FINANCIAL SERVICES INSTITUTE of Australasia

22 August 2016

By email
elder_abuse@alrc.gov.au

Dear ALRC Executive Director,

Re: Australian Law Reform Commission Issues Paper 'Elder Abuse'

The Financial Services Institute of Australasia (Finsia) commends the ALRC on the release on IP 47 'Elder Abuse' (Issues Paper) and the invitation to comment on the issues raised therein.

Finsia is a membership organisation for financial services professionals. With a 130 year history, Finsia's members include professionals from across the entire financial services value chain.

In formulating a response to the Issues Paper, Finsia consulted with a cross-section of members in the financial advice, and funds and asset management industries.

The comments presented in this submission focus on the following sections of the Issues Paper:

> What is elder abuse?
> Superannuation
> Financial institutions
> Forums for redress

Through member consultation Finsia found strong support for:

> registration of power of attorney and other decision-making instruments
> strengthened reporting mechanisms for suspected cases of financial abuse
> building comprehensive prevalence data on financial abuse, and further research into the effects of cognitive decline on financial decision making
> improving the educational and ethical standards of financial advisers and retail banking staff so that they are better equipped to support the financial needs of the elderly.

Finsia welcomes the opportunity to contribute to further investigations undertaken by the ALRC in this area.

Please refer any future inquiries to Caroline Falshaw, Head of Corporate Affairs and Policy: c.falshaw@finsia.com

With kind regards,

Caroline Falshaw A Fin

Head of Corporate Affairs and Policy

finsia.com

Level 18
1 Bligh Street
Sydney NSW 2000
Australia

T 61 2 9275 7900
T 1300 346 742
F 61 2 9275 7999
membership@finsia.com

PO Box H99
Australia Square
NSW 1215
Australia

ABN 96 066 027 389

Question 1: To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse:

- ***harm or distress***
- ***intention***
- ***target***

A clear, agreed definition of elder abuse will assist financial services professionals in the identification and reporting of suspected cases.

The Australian Institute of Family Studies (AIFS) report cited in the Issues Paper rightly identifies elder abuse as fundamentally a human rights issue that sits within complex policy structures.[1]

In financial services these policy structures primarily are federal; however, there are state laws, such as those relating to power of attorney, that affect the professional practice of financial advisers and frontline banking personnel among others. The differences in power of attorney laws between the states reveal an opportunity for legal harmonization, and forming a consensus on best practice. This is discussed further in this submission in response to question 29.

A clear, agreed definition of elder abuse is also important in researching the prevalence of elder abuse and from this developing tools and guidance so that service providers build awareness and develop strategies to identify and report suspected cases.

The World Health Organization (WHO) definition of elder abuse referred to in the Issues Paper is a helpful starting point, because it encompasses the elements of harm and distress, a broad spectrum of forms (including financial abuse), and the question of intention.

The Australian Human Rights Commission goes further to define financial abuse as when a relationship of trust is abused to gain access to money or property and details the forms it may take, including:

- Pressure to act as guarantor for a loan;
- Pressure to transfer or sell your house;
- Pressure to take out a loan in your name for someone else to repay;
- Pressure to give away your money;
- Money you have loaned not being repaid; or
- Persons authorised to manage your money not acting in your best interest, or using your money for themselves.[2]

These examples, taken together with the WHO definition, are useful in framing the discussion and developing a clearer picture of the incidence and impact of financial abuse of the elderly and informing industry responses.

Additionally, the AIFS paper summarises the perspectives that inform different definitions of elder abuse, and shows that the definition of elder itself is contested.

It is noted that building consensus on a definition of elders is of critical importance to research undertaken on financial decision-making discussed later in this submission.

Finsia agrees that the distinction between ‘old’ (65–84) and ‘old old’ (85+) persons highlighted in the AIFS paper is useful for financial services providers and researchers in identifying differences in financial decision-making capability across the lifecycle.

