Submission to the Senate Community Affairs References Committee 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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1. This submission is made to the Senate Community Affairs References Committee's ('Senate Committee') 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 ('the Senate Inquiry').

Preliminary Definitional and Conceptual Issues

2. At a core level, issues related to violence against people with disability, particularly institutional and legal barriers to recognition of this violence, are related to the cultural devaluation of disability and the extent to which as a society we view people with disability as worthy of inclusion in our communities and, at a very base level, worthy of recognition as human beings and worthy of life.

3. Critical disability scholarship and disability rights advocacy has critiqued medical models of disability which characterise disability in terms of internal, individual, pathological deficits and provided alternative ways of approaching disability attentive to disability's complex lived, systemic, cultural, political, social, environmental and historical dimensions. This scholarship and advocacy has also identified the medicalisation of people with disability as a key means through which discrimination, oppression and violence done to these individuals has occurred, including specifically

through medical interventions framed as necessary, protective, benevolent and empowering.

4. **In the course of inquiring into violence, abuse and neglect against people with disability, the Senate Committee should engage with the underlying ideas and assumptions about disability both in society generally and specifically those within and produced by law. Moreover, alongside making recommendations directed towards reforming specific laws and institutional practices, the Senate Committee should consider making recommendations for contesting and shifting cultural ideas around disability at a fundamental level.**

5. Following on from these general points about the Senate Committee's approach to disability, there are a number of preliminary matters concerned with the scope and meaning of key concepts contained in the terms of reference.

'Disability'

6. In the course of the inquiry, the term 'disability' should not be given a medical meaning grounded in individual, diagnostic criteria. Instead the Senate Committee should approach disability in terms of its complex lived, systemic, cultural, political, social and historical dimensions. In light of the focus of the inquiry, the Senate Committee should also be particularly attentive to the ways in which the very concept of disability itself might be bound up with violence, abuse and neglect, as opposed to disability as a concept and an embodied phenomenon existing prior to and discrete from violence, abuse and neglect. For example, the Senate Committee should consider (a) the relationship *between* medical understandings of disability and violence, and (b) the ways in which the political and historical aspects of violence, abuse and neglect against marginalised groups are themselves factors in the emergence of disability in these groups (eg the violence and neglect inherent in colonialism and neocolonialism, sexual assault of women, poverty and environmental pollution can themselves generate disability[1]).

[1] See, eg, Beth Ribet, 'Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy' (2010) 17(2) *Virginia Journal of Social Policy and the Law* 281; Beth Ribet, 'Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities' (2011) 14 *Yale Human Rights and Development Law Journal* 155.

'Violence, abuse and neglect'

7. The author commends the broad understanding of the term 'violence, abuse and neglect' described in the terms of reference. In keeping with the broad interpretation of this term, the scope of 'violence, abuse and neglect' in the Senate Inquiry should not be governed by or limited to forms of violence that are *prohibited* by law (eg by reason of legal definitions of assault and battery in criminal law and tort law). The Senate Inquiry should consider forms of violence, abuse and neglect which are currently *permitted by law*, notably (to borrow the terminology of the terms of reference) 'constraints and restrictive practices' and 'forced treatments and interventions' which are lawfully conducted pursuant to third party consent, court or tribunal authorisation or civil or forensic mental health legislation (rather than only those practices which are done contrary to the law). This is discussed further below in the part on 'disability-specific lawful violence'.

8. Consideration of these forms of violence is profoundly important because the Senate Committee by reason of term of reference (e) is concerned with 'the different legal … frameworks and practices across the Commonwealth, states and territories to address and prevent violence, abuse and neglect against people with disability': the Senate Committee should consider not only laws preventing or prohibiting violence, but those that explicitly permit and legitimate violence, abuse and neglect.

'Institutional and residential settings'

9. The author commends the broad understanding of the term 'institutional and residential settings'. The inclusion of criminal justice settings in the terms of reference is particularly significant, but this should extend beyond prison to other criminal justice settings including forensic mental health facilities and police stations. The inclusion of these settings in the scope of the inquiry is important for a number of reasons. First, people with disability are overrepresented in the criminal justice system.[2] Second, and compounded with the first reason, people with disability in the criminal justice system experience high rates of victimisation (both specifically in prison, as well as across

