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## INQUIRY INTO OLDER PEOPLE AND THE LAW

### AREAS for REFORM

1. Legislation to defend Human Rights
2. Mandatory Reporting of All Abuse by Staff
3. Whistleblower Legislation
4. Legislation to Clearly Define Federal and State Jurisdiction in the Aged Care Complaint Schemes
5. Legislation to Bring Transparency into the Federal and State Complaints Schemes

#### 1. Legislation to defend Human Rights

One of the Definitions of Elder Abuse is as follows:

'Elder abuse is any pattern of behaviour including neglect, which causes physical, psychological, financial or social harm to an older person'.

There are different categories of abuse:

##### **Physical abuse**

Physical abuse is the infliction of physical pain or injury, or physical coercion. Examples include hitting, slapping, pushing, burning, sexual assault, inappropriate use of medication, and physical restraint.

##### **Psychological abuse**

Psychological abuse is the infliction of mental anguish, involving actions that cause fear of violence, isolation or deprivation, and feelings of shame, indignity and powerlessness.

Examples include verbal intimidation, humiliation and harassment, shouting, threats of physical harm or institutionalisation, and withholding of affection.

##### **Financial or material abuse**

Financial or material abuse includes the illegal or improper use of the older person's property or finances. This includes misappropriation of money valuables or property, forced changes to a will or other legal document, and denial of the right of access to, or control over, personal funds. There may be sudden inability to pay bills, loss of credit cards, bank books or cheque books, unexplained withdrawal of money from an account or transfer of money, and the improper use of a power of attorney.

##### **Neglect**

Neglect is the failure of a caregiver to provide or allow to be provided the necessities of life, ie. adequate food, shelter, clothing, medical care or dental care. Examples include poor hygiene or personal care.

It seems that the only legal action open to residents who are the victims of abuse is to sue the provider with negligence or charge the abuser with assault.

- Charging the Provider with negligence: This is very hard to achieve because it depends on proving pain and suffering linked to awarding damages for loss of earnings on a time and percentage of injury basis etc. As the elderly are not in the workforce this becomes irrelevant

The Aged Care Act 1997 is the basis for standards in aged care. See Section 2-1 which states the Objects of the Act and Section 54-1 which states the Responsibilities of approved providers. However the only penalty for breaching these two sections are sanctions which consist of financial penalties imposed at the discretion of the Department of Health and Ageing. In practice these penalties are usually not imposed even when the Accreditation System finds a provider in breach of more than half the 44 Accreditation Standards.

- Charging the abuser with assault: Often the elderly have dementia and are unable to give evidence; if they do not have dementia they and their relatives fear retribution; they either die because of their injuries or from natural causes before their cases come to court; because of lack of transparency in the complaint system evidence is difficult to obtain; staff fear retribution as they commonly lose their jobs.

## **2. Mandatory Reporting of All Abuse by Staff As Well As Providers**

- Because of the elderly person's frequent inability to testify on their own behalf they are very dependent on staff to report abuse.
- The new reforms scheduled to be introduced in April 2007 restrict mandatory reporting to providers. This is like expecting a burglar to report his theft to a police station.
- Mandatory reporting is restricted to cases of major physical abuse and all sexual abuse. All the other forms of abuse listed in the definition above are left unaddressed. Also as yet there is no definition of the word 'major', — is this going to be left to the provider to decide?

## **3. Whistleblower Legislation**

- It is the norm for whistleblowers to lose their jobs. Many aged care staff are Casual employees so dismissal can be very subtly and easily achieved. As well, the new Industrial Relations Laws may make dismissal easier. Many caring staff see a non-functioning Complaint System and job loss as the inevitable outcomes should they complain. Caring staff need encouragement and job protection.
- Apparently there is some State Whistleblower legislation in place already but it is deemed inadequate. I understand that it only protects a whistleblower from legal action if they complain through the official channels of the government complaints system and not if they report a case of abuse to the media. Faced with a provider who covers up abuse and an ineffective government system some altruistic whistleblowers in the past have gone to the media. As they have acted in the public interest they should be protected legally.

## **4. Legislation to Clearly Define Federal and State Jurisdiction in the Aged Care Complaint Schemes**

The State/federal jurisdiction dealing with complaints is blurred. Theoretically the Federal Complaints Resolution Scheme deals with complaints relating to administrative matters eg staffing numbers and systems in place relating to standards of care while the State bodies deal with complaints relating to conduct of 'health practitioners'. In practice the two governments may disagree on classification so that neither address the case of abuse. An example of this occurred when I submitted a complaint against the manager of a retirement hostel. She was a registered nurse employed as a manager. The provider said her job description was that of a manager not as a nurse (although in fact she often performed nursing duties). The Health Care Complaints Commission, the NSW complaints body, said therefore she was not a health practitioner and not in their jurisdiction. The Federal Complaints Resolution Scheme did not investigate this nurse so presumably classified her as a nurse or health practitioner. When queried on this point they declined to answer on the grounds that the information was covered by the FOI laws. Providers know to exploit this loophole.

#### **5. Legislation to Bring Transparency into the Federal and State Complaints Schemes**

We need transparency to bring about accountability of the whole chain of the complaints system from the provider to the government complaints bodies. It is hard to see standards rising without accountability. There needs to be changes in The Aged Care Act 1997 and the Freedom of Information Laws, State and Federal, to bring this about.

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