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[1] Kaspiew R, Carson R and Rhoades H (2016), ‘Elder Abuse: Understanding issues, frameworks and responses’, Australian Institute of Family Studies, p. 1.

[2] Australian Human Rights Commission (2014), ‘Your Rights at Retirement’, p. 74.

Question 4: The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence?

One gap of immediate concern to the financial services professionals that Finsia represents is that there is no comprehensive data about the prevalence of financial abuse of the elderly in Australia. The AIFS paper summarises a number of relevant studies, including state-based studies drawn from calls to helplines. While valuable, these studies depend on individuals who are confident enough to seek assistance, or other persons who report suspected cases, for their data.

This is concerning, because a frequently discussed challenge in financial services, particularly as it affects the superannuation industry, is the impact of population ageing on retirement adequacy.

In the period 2012–14, Finsia undertook a three part research series that revealed that, while Australia's superannuation system holds a growing and sizeable pool of savings (currently $2 trillion)[3], many Australians retire with inadequate savings to enjoy a comfortable standard of living in retirement. Superannuation policy design in the past two decades has exposed savers to shocks from unexpected market volatility when their savings levels are at their highest in the period leading up to retirement.[4]

From this research work increasingly it is recognised that not only does superannuation policy and product design need to move from a savings accumulation to an income replacement mindset, but also to acknowledge and tailor policy design to the needs of individuals in three distinct phases of retirement: active (60–75), passive (65–85) and frail (75+).

These phases were described by the Productivity Commission in the 2015 research paper 'Housing Decisions of Older Australians'.[5] In moving from the passive to the frail phase, there is increasing need for age appropriate living facilities (moving out of standard dwellings) and for specialised care.

Importantly, there is also the question of decision-making capacity with financial decisions in retirement being made by people of declining capacity, or by appointed decision-makers who may or may not act in the best interests of the elder.

These factors point to the need for prevalence data, but also to the need for further research into the effects of ageing on financial decision-making. This research has an important bearing on the identification and redress of financial abuse.

Research from the United States finds that the prevalence of dementia exceeds 30%, not including the numbers of adults in this cohort that experience substantial cognitive impairment without a strict diagnosis of dementia.[6] This research looks at the impact of age on ten financial choices, including credit card balance transfer offers and

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[3] APRA (2016), 'Statistics: Quarterly Superannuation Performance', March, p. 8.

[4] The research reports in this series are available at http://www.finsia.com/insights/future-of-finance/your-income-in-retirement:
Basu, A, Doran, B and Drew M (2012), 'Sequencing Risk: A Key Challenge to Sustainable Retirement Incomes', Finsia
Drew, M, and Walk, A, (2014), 'How Safe are Safe Withdrawal Rates in Retirement? An Australian Perspective', Finsia
Drew, ME, AN Walk and JM West, 2015, The Role of Asset Allocation in Navigating the Retirement Risk Zone, Finsia

[5] Productivity Commission (2015), 'Housing Decisions of Older Australians', http://www.pc.gov.au/research/completed/housing-decisions-older-australians

[6] Argawal S, Driscoll JC, Gabaix X and Laibson D (2009), 'The Age of Reason: Financial Decisions over the Life-Cycle with Implications for Regulation', *Brookings Papers on Economic Activity*, p. 2.

mortgages. Across the ten choices the authors found the average age of peak performance for decision-making was 53.3 years — 'the age of reason for financial decision making'.

What's significant about this research is that it builds a picture of how the capacity to make prudent financial decisions declines with age, and that this decline may affect persons who do not have a strict diagnosis of dementia.

Further, there is emerging work in neuroeconomics that is starting to investigate how financial choices are made biologically.[7]

Research about cognitive decline and financial decision making reveals a number of smoking guns, but more work needs to be done. Based on the current research, it is difficult to make precise policy prescriptions; however, there is an opportunity to further the evidence in this area to identify what the biggest problems, or potential financial abuses, are. Importantly, this research needs to be translated so that it can provide real world guidance to planners, advisers and policy makers.

