

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email: elder_abuse@alrc.gov.au

2 September 2016

Dear Commissioners,

**AFA Submission – Elder Abuse
(Issues Paper 47)**

The Association of Financial Advisers Limited (AFA) has served the financial advice industry for 69 years. Our objective is to achieve Great Advice for More Australians and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are required to be practising financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Summary of the AFA's position on elder abuse

The AFA supports the Commission's review of the laws and legal framework intended to protect our elderly citizens. Responses to the management and prevention of elder abuse requires a range of complex policy and practice structures ranging across different levels of government and various frameworks within the private sector, government and non-government organisations.¹

The AFA supports a multilateral or holistic approach that involves:

- Review of our legal and financial systems
- Examining the connections between and causes of elderly, spousal and child abuse²
- Government support and funding to educate the community and arrest the social isolation that the elderly feel
- Significant improvement in the support of older people³
- Leadership from government agencies and our corporate institutions to implement corporate codes of conduct or other organisational cultural improvements designed to better detect and appropriately respond to potential maltreatment of any vulnerable class of citizens
- Better guidance to the community, corporations and professionals about the avenues for redress available and what the law says, and
- Ultimately a recognition from everyone that how we act toward our elderly today will impact upon one's own sunset years.

Only with a holistic approach including law reform can Australia truly address the needs of our elderly and provide the safeguards that everyone should expect in old age. As with all regulatory reform, the AFA considers that the benefits to the community from our recommendations and others should be weighed against the cost of reform and the effects on individuals.

Financial advisers and the elderly

Financial advisers are in a good position to recognise if their elderly clients are being subjected to financial abuse by family members or those with some type of other relationship. Financial abuse may be a consequence of emotional or psychological abuse. In many instances older clients are vulnerable to abuse because they are lonely and feel the need to protect the relationships of family, friends or carers to ensure continuity of care. Some elderly people perceive that the gifting of money, assets or guarantees can be a way to encourage and retain relationships.

In some cases the purpose of the 'gift' may be to increase the elderly person's social security payments. However, the amount given away is often more than the increase in social security payments and the client is out of pocket. These clients usually then have to rely heavily on the Government for their future needs. In these situations, the risk for the abused is they may not having enough funds for their lifestyle and the care

¹ Kaspiew, R., Carson R., and Rhoades H. *Elder abuse: Understanding issues, frameworks and responses*, Australian Institute of Family Studies (2015).

² James, M. *Abuse and Neglect of Older People*, Australian Institute of Family Studies, Issue 47 available at <https://aifs.gov.au/publications/family-matters/issue-37/abuse-and-neglect-older-people>

³ Ibid.

they may need in later years. Those who provide guarantees or provide their home as security for a loan run the risk of their guarantees being called on. In the instances where children agree to keep money for the parent until it is needed, there is a risk (sometimes realised) that the elderly person's funds can be spent or may potentially form part of divisible property in a relationship breakdown or a bankruptcy claim.

Below is a summary of the other anecdotal examples of potential elderly abuse:

- A son seeking his age pensioner mother to purchase a property – but for the title to be registered in his name
- A pensioner couple were asked to provide a guarantee for a son-in-law's business loan
- An elderly woman whose main asset was her home was asked to secure her home against the mortgage of one of her children
- An elderly man who was pressured by his three children to sell his home after suffering a stroke even though the cost of his care did not require it, and then subsequently being pressured to move into a lower cost facility to presumably to reduce the impact on the estate to be