

Submission to the call for contributions on older persons  
deprived of liberty – 2022 HRC report

Sexual violence in residential aged care services Australia

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The following key questions outlined by the Independent Expert, Dr Claudia Mahler, are relevant to this submission:

1. What are the key human rights risks and violations affecting older persons deprived of their liberty, considering different intersectional factors?	X
2. Please provide figures and data on older persons deprived of their liberty. Has the number of older persons deprived of their liberty increased or decreased over the past decade?	X
3. What kind of specific measures have been taken and implemented concerning older persons deprived of their liberty in the context of COVID-19 pandemic?	
4. Could you give us an overview on the national and local frameworks which prevent and protect older persons deprived of their liberty from human rights violations? Are there effective and available national monitoring and accountability mechanisms? Please provide a detailed answer with supporting information/documents.	X
5. Please share examples of good practices on how to ensure that older persons deprived of their liberty can exercise their human rights.	X

## What are the key human rights risks and violations affecting older persons deprived of their liberty, considering different intersectional factors?

All older persons who reside in residential aged care services (RACS) are not adequately protected from violence and abuse under Australian law and policy. Listed below are our concerns and reflections regarding sexual violence in RACS. Part 2 of our previous submission to the Independent Experts of older adult enjoyment of human rights (“previous submission”)<sup>1</sup> details our relevant international human rights laws relevant to the issue of sexual violence in RACS whilst Part 3 presents evidence for each concern and reflection listed below:

### The failure of the Australian Government to design, develop and implement:

- clear and tailored policies on the issue of sexual violence regarding:
  - older persons,
  - older persons in RACS, and
  - LGBTQIA+, Indigenous, disability etc. older persons.
- A national system or policy to manage residents with past sexual convictions, or sexually changed behaviour due to illnesses such as dementia, to prevent sexual violence in RACS.
- Clear and consistent RAC incident reporting obligations that are not counterintuitive to sexual violence best practice (e.g., to remove staff’s obligation to judge the severity of victim-impact and incident seriousness).
- Compassionate, rights-based response to address victim-survivors’ immediate and long-term care needs and ensure ongoing prevention of further harm.
- Mandatory sexual violence in RACS education and training for RACS staff.

### The failure of the Australian Government and aged care regulator to:

- examine the *prevalence* and *nature* of sexual violence in RACS using existing available longitudinal data.
- Represent older persons and older persons in RACS in Australia’s recent Royal Commissions, Inquiries, and national plans to end violence.
- Address known issues regarding sexual violence in RACSs, protect residents, and support victim-survivors within relevant Royal Commissions, Inquiries, and national plans to end violence final recommendations and priorities.

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<sup>1</sup> The Impact of Sexual Violence in Residential Aged Care on the Rights of Older Women. Submission to Independent Expert on the enjoyment of human rights by older persons. Available from: <https://www.ohchr.org/Documents/Issues/OlderPersons/OlderWomen/submissions-others/Castan-Centre-submission-older-women.pdf>

## The failure of RACS providers to:

- provide a safe environment which promotes victim-survivors to disclose violence without threat of being reprimanded or dismissed.
- Deliver compassionate, rights-based response to address victim-survivors' immediate and long-term care needs and ensure ongoing prevention of further harm.
- Consult with relevant stakeholders when managing and responding to sexual offences.

## Please provide figures and data on older persons deprived of their liberty. Has the number of older persons deprived of their liberty increased or decreased over the past decade?

Mandatory reporting data in Australia suggest an increase in reports of alleged or suspected unlawful sexual contact<sup>2</sup> in residential aged care services (RACS). In 2015–2016 the Department of Health was notified of 396 reports of alleged or suspected unlawful sexual contact of residents in RACs in Australia.<sup>3</sup> This number has increased in subsequent years, with 547 reports in 2017–2018,<sup>4</sup> and 739 reports in 2018–2019,<sup>5</sup> and 816 reports between 2019–2020.<sup>6</sup> Unfortunately, the 2020–21 annual report did not report the number of sexual violence incidents.<sup>7</sup> Since mandatory was established in 2007, the Australian Government have not provided transparent detail on how reportable assault data is being used to improve care and protect residents. Annual report figures are an underestimation of the true incidence of sexual violence in RACS

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<sup>2</sup> I.e., Non-consensual sexual contact, which is or may amount to a criminal act under state/territory or Commonwealth legislation. These offences are commonly understood as sexual assault: which occurs when someone does not consent to engaging in a sexual act(s) with another person (e.g., non-consensual digital penetration, coerced sexual acts). Until 2021, there were exemptions to reporting certain acts of sexual violence, and exemptions regarding cognitive/mental impairment status. For example, only unlawful sexual contact acts were classified as reportable in RACS. Therefore, unlawful sexual non-contact acts (e.g., threats to commit a sexual offence) and unwelcome sexual behaviour (e.g., unwelcome sexual propositions and conversations) are not accounted for in the figures provided in this submission.