[2] See, eg, Eileen Baldry, Leanne Dowse and Melissa Clarence, 'People with Intellectual and Other Cognitive Disability in the Criminal Justice System' (Family & Community Services: Ageing, Disability & Home Care, 2012); Eileen Baldry, Leanne Dowse and Melissa Clarence, 'Background Paper for Outlaws to Inclusion Conference February 2012: People with Mental and Cognitive Disabilities: Pathways into Prison' (University of New South Wales, 2012).

their life course).[3] Third, criminal justice institutional and residential settings can themselves be sites of violence, abuse and neglect which can cause disability or further exacerbate disability.[4] Fourth, people with disability in the criminal justice system are typically marginalised in policy and scholarly discussions of violence against people with disability. The fifth reason is that people with disability in the criminal justice system might not be readily viewed as 'victims' of violence due to the pervasiveness of absolute dichotomies between victim and offender, coupled with institutional barriers to access to justice and legal barriers to recognition of violence in these settings, such as statutory limitations on recovery of compensation for civil liability and practical limitations on access to legal assistance. Finally, on a broader level, there is the possibility that the cultural and legal acceptance of incarceration as a legitimate societal and legal practice per se (as opposed to viewing prison and other criminal justice settings as inherently violent, abusive or neglectful) risks the normalisation of violence against people with disability occurring within criminal justice settings.

10. The term 'institutional and residential settings' should include hospitals, mental health facilities and other health and medical facilities. This is not to dispute the importance and positive benefits of health and medical facilities to people with disability and people generally, but rather to be mindful of the risk that these sites will be overlooked as also being sites of violence, abuse and neglect because the violence which takes place in these settings might instead be perceived as therapeutically necessary and legally permissible.

Disability-Specific Lawful Violence

11. This submission urges the Senate Committee to inquire into forms of violence, abuse and neglect against people with disability (particularly people with intellectual disability, cognitive impairment and mental illness) which are termed 'disability-specific lawful violence'.

[3] See, eg, Eileen Baldry, Leanne Dowse and Melissa Clarence, 'People with Intellectual and Other Cognitive Disability in the Criminal Justice System' (Family & Community Services: Ageing, Disability & Home Care, 2012); Eileen Baldry, Leanne Dowse and Melissa Clarence, 'Background Paper for Outlaws to Inclusion Conference February 2012: People with Mental and Cognitive Disabilities: Pathways into Prison' (University of New South Wales, 2012).

[4] See, eg, Beth Ribet, 'Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy' (2010) 17(2) *Virginia Journal of Social Policy and the Law* 281.

What is Disability-Specific Lawful Violence?

12. In summary, 'disability-specific lawful violence' refers to interventions in the bodies and lives of people with disability, generally in medical or professional care settings, which are currently *permitted by law* because they are conducted pursuant to third party consent, court or tribunal authorisation or civil or forensic mental health legislation. Examples include:

    a. Family Court or guardianship tribunal authorised sterilisation,

    b. behavioural interventions in the form of physical restraints, deprivations of liberty or medical treatment authorised under guardianship legislation,

    c. involuntary mental health treatment and detention ordered under civil mental health legislation, and

    d. detention ordered under forensic mental health legislation (eg after a finding of unfitness or not guilty by reason of mental illness, where individuals not convicted for other reasons would be free of any further detention or punishment).

'Lawful'

13. The reference to 'lawful' in 'disability-specific lawful violence' refers to the fact that these interventions are *permitted* by law rather than *prohibited*. Thinking of violence as permitted by law perhaps runs counter to a common assumption that law has an authoritative role in defining violence through legal definitions of criminal offences and civil (eg tort) causes of action, coupled with rules of evidence and procedure which govern the individual adjudication of these causes of action.[5] Yet, it is important to consider violence which is permitted by law because, in the context of people with disability lacking mental capacity, this is a core means through which violence occurs.

14. Generally, one of the key boundaries between lawful and unlawful violence in criminal and civil law contexts is individual consent. Reflecting principles of autonomy and individualism, interventions such as physical contact and restrictions on liberty which

[5] See generally Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence' (2014) 23(3) *Griffith Law Review* 467.

would otherwise be unlawful as criminal assault, tortious battery or tortious false imprisonment will be lawful if consented to by the individual.[6] The consent exception is generally seen as important recognition of the principle of individual autonomy insofar as it upholds the ability of individuals to control what happens to their bodies and protect themselves from unwanted interferences. However, this is problematic in the context of people with disability because it is their very perceived *inability* to consent by reason of mental incapacity which has provided a legal opening to enable others to determine what can be done to their bodies. Laws relating to court or tribunal authorisation of third party consent, substituted decision making schemes and civil and forensic mental health legislation all sit within this opening.