Question 24: What evidence is there of older people being coerced, defrauded or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and redressed?

The Finsia members that contributed to this response to the Issues Paper identified the issues of population ageing and cognitive decline as a 'silent tsunami' for self-managed super funds (SMSFs), exposing investors in this sector to financial abuse, including fraud and inappropriate investment advice.

Financial advisers in this group noted that SMSFs raise unique issues in the context of elder abuse, particularly when financial affairs become unmanageable for a trustee.

The issues raised by SMSFs point to the need for policy responses to financial elder abuse to consider whether elders have:

> their own private assets or income, including whether these assets are a lump sum or received as an annuity stream; or
> a mix of, or sole reliance on, public pensions.

Policy responses should afford elders similar levels of protection, and avenues for reporting and redress, regardless of their financial affairs.

Question 25: What evidence is there of elder abuse in banking or financial systems?

Finsia members highlighted that it is often bank branch staff that come across cases of suspected elder abuse. Elderly persons are more likely to access banking services in the branch rather than electronically, and so branch staff are in an important position to identify suspicious transactions.

Robust data on the incidence of elder abuse in banking or financial systems is not available, for the reasons discussed in the response to question 4. Thus there is an opportunity to gather more detailed industry-wide data.

As noted in the Issues Paper and the AIFS paper, the Australian Banker's Association has developed industry guidelines for financial abuse prevention.[8] These guidelines,

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[7] Bossaerts, P and Murawski, C (2016), 'Decision Neuroscience: Why We Become More Cautious with Age', *Current Biology*, 26, R493–R513.
[8] Australian Bankers' Association (2013), 'Protecting vulnerable customers from potential financial abuse', industry guideline, available at http://www.bankers.asn.au/Media/Media-Releases/Media-Release-2013/Financial-abuse-prevention

while comprehensive, are voluntary and not legally binding. As a result, they rely for their effectiveness on the quality of internal procedures and training at individual banks.

It is noted that research into the impact of cognitive decline on financial decision making is helpful in building the evidence base of elder abuse in banking and financial systems.

This research shows the disadvantage that elderly people experience in accessing financial services such as higher rates and fees, lower investment returns, and risks associated with purchasing unsuitable banking and investment products.[9]

Question 26: What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

There was support among the Finsia members that contributed to this submission for strengthened reporting requirements where suspected cases of financial abuse of the elderly are encountered. It is noted that research by Alzheimer's Australia finds support for mandatory reporting of financial abuse.[10]

The lack of clarity in reporting pathways is a significant issue for the financial services professionals Finsia surveyed in response to the Issues Paper. This issue is also raised by the AIFS report into elder abuse.[11]

While considerations such as respect for the autonomy of elders and paternalism were highlighted by the AIFS in their paper as arguments against mandatory reporting, the vulnerability of this sector of the population to cognitive decline and abuse by family members or persons in caring or decision-making roles presents a compelling argument to establish mandatory reporting for professionals, including those in financial services.

Finsia members also broadly support strategies to strengthen educational and ethical standards for financial services professionals to identify and appropriately respond to cases of elder abuse. It was suggested that RG 146, the Australian Securities and Investments Commission's (ASIC) regulatory guidance on training of financial product advisers,[12] be amended to address the issue of financial abuse for advisers of tier 1 and tier 2 products.

Question 29: What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?

Finsia members that contributed to this submission were aware, in their own professional experience and anecdotally, of a range of intentional and unintentional abuses committed by people acting as decision-makers under instruments such as powers of attorney.

There were overarching issues raised about powers of attorney, such as:

> Persons not allocating power of attorney until it's too late.

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[9] Argawal S, Driscoll JC, Gabaix X and Laibson D (2009), 'The Age of Reason: Financial Decisions over the Life-Cycle with Implications for Regulation', *Brookings Papers on Economic Activity.*

[10] Alzheimer's Australia (2014), 'Preventing Financial Abuse of People with Dementia', Discussion paper 10, pp. 25–6.

