



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCSC/CLC:BMgl290524

29 May 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: nathan.macdonald@lawcouncil.au

Dear Dr Popple,

Financial Services Regulatory Framework in Relation to Financial Abuse

Thank you for the opportunity to provide input to the Law Council of Australia for a potential submission to the Parliamentary Joint Committee on Corporations and Financial Services, in response to its Inquiry, the *Financial Services Regulatory Framework in Relation to Financial Abuse*. The Law Society's Elder Law, Capacity and Succession and Criminal Law Committees have contributed to this submission.

Our comments, other than in response to the fifth Term of Reference for the Inquiry, focus primarily on elder financial abuse.

1) The prevalence and impact of financial abuse

b) the impact of the shift of financial products to online platforms; and any other contributory factors

In our view, the shift to online banking platforms may, without greater education, potentially facilitate elder financial abuse, as many in the cohort of older Australians do not have sufficient digital skills to independently manage their bank accounts online. Our members are aware of instances of adult children operating their parent's internet banking services without their supervision, knowledge or authority.

In one instance, an elderly client remained unaware of the fact that she had lent a large sum of money to a family member because she could no longer access paper bank statements, after her adult son switched her bank statements to online only. The transactions were only detected after subsequent legal intervention.

The Government's proposed phasing out of cheques¹ may also have an impact on elder financial abuse. The use of cheques is prevalent amongst older Australians and cheques enable a degree of "financial independence". Customers may currently have the confidence to use a cheque book, but not have the same level of trust or confidence in relation to electronic banking.

3) Other potential areas for reform, such as prevention, protection, and proactive systems

c) employee training

In our view, additional training for the employees of financial institutions in relation to the nature of financial abuse and elder abuse, including the different ways in which it can manifest, and how to monitor for warning signs of financial abuse, may assist in enabling the employees to take proactive steps to prevent financial abuse. We note the voluntary guideline published by the Australian Banking Association, *Preventing and responding to financial abuse (including elder financial abuse)*² is a useful contribution in this respect.

We also support the work of the Australian Banking Association in seeking to increase understanding amongst its members of relevant instruments, such as powers of attorney, and guidance as to suggested protocols for responding to requests relating to such instruments.³ In our view, education, and well understood and transparent processes on the part of financial institutions, are key to ensuring that instruments such as enduring powers of attorney are used in accordance with the terms of the appointment. In our members' experience, greater awareness is needed in relation to the differences between the roles of an attorney, executor, administrator, trustee and financial manager, and the role and authority of the NSW Trustee and Guardian. A better understanding, through employee training, of the various ways in which a person or entity can be authorised to deal with the bank account of another person will assist in combatting financial abuse.

4) Steps that might be taken to support financial institutions to better detect and respond to financial abuse

Strategies could be developed by financial institutions to try to identify financial abuse, through greater use of data analysis to monitor for irregular spending patterns. Financial institutions already have programs in place to monitor for fraudulent activity generally, which could be expanded or targeted to monitor for suspected financial abuse. We note that this approach is already supported and encouraged by the Australian Banking Association in its voluntary industry guideline, *Preventing and responding to financial abuse (including elder financial abuse)*.⁴

Financial institutions could also work more closely with existing organisations that work to prevent financial abuse, such as the NSW Ageing and Disability Commission, which can

¹ The Commonwealth Government intends to wind down the cheques system in Australia by no later than 2030, see for example the Treasury Consultation paper issued in December 2023, at page 4, <https://treasury.gov.au/sites/default/files/2023-12/c2023-471331-cp.pdf>.

² Preventing and responding to financial abuse (including elder financial abuse), Australian Banking Association, March 2021 <https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Financial-Abuse-Industry-Guideline.pdf>.

³ Responding to requests from a power of attorney or court-appointed administrator, Australian Banking Association, October 2020 <https://www.ausbanking.org.au/wp-content/uploads/2020/11/Banking-Industry-Guideline-Power-of-Attorney.pdf>.