'Disability-specific'

15. 'Disability-specific lawful violence' is 'disability-specific' because it applies exclusively to people with disability (particularly people with intellectual disability, cognitive impairment and mental illness) generally by reason of 'legal capacity' and its problematic relationship to mental capacity and disability. This is explained by Beaupert and Steele as follows:

> 'Legal capacity' is the basis for recognising an individual as a person before the law and specifically consists of 'the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)'. Legal capacity is a foundational concept in Australian law and central to an individual's ability to be recognised as a legal subject (eg be a party to legal proceedings, engage in commercial transactions), have control over one's body (eg consent to medical procedures done to one's body) and to participate in society more broadly (eg vote, choose where to live). Not everyone holds legal capacity. For individuals who do not hold lack legal capacity third parties make legal decisions on their behalf. There are a variety of substitute decision-making schemes – such as guardianship, the civil and forensic mental health systems and the Family Court's welfare jurisdiction – which provide structure and oversight to third parties making

[6] This is, of course, more nuanced due to the law around consent which does place some limits on what forms of conduct one can consent to. See generally Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence' (2014) 23(3) *Griffith Law Review* 467.

decisions on behalf of people lacking legal capacity. These schemes have been viewed as 'protective', supportive and even empowering, because they direct third party decision-making towards working out what is in the individual's 'best interests'.

Legal capacity is linked to '*mental* capacity' and has traditionally been denied to people on the basis that they lack mental capacity. Mental capacity is 'the decision-making skills of a person' and mental incapacity has largely been assessed in terms of individualistic, internal psychological processes, by reference to diagnoses of mental and cognitive impairments (eg it is linked to such diagnoses as intellectual disability, dementia and schizophrenia). Significantly, this means that it is largely people with disability (and specifically with diagnoses or perceived diagnoses of mental and cognitive impairments) who are deemed mentally incapable and in turn are deemed to lack legal capacity.

The assumed relationship between mental incapacity and disability is commonly presented as objective, scientific and natural. Yet, the self-evidence of the association between disability and mental incapacity has been contested in disability studies scholarship and disability rights activism. This contestation can be summarised in three points. First, disability is constructed as negative variations in human existence through the operation of social norms which provide a narrow scope of valorised 'normality', through a focus on particular perceived deficits. Secondly, society has failed to provide necessary supports for people with disability in many respects and those supports which are provided typically focus on managing or obliterating the disability – as recuperating individuals to a state of normality or minimising the impacts of their abnormality. Thirdly, mental incapacity is not, as it is commonly presented, an objective, scientific and naturally occurring phenomenon. Through association with problematic notions of disability, mental capacity is similarly constructed as a negative difference and devalued through the application of social norms of decision-making ability. The concepts of mental capacity and incapacity are contingent on social and political contexts, as are the disciplines,

> professions and practices which play a dominant role in assessing mental capacity and incapacity.
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> It is the combined effects of the links between, firstly, disability and mental incapacity and, secondly, mental incapacity and legal capacity which render legal capacity and associated substitute decision-making regimes highly discriminatory and marginalising to people with disability. Being denied legal capacity means being denied the ability to make one's own choices and being at the whim of the decisions of others (including decisions ranging from public matters of civic participation to some of the most intimate and private matters, and extending to decisions involving violence, forced treatment and invasion of privacy).[7]

16. Thus, the associations in law between mental incapacity and disability, and between legal capacity and mental capacity, have two major implications for the purposes of the Senate Inquiry: (a) they have prevented individuals with disability deemed to lack legal capacity from making their own decisions about interventions by others in their bodies and lives, and (2) they have resulted in alternative legal frameworks for enabling other individuals to decide on interventions in the bodies and lives of people with disability. This is ***discriminatory*** for a number of reasons:

    a. It is done without the consent of the individual with disability, whereas contact or restrictions on the liberty of people without disability can *never* be done without their consent. As was stated by McHugh J in *Marion's Case*:

        > It is the central thesis of the common law doctrine of trespass to the person that the voluntary choices and decisions of an adult person of sound mind concerning what is or is not done to his or her body must be respected and accepted, irrespective of what others, including doctors, may think is in the best interests of that particular person.[8]