[11] Reporting pathways are acknowledged to be complex and confusing for members of the community and professionals.' Kaspiew R, Carson R and Rhoades H (2016), 'Elder Abuse: Understanding issues, frameworks and responses', Australian Institute of Family Studies, p. 13.

[12] ASIC, 'RG 146: Licensing: Training of financial product advisers' available at http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-146-licensing -training-of-financial-product-advisers/

- Persons not knowing to whom to confer a power of attorney.
- Power of attorney being a complex decision for persons with a number of family members who may feel entitled to be appointed.
- Powers of attorney may not have sufficient financial expertise to be making decisions on behalf of elders.
- Powers of attorney, like estate planning documentation, may not be regularly reviewed in the absence of a policy trigger.

Family members acting under powers of attorney were singled out, particularly children, who perpetrate financial abuse under the assumption, for example, that they would be due funds under inheritance ('my mother/father would want me to have this money'). Alzheimer's Australia has described this phenomenon as 'inheritance impatience'.[13]

While comprehensive prevalence data still is needed, research into financial decision making and cognitive decline reveals the limitations of instruments such as power of attorney as a policy response for elderly people to manage their financial affairs. Agarwal et al survey nine policy frameworks for financial decision-making in the context of cognitive decline, including advanced directives. Relevantly, they observe:

> [F]amily members are often counter-intuitively poorly positioned to play an oversight role … [they] face a conflict of interest since they are usually the primary residual claimants of the estate. Hence, it will often be the case that older adults do not have an unconflicted, low-cost agent to whom they can delegate decision-making authority. [14]

Because of this, there should be increasing emphasis on powers of attorney demonstrating independence and offering financial expertise. This is vital because of the sophisticated nature of financial arrangements affecting the elderly, and the potentially devastating consequences if decision-making authorities are abused.

There was also support for policies that trigger the formalization of power of attorney arrangements, such as when a person is preparing to access a superannuation lump sum.

Further, Finsia members supported the development of policy mechanisms to trigger review of power of attorney arrangements to ensure their continuing appropriateness. On this point, it was noted that younger people might assign power of attorney to their parents, and this may not be appropriate in the long run, for the issues relating to cognitive decline and decision-making impairment discussed elsewhere in this submission.

Question 30: Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should manage and host the register?

The members that contributed to Finsia's strongly support the registration of power of attorney and decision-making instruments. Registration of these interests is a 'no brainer' for improving safeguards against elder abuse.

This register should include the date of birth of the power of attorney, for the reasons discussed in the response to question 29.

Further, Finsia members expressed strong support for tracking of transactions made under powers of attorney and similar instruments.

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[13] Alzheimer's Australia (2014), 'Preventing Financial Abuse of People with Dementia', Discussion paper 10, p.6.
[14] Argawal S, Driscoll JC, Gabaix X and Laibson D (2009), 'The Age of Reason: Financial Decisions over the Life-Cycle with Implications for Regulation', *Brookings Papers on Economic Activity*, p. 26.

As regards an appropriate body to manage and host the register, it is suggested that the body be national. This may present an opportunity for harmonization of power of attorney laws among the states and territories.

Hosting a register of power of attorney would be outside the current mandate of the Australian Transactions Reports and Analysis Centre (AUSTRAC); however, it is suggested that AUSTRAC could be an appropriate body to monitor financial transactions made under a power of attorney.

If transactions made under a power of attorney were monitored, there would be a powerful disincentive for decision makers to abuse their powers. Where suspicious transactions are engaged in, victims of abuse would be able to access records that evidence fraud.

With increasing automation of financial transactions, and corresponding data, there is an opportunity to create greater security for elders that have their financial affairs managed by powers of attorney and other appointed decision makers.

While the Issues Paper noted the dangers of making power of attorney obligations too onerous, Finsia members agreed that improved educational standards for powers of attorney, and registration of interests, are critical to safeguard against elder abuse.