⁴ Paragraph 4.3, Preventing and responding to financial abuse (including elder financial abuse), Australian Banking Association <https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Financial-Abuse-Industry-Guideline.pdf>.

respond to reports of abuse of an older person or adult with disability. If financial institutions identify potential instances of financial abuse, the further investigation, support to possible victims, and consequences that may follow, require the assistance of other services.⁵

We note there are ongoing discussions at a national level about potential reforms to powers of attorney legislation. We support the harmonisation of legislation in respect of powers of attorney and note that this would make it easier for financial institutions to develop national policies and processes for responding to requests in relation to these instruments.

5) The role of government agencies in preventing and responding to financial abuse

The role of government and non-government agencies is critical in preventing and responding to financial abuse. The criminal law works to deter, and enable the Crown to respond to, instances of financial abuse. Indeed, financial abuse is recognised specifically as part of the coercive control reforms contained in the *Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW)*,⁶ scheduled to commence in NSW in July 2024. The reforms will ensure that 'behaviour that is economically or financially abusive' falls within the definition of 'abusive behaviour' under the *Crimes Act 1900 (NSW)* (proposed new section 54F(2)(c) – yet to commence), and 'domestic abuse' under the *Crimes (Domestic and Personal Violence) Act 2007* (proposed new section 6A(2)(c) – yet to commence).

7) Any other related matters, including comparative information about arrangements in relevant overseas jurisdictions.

Financial abuse in seniors living manifests itself in various ways, including by family members and enduring attorneys:

- refusing to make payments for care;
- selling assets for their benefit, eg private home or investments; and
- employing emotional abuse to deny access or visitation of relatives as leverage for financial or other benefits.

We note that, under Schedule 3A, clause 10 of the *Retirement Villages Regulation 2017 (NSW)*,⁷ retirement village operators must prepare a strategy for the prevention of elder abuse, which encompasses financial abuse.

Similarly, under the *Aged Care Act 1997 (Cth)*, the updated Aged Care Quality Standards⁸ refer to ensuring dignity, choice and respect, emphasising the need to protect against abuse.

The proposed new legislation for the aged care sector, the Exposure Draft Aged Care Bill 2023, refers to the creation of a 'representative', which, if enacted, will have implications for financial abuse in aged care settings. Under s 376 of the Bill, a 'representative' is a person appointed by the System Governor (Secretary) to act on behalf of the person receiving 'funded aged care services', (either a resident of a care service or a recipient of home care services). A 'representative' is then empowered by s 27 to:

⁵ Ibid, paragraphs 4.5-4.7, indicate that the Australian Banking Association encourages its members to do this.

⁶ <https://legislation.nsw.gov.au/view/pdf/asmade/act-2022-65>.

⁷ <https://legislation.nsw.gov.au/view/html/inforce/current/sl-2017-0485#sch.3A>.

⁸ The Aged Care Quality Standards, <https://www.agedcarequality.gov.au/providers/quality-standards/about-quality-standards>.

on behalf of the individual, do any thing that may or must be done by the individual under, or for the purposes of, this Act.

The language is broad and would appear to include decisions to incur costs, make payments, and enter into financial arrangements of any kind to receive funded care services.

A person who is an enduring attorney is not automatically appointed to the role of 'representative', and s 28(1) states:

a person must not make a decision under, or for the purposes of, this Act on behalf of an individual unless the person is appointed as a representative of the individual under section 376.

Section 28(2) then confirms that s 28(1) applies, even if the person holds an enduring power of attorney granted by the individual. A representative, as currently contemplated under the Exposure Draft Aged Care Bill 2023, appears to be another basis upon which a person may approach a financial institution seeking authority to access another person's bank account. If this Bill is enacted in its current form, guidance to the staff of financial institutions about the authority of an appointed representative under the Aged Care legislation would be of assistance to financial institutions.

When considering the issue of the interaction of the banking sector and financial abuse in the aged care sector, we suggest that it would be of assistance to aged care providers and retirement village operators to have a mechanism by which these providers and operators could approach financial institutions directly, and liaise in respect of incidents of potential financial abuse. For example, to assist in situations where a rogue attorney under an enduring power of attorney is not paying care service fees and exposing the individual to potential recovery or bankruptcy actions.

Thank you for the opportunity to provide input into a potential Law Council submission. Any questions in relation to this letter should be directed to Gabrielle Lea, Senior Policy Lawyer, at gabrielle.lea@lawsociety.com.au or on (02) 9926 0375.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', written in a cursive style.

pp.
Brett McGrath
President