[7] Fleur Beaupert & Linda Steele, 'Questioning Law's Capacity' (2015) 40(3) *Alternative Law Journal* (forthcoming).
[8] *Marion's Case* (1992) 175 CLR 218 at 309 (McHugh J).

b. Reliance upon consent of third parties is possible because of problematic assumptions about the mental incapacity associated with particular impairments.

c. The tests that form the basis of court or tribunal authorisation of third party consent or civil and forensic mental health orders are based on problematic ideas about disability,[9] including its associations with danger and medical deficiency.

d. The physical and mental effects of the disability-specific lawful violence are themselves further disabling (eg mental distress associated with detention, side effects of medicines, removal of bodily organs), create greater inequality between people with and without disability by limiting life opportunities and exacerbate perceptions of people with disability as 'abnormal' by further limitations to meeting social norms (eg removal of reproductive organs renders females 'abnormal' women because cannot meet social norms of mothering).

17. Yet, disability-specific lawful violence is not readily labelled in society and specifically in law as violence, abuse and neglect (or as discriminatory) because:

a. It is permitted by law, and law has an important moral, social and cultural role in defining violence.

b. It is permitted by law specifically because it is considered to be in the 'best interests' of the individual or is necessary for the protection, safety. health or welfare of the individual, of others or the community at large.

c. It is generally carried out in care or medical contexts and hence is seen as benevolent, beneficial or even empowering to the individual.

d. What is appropriate in relation to individuals with disability cannot be compared to what is appropriate in relation to people without disability due to fundamental

[9] Carolyn Frohmader, *Dehumanised: The Forced Sterilisation of Women and Girls with Disabilities in Australia* (Women with Disabilities Australia, 2013) 35-57; Linda Steele, 'Making Sense of the Family Court's Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability' (2008) 22(1) *Australian Journal of Family Law* 1.

differences between these groups by reason of their varying abilities, mental capacities and lifestyles.

18. Moreover, historically, sterilisation, involuntary mental health treatment and detention and behaviour restraints have been carried out with little judicial oversight and have been used as tools of repression of people with disability as exemplified by the widespread practices both in the United States during the mental defectives era of the early 20th century and the practices of Nazi Germany during the Holocaust. Contemporary practices which are authorised by courts or tribunals or ordered pursuant to legislation is typically juxtaposed to and distanced from this history by reason of the 'procedural safeguards' provided by judicial oversight coupled with legal tests focused on 'best interests', protection and necessity. The layers of protection purportedly offered by the legal frameworks of court authorisation and substituted decision making might lead some to suggest that court authorised sterilisation is ultimately a safe, necessary and even beneficial practice, thus obfuscating arguments that this legal sterilisation is harmful and, specifically, is discriminatory.[10]

Disability-Specific Lawful Violence is Contrary to Human Rights

19. Disability-specific lawful violence is contrary to human rights, notably following the United Nations *Convention on the Rights of Persons with Disabilities* ('Disability Convention').[11] Earlier human rights instruments and international human rights decisions have accommodated disability-specific lawful violence by recognising the validity of distinctions based on mental incapacity and focusing instead on legal procedural safeguards in the legal authorisation or ordering of individual instances of such violence. In comparison, the Disability Convention prohibits such violence.

20. By way of background, the Disability Convention does not introduce any new human rights but instead seeks to redefine disability and make existing human rights realisable for people with disability by taking account of their experiences and needs and by contesting pervasive medical and individual models of disability which have historically encouraged the discriminatory and paternalistic approaches to rights.

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[10] See generally Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence' (2014) 23(3) *Griffith Law Review* 467.

[11] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

21. On a general level the Disability Convention recognises the right to non-discrimination and equality before and under the law[12] and the right to life, to freedom from violence and respect of bodily and mental integrity[13] (including the particular vulnerability to violence of women and children).[14] These rights support an argument that states should address violence against people with disability, including forms of violence which apply in a discriminative, disproportionate or unequal way to people with disability (ie including disability-specific forms of violence).

22. For the purposes of 'disability-specific lawful violence' the most significant contribution of the Disability Convention relates to its approach to legal capacity. The Disability Convention includes the right to legal capacity, which renders contrary to human rights forms of violence that are lawful because of a denial of legal capacity (ie lawful forms of violence). The CRPD recognises the right to legal capacity. Article 12 states in part:

> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The

[12] See Art 3(b), Art 5(1)-(2), Preamble para (h).
[13] See Art 10, Art 15, Art 17. See also Art 16.
[14] Preamble para (q), (s).

> safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.[15]

The right to legal capacity is also confirmed by the preamble to the CRPD which states:

> *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices[16]

One of the general principles of the CRPD stated in Article 3(a) is:

> Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons[17]

23. Beaupert and Steele explain the effect of Article 12 as follows:

> Article 12 elaborates on the content of the right to equality before the law – guaranteed by Article 26 of the *International Covenant on Civil and Political Rights* – as it relates specifically to people with disabilities. Article 12 places obligations on States Parties to repeal laws which deny legal capacity to people with disability and introduce measures to support individuals with disability to exercise their legal capacity. It is generally acknowledged that Article 12 calls for a shift to the paradigm of supported decision-making. 'Supported decision-making' is a range of informal and formal measures which support people to exercise their legal capacity, notably to make their own choices to enter into legal relations and exercise their legal rights. Examples of supported decision-making models range from advice provided by family and friends to formal appointment of a support person. Supported decision-making can be contrasted to 'substitute decision-making', of which the clearest examples are appointment of a guardian under guardianship law and compulsory treatment under mental health laws. Whilst it is now generally recognised that there should be a shift to supported decision-making, in most developed countries substitute

[15] Article 12(1)-(4). See also Article 13 concerning access to justice and Articles 14 and 19 concerning deprivation of liberty.
[16] Para (n).
[17] Article 3(a).

decision-making continues alongside increased supported decision-making options.

The UN Committee on the Rights of Persons with Disabilities (the Committee) has recently considered Article 12 in depth. Following a submission process (to which the authors of this article made a submission), the Committee adopted its General Comment dealing with Article 12, entitled 'Article 12: Equal recognition before the law', on 11 April 2014 (General Comment), informed by the fact that there appeared to be a general misunderstanding of the exact scope of the obligations imposed by Article 12.

The General Comment provides that States Parties to the CRPD must holistically examine all areas of law to ensure that the right of people with disability to legal capacity is not restricted on an unequal basis. The General Comment urges State parties to abolish substitute decision-making regimes in order to ensure that full legal capacity is restored to people with disability on an equal basis with others. It reaffirms that 'a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12'.

The Committee outlines three different approaches often taken in judging whether a person has impaired decision-making skills: the status approach; the outcome approach; and the functional approach. The Committee rejects all three approaches, on the basis that they result in a 'discriminatory denial of legal capacity' because 'a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law'.

The Committee emphasises that legal capacity and mental capacity are distinct concepts, noting that the law in most countries conflates the two concepts, so that a person is denied legal capacity if considered to have impaired decision-making skills. Although the focus of the General Comment is legal capacity, the General Comment also discusses and

contests the concept of mental capacity, stating that this concept 'is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon'.[18]

24. The United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) in its General Comment on Article 12 has linked the recognition of legal capacity to the recognition of other human rights and, in turn, the need to prohibit interventions in the bodies and lives of people with disability based on a denial of legal capacity:

> Respecting the right to legal capacity of persons with disabilities on an equal basis with others includes respecting the right of persons with disabilities to liberty and security of the person. The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.
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> The right to enjoyment of the highest attainable standard of health (art. 25) includes the right to health care on the basis of free and informed consent. States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.

[18] Fleur Beaupert & Linda Steele, 'Questioning Law's Capacity' (2015) 40(3) *Alternative Law Journal* (forthcoming).

> As has been stated by the Committee in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention. States parties must, instead, respect the legal capacity of persons with disabilities to make decisions at all times, including in crisis situations; must ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available; and must provide access to independent support. States parties have an obligation to provide access to support for decisions regarding psychiatric and other medical treatment. Forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities. States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, as it is an ongoing violation found in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment. The Committee recommends that States parties ensure that decisions relating to a person's physical or mental integrity can only be taken with the free and informed consent of the person concerned. [19]

25. Thus, there is a compelling international human rights argument for the Senate Committee to specifically consider disability-specific lawful violence and make recommendations to prohibit forms of this violence.

