.

³³ Alzheimer's Australia 'Summary of dementia statistics in Australia' <<https://fightdementia.org.au/national/statistics>>.

³⁴ Council of Europe Recommendation, 'Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder' (Explanatory Memorandum No 10, 2004) 20.

³⁵ American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders: DSM-5*. Washington, D.C: American Psychiatric Association.

³⁶ Australian Institute of Health and Welfare (2012) 'Residential aged care in Australia 2010-11: A statistical overview' (Aged Care Statistics Series no. 36. Cat. No. AGE 68. Canberra: AIHW).

relevant to a majority of aged care residents. Instances of sexual abuse in aged care facilities (discussed above), and the lack of safeguards against it, can therefore be seen as discriminatory against older women.³⁷ Australia has arguably failed to pursue through policy the elimination of this discrimination.³⁸

Australia has signed and ratified all of the above Conventions. They are therefore bound to create and alter domestic laws in order for it to be consistent with each treaty.³⁹ The fact that they have failed to do so means they have breached the above treaties. The Human Rights (Parliamentary Scrutiny) Act⁴⁰ also implicitly encourages Australia to ensure that laws are consistent with international obligations. Australia is therefore actively breaching their obligations under international law, and passively breaching their obligations under domestic law.

Pushing for change

There are signs that the Australian government is beginning to perceive aged care residents as possessing human rights worthy of protection. The Charter of Care Recipients Rights and Responsibilities⁴¹, which forms part of the Aged Care Act 1997 (Cth), identifies the rights of residents in aged care facilities. These include the right to (i) quality care appropriate to his or her needs; (ii) to be treated with dignity and respect, and to live without exploitation, abuse or neglect; and (iii) to live without discrimination or victimisation, and without being obliged to feel grateful to those providing his or her care and accommodation.

However, this Charter is insufficient to meet Australia's obligations under the international Conventions discussed above. The state is required to take active steps to protect rights; more needs to be done to proactively protect the rights of aged care residents. The charter does not require the government to act on complaints made under the Charter, nor does it hold accountable those who breach the Charter.

In order for Australia to fulfil their obligations under International law, more work needs to be done to incorporate the values of the Conventions into domestic law. Most importantly, such an approach would empower older people to protect their rights and create accountability for rights violators.

The need for a more specific human rights instrument

There is increasing dialogue around whether current international instruments are sufficient to protect the rights of older people. In response, the General Assembly of the United Nations established an Open Ended Working Group on Ageing ('OEWG') in 2010. This group intends to review existing protection of older people's human rights, and consider how their rights could be further protected. At their most recent meeting, it was established that there

³⁷ Ferdous Ara Begum, 'Ageing, Discrimination and Older Women's Human Rights from the Perspectives of CEDAW Convention' <<http://www.globalaging.org/agingwatch/cedaw/cedaw.pdf>>.

³⁸ *The Convention on the Elimination of all Forms of Discrimination Against Women*, art 2.

³⁹ *Vienna Convention on the Law of Treaties* art 26.

⁴⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8.

⁴¹ *Aged Care Act 1997* (Cth), sch 1

needs to be greater protection of elderly people's human rights.⁴² Some delegates believe this could be reached by the international Conventions discussed above. However, others argue that a specific international legal instrument needs to be created which addresses the rights of older people.

This instrument has been coined the Convention on the Rights of Older People. This Convention is considered necessary to protect older people's human rights, as it would establish legal standards capable of "challenging and replacing stigmatising and dehumanising ageist attitudes and behaviour in society".⁴³ It would also clarify how human rights should apply in older age, as the current conventions do not do this. Further, it would allow individuals to better understand and assert their rights, as well as improve accountability of State Parties for their human rights obligations towards older people. Finally, it would provide a framework for policy and decision making involving the issue.

HelpAge International considers that this Convention is necessary, in order to '(i) provide a comprehensive and systematic framework for the protection and promotion of all human rights in older age, (ii) prohibit discrimination on the basis of older age in every aspect of our lives, (iii) articulate how each human right specifically applies to us in older age; and (iv) provide for a strong implementation, monitoring and accountability system'.⁴⁴

It is possible that such a Convention will be created in the future, under the guidance of OEWG. The Australian government should therefore take this as a sign and proactively change legislation to be more in line with such international developments. Doing so would involve actively altering legislation to further protect institutionalised elderly individuals.

Conclusion

It is clear that older individuals living in aged care suffer neglect and abuse. I myself have been witness to such mistreatment, during the time in which my great aunt lived in a nursing home. The mistreatment outlined above is inhumane and unjustifiable.

It should naturally be considered a violation of human rights. Australia can therefore be seen as violating various human rights conventions, which they have signed and agreed to ratify. They should immediately alter legislation in order to actively protect older Australians in aged care.

The Convention for the Rights of Older People, which may be created in the near future, further confirms Australia's obligation to care for our elderly. Australia should use this as yet another reason to proactively protect the rights of elderly citizens.

⁴² UN General Assembly, *Open-ended Working Group on Ageing, Sixth Working Session* UN Doc A/AC.278/2015/2 (29 July 2015).

⁴³ Ina Voelcker and HelpAge International, *Towards a convention on the rights of older people*, Help Age International <http://www.helpage.org/what-we-do/rights/towards-a-convention-on-the-rights-of-older-people/?gclid=Cj0KEQjwmNuuBRDTu5rDjr2kxJsBEiQAWlm6UnujZBXYAxhEWIJyfw9dc6zhod3DqL9_bzJGovh-hsaArqE8P8HAQ>.

⁴⁴ *Ibid.*