<sup>3</sup> Australian Government Department of Health, *2015–16 Report on the Operation of the Aged Care Act 1997* (Report, 2016) at [https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/ROACA/2015-16-ROACA.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/ROACA/2015-16-ROACA.pdf).

<sup>4</sup> Australian Government Department of Health, *2016–17 Report on the Operation of the Aged Care Act 1997* (Report, 2017) at [https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/ROACA/2016-17\\_Report\\_on\\_the\\_Operation\\_of\\_the\\_Aged\\_Care\\_Act\\_1997.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/ROACA/2016-17_Report_on_the_Operation_of_the_Aged_Care_Act_1997.pdf).

<sup>5</sup> Australian Government Department of Health, *2018–19 Report on the Operation of the Aged Care Act 1997* (Report, 2019) at [https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/ROACA/2018-19-ROACA.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/ROACA/2018-19-ROACA.pdf).

<sup>6</sup> Australian Government Department of Health, *2019–20 Report on the Operation of the Aged Care Act 1997* (Report, 2020) at <https://www.health.gov.au/news/announcements/2019-20-report-on-the-operation-of-the-aged-care-act-1997> ('*2019-20 Report on the Operation of the Aged Care Act*').

<sup>7</sup> Australian Government. Aged Care Quality and Safety Commission. Annual Report 2020–2021. 2021. [Internet]. Available from <https://www.agedcarequality.gov.au/sites/default/files/media/acqsc-annual-report-2020-21.pdf>

in Australia due to previous mandatory reporting exemptions (detailed in Part 3 our previous submission to the Independent Expert).<sup>8</sup>

The Aged Care Royal Commission into Quality and Safety ('Aged Care Commission') final report estimates that the national number of alleged incidents of unlawful sexual contact to be as high almost 50 per week.<sup>9</sup> Whilst the recent federally funded KPMG report (2019) estimates tens of thousands of physical and sexual assaults to occur annually in Australian RACS nationally.<sup>10</sup> Details of this report and the findings of the Aged Care Commission can be found in our previous submission to the Independent Expert.<sup>11</sup>

**Could you give an overview of the national and local frameworks which prevent and protect older persons deprived of their liberty from human rights violations? Are there effective and available national monitoring and accountability mechanisms? Please provide a detailed answer with supporting information/documents.**

Current national frameworks are not effective to prevent and protect residents from sexual violence. Issues with (i) mandatory reporting, (ii) the Aged care Quality and Safety Commission (ACQSC, the regulator (detailed in footnotes))<sup>12</sup> and (iii) the proposed domestic, family, and sexual violence commission<sup>13</sup> are discussed below.

**Issues with mandatory reporting of serious incidents:**

- The stark differences between annual report figures and those estimated by the Aged Care Commission & KPMG (presented above) illustrates how mandatory

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<sup>8</sup> The Impact of Sexual Violence in Residential Aged Care on the Rights of Older Women. Submission to Independent Expert on the enjoyment of human rights by older persons. Available from: <https://www.ohchr.org/Documents/Issues/OlderPersons/OlderWomen/submissions-others/Castan-Centre-submission-older-women.pdf>

<sup>9</sup> *Royal Commission into Aged Care Quality and Safety* (Final Report, Executive Summary, 2021) 46 at <https://agedcare.royalcommission.gov.au/publications/final-report-executive-summary> ('*Royal Commission Final Report*').

<sup>10</sup> KPMG, *Prevalence Study for the Serious Incident Response Scheme* (Report, November 2019) at <https://www.health.gov.au/resources/publications/prevalence-study-for-a-serious-incident-response-scheme-sirs> ('*KPMG Report*').

<sup>11</sup> The Impact of Sexual Violence in Residential Aged Care on the Rights of Older Women. Submission to Independent Expert on the enjoyment of human rights by older persons. Available from: <https://www.ohchr.org/Documents/Issues/OlderPersons/OlderWomen/submissions-others/Castan-Centre-submission-older-women.pdf>

<sup>12</sup> To operate RACS within the federal aged care system, approved providers must be accredited by the regulator for aged care services, the Aged Care Quality and Safety Commission (ACQSC). The ACQSC has various functions in addition to accreditation, including the handling of complaints, provision of education, and 'consumer' engagement. Australian Government. Aged Care Quality Safety Commission. Providers. Available from <https://www.agedcarequality.gov.au/providers>

<sup>13</sup> Australian Government. Department of the Prime Minister and Cabinet. Domestic, Family, and Sexual Violence Commission. Available from: <https://ministers.pmc.gov.au/payne/2021/domestic-family-and-sexual-violence-commission-provide-national-leadership-and-accountability>

reporting obligations have not improved the reporting of sexual violence in RACS.

- The Serious Incident Response Scheme (SIRS) was the only recommendation from the Aged Care Royal Commission to manage sexual violence in RACS, despite sexual violence in RACS reported as a serious issue in which staff are inadequately trained to manage in the Commission's final report.
- SIRS requires RACS staff to judge the priority of incidents, the seriousness of incidents, and the impact they have on the victim-survivors. There has been little-to-no guidance from the government on how to fulfil these obligations, which we argue are inappropriate requirements.
- RACS providers are now required to report the outcome of the investigation, including action taken against the survivor and exhibitor/perpetrator. RACS providers are business operators, not forensic or criminal investigators. Therefore, without appropriate training, RACS will not necessarily be able to appropriately manage sensitive issues relating to sexual violence with adequate care and due diligence.

Our concerns regarding SIRS are detailed extensively in Part 3 of our previous submission to the Independent Expert.<sup>14</sup>

#### **Issues with the ACQSC:**

- Under SIRS, the ACQSC oversees the RACS investigation and response to a reported incident. The ACQSC is a regulator, meaning that it is not a suitable organisation to:
  - manage incidents of sexual violence, or
  - judge whether an incident constitutes sexual violence or
  - judge whether an incident is a manifestation of cognitive impairment or
  - assess the extent of harm a victim-survivor has experienced resulting from the incident as required under SIRS.

Further issues with the ACQSC are detailed in Part 3 of our previous submission to the Independent Expert.<sup>15</sup>

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<sup>14</sup> The Impact of Sexual Violence in Residential Aged Care on the Rights of Older Women. Submission to Independent Expert on the enjoyment of human rights by older persons. Available from: <https://www.ohchr.org/Documents/Issues/OlderPersons/OlderWomen/submissions-others/Castan-Centre-submission-older-women.pdf>

<sup>15</sup> The Impact of Sexual Violence in Residential Aged Care on the Rights of Older Women. Submission to Independent Expert on the enjoyment of human rights by older persons. Available from: <https://www.ohchr.org/Documents/Issues/OlderPersons/OlderWomen/submissions-others/Castan-Centre-submission-older-women.pdf>

## Issues with Australia's Domestic, Family, and Sexual Violence Commission

In 2021, the Australian Government have promised to establish a "transparent" domestic, family, and sexual violence commission<sup>16</sup> to act as a voice for survivors, ensure adequate data regarding violence is available, and to ensure funding meets the local needs across the country.

However, the Australian government have not:

- provided detail or insight of *how* it plans to act as a voice for persons with health and mental conditions, such as older adults who reside in RACS.
- been inclusive of RACS survivors within policy and research, therefore little is known about the needs of these survivors and where funding would be most effectively placed.
- used existing data (e.g., mandatory reporting obligations established 2007).

## Please share examples of good practices on how to ensure that older persons deprived of their liberty can exercise their human rights.

We offer the following suggestions for the issues discussed in the questions above and as examples of good practices.

(1) Establish and implement tailored policies and initiatives specific to RACS resident survivors and resident exhibitors/perpetrators. Existing policies and initiatives developed to manage and prevent sexual violence within other populations should be examined to determine their efficacy for RACS survivors and exhibitor/perpetrators.

(2) Training RACS staff to match the demands of SIRS regulations is not practical or achievable. Incident management and reporting regulations should be structured to *require* a collaborative system whereby safeguarding victim-survivors or resident exhibitors becomes the shared responsibility of required expert external services (e.g., sexual violence organisations, dementia care

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<sup>16</sup> Australian Government. Department of the Prime Minister and Cabinet. Domestic, Family, and Sexual Violence Commission. Available from: <https://ministers.pmc.gov.au/payne/2021/domestic-family-and-sexual-violence-commission-provide-national-leadership-and-accountability>

specialists, psychologist etc.) Adopting this approach will ultimately impact training demands, whilst also achieving a best –practice framework.

**(3)** The implementation of the e-training “*Preventing Unwanted Sexual Behaviour in Residential Aged Care Services*”<sup>17</sup> as part of RACS staff mandatory training and development.

This training was developed, piloted, and evaluated (with results published) and is therefore Australia’s first evidence-based initiative regarding sexual violence in RACS.<sup>18</sup> It is designed to equipped staff to better detect, manage, and prevent incidents of unwanted sexual behaviour in RACS. It provides information regarding resident victim-survivor and exhibitor/perpetrator management, clinical forensic management, legal regulatory obligations, prevention strategies and external expert service options.

Content therefore promotes adhering to legal regulatory obligations such as SIRS and is legally compliant, up to date with legislation for all states and territories in Australia. Content is interactive and was developed with national and international best practice responding to sexual violence,<sup>19</sup> and person-centered frameworks.<sup>20</sup> The Australian College of Nursing has endorsed our course for continuing professional development for aged care nurses. We propose an organisational training approach is adopted for all RACS staff to have baseline knowledge regarding this issue.

**(4)** To oversee and manage RACS response to incidents requires an independent body of experts such as an “Elder Abuse in Management and Prevention Council,” in which people are drawn from all relevant stakeholders.

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<sup>17</sup> ‘Preventing Unwanted Sexual Behaviour in Residential Aged Care Services’ is a short e-learning course developed by HLARU. The course has been formally externally reviewed by the following experts: La Trobe University: ACEBAC Deirdre Fetherstonhaugh Australian Centre for Evidence Based Aged Care; Dementia Support Australia: Qualified Dementia Care Trainer and Registered General Nurse Julie Patton and Dementia Support Australia Team Leader Melanie Shanahan; HammondCare: Head of Clinical Services at HammondCare Dr Stephen Macfarlane; University College Dublin: Assistant Professor in Social Work at UCD Dr Sarah Donnelly; Health Service Executive Ireland: Celine Connor Principal Social Worker for HSE Adult Safeguarding and Protection; Wintringham: Chrissy Garvan Learning & Development Manager. Access at: <https://shop.monash.edu/short-course-preventing-unwanted-sexual-behaviour-in-residential-aged-care-services.html>

<sup>18</sup> Smith D, Wright M, Pham T, Ibrahim J. Evaluation of an online course for prevention of unwanted sexual behaviour in residential aged care services—A pilot study. *International Journal of Older People Nursing*. 2021;00(e12142).

<sup>19</sup> National Association of Services Against Sexual Violence (NASASV). *Frame Best Practice: National Standards for the primary prevention of sexual assault through education*. Sydney: NASASV; 2009 p. 1-80. And World Health Organisation (WHO). *Caring for women subjected to violence: A WHO curriculum for training health-care providers*. Geneva: WHO; 2019 p. 1-94.

<sup>20</sup> SA Health 2014, *Staff Information on Respecting Patients’ Privacy and Dignity with Patient Centred Care Principles*, SA Health, viewed 22 August 2019, <https://www.sahealth.sa.gov.au>. And Health Vic 2018, *Protecting Patient Privacy in Victoria*, Health Vic, viewed 22 August 2019, <https://www2.health.vic.gov.au/public-health/infectious-diseases/protecting-patient-privacy>



(5) The collection of over a decade worth of incidents provides Australia with a critical opportunity to lead evidence based and practical approaches to managing and preventing sexual violence in RACS. Australia has an opportunity to model international initiatives, such as the Care Quality Commission in England, who are beginning to utilise equivalent data to develop an understanding how to keep persons in care services safe from sexual violence.<sup>21</sup>

The Australian Government should release incident data to an independent body for analysis.

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<sup>21</sup> Care Quality Commission. Promoting sexual safety through empowerment. A review of sexual safety and support of people's sexuality in adult social care. 2020 [Internet]. Available from <https://www.cqc.org.uk/publications/major-report/promoting-sexual-safety-through-empowerment>