26. Australia is a signatory to the United Nations Convention on the Rights of Persons with Disabilities. However, in considering term of reference (f), which is phrased in terms of 'compliance with its international *obligations*', the Senate Inquiry might limit the relevance of the Disability Convention to its assessment of violence, abuse and neglect and to the recommendations it makes if it takes an overly formal, legalistic approach

[19] Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), 10 [40]-[41], 11 [42].

which ignores the wider ethical significance and force of the Disability Convention. This is for two reasons. First, the Senate Committee might conclude that the extent of Australia's formal *compliance* with *obligations* is limited by the legal status of international instruments in Australian domestic law. Second, the Senate Committee might conclude that Australia's legal obligations under Article 12 of the Disability Convention (concerning legal capacity) are limited because of its reservation to this Article which is to the effect that Australia continues substituted decision making.[20] This is demonstrated by the Senate Community Affairs References Committee report *Inquiry into the Involuntary or Coerced Sterilisation of People with Disabilities in Australia*.[21] In this report, the Senate Community Affairs Reference Committee took a narrow legalistic approach to the CRPD's relevance to domestic law reform related to sterilisation.[22] One of the effects of this was that ultimately the recommendations which recommend retaining substituted decision making framework for sterilisation were made in the sterilisation inquiry are not in line with Article 12 of the Disability Convention and other Articles protecting rights of non-discrimination and equality and freedom from violence.

27. It is central that *this* Senate Inquiry move beyond this legalistic approach to the Disability Convention and look to the underlying ethical, political and social approaches to disability and disability rights in the Convention as providing a (realisable) ethical and legal ideal for the treatment of people with disability in our society. Laws can be reformed in ways that *exceed* the formal requirements of international legal obligations. This is demonstrated by the Australian Law Reform Commission recommendations in its recent report on disability and legal capacity[23] which go quite a way towards reflecting the spirit of the Disability Convention.[24] Moreover, regardless of the legal effect of the Interpretive Declaration on Article 12 vis-à-vis substituted decision making, abolishing forms of disability-specific lawful

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[20] *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).
[21] Senate Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, (2013, Senate Community Affairs Committee Secretariat).
[22] Senate Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, (2013, Senate Community Affairs Committee Secretariat) 51-64 [3.1]-[3.37], 83-88 [4.3]-[4.17].
[23] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).
[24] Fleur Beaupert & Linda Steele, 'Questioning Law's Capacity' (2015) 40(3) *Alternative Law Journal* (forthcoming).

violence is necessitated by *other* Articles of the Disability Convention as discussed in paragraphs 19 and 20 above, and by the following excerpt from the General Comment on Article 12:

> To achieve equal recognition before the law, legal capacity must not be denied discriminatorily. Article 5 of the Convention guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability. Discrimination on the basis of disability is defined in article 2 of the Convention as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms". Denial of legal capacity having the purpose or effect of interfering with the right of persons with disabilities to equal recognition before the law is a violation of articles 5 and 12 of the Convention. States have the ability to restrict the legal capacity of a person based on certain circumstances, such as bankruptcy or criminal conviction. However, the right to equal recognition before the law and freedom from discrimination requires that when the State denies legal capacity, it must be on the same basis for all persons. Denial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating the person differently.
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> Freedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person in accordance with the principles enshrined in article 3 (a) of the Convention. Freedom to make one's own choices most often requires legal capacity. Independence and autonomy include the power to have one's decisions legally respected. The need for support and reasonable accommodation in making decisions shall not be used to question a person's legal capacity. Respect for difference and acceptance of persons with disabilities as part of human diversity and

humanity (art. 3 (d)) is incompatible with granting legal capacity on an assimilationist basis.[25]

28. **The author urges the Senate Committee to address disability-specific lawful violence, by:**

a. **Identifying as violence, abuse and neglect all interventions in the lives of people with disability, generally in medical or professional care settings, which are currently *permitted by law* because they are conducted pursuant to third party consent, court or tribunal authorisation or civil or forensic mental health legislation.**

b. **Appreciating the role of law in making these forms of violence, abuse and neglect possible including specifically critically examining the following legal dimensions:**

i. **The concept of legal capacity,**

ii. **The legal assessment of mental incapacity and the psychological, neuropsychological and psychiatric definitions of mental capacity,**

iii. **Schemes of substituted decisionmaking,**

iv. **Legal tests and criteria such as best interests, necessity, and risk, and**

v. **Civil and forensic mental health legislation.**

c. **Making recommendations to reform laws in order to recognise legal capacity for all individuals regardless of perceived mental incapacity.**

d. **Making recommendations to reform laws in order to abolish legal frameworks permitting all forms of disability-specific lawful violence.**

e. **Recommending withdrawal of the Australian Government's Interpretive Declaration on Article 12.**

[25] Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), 8[32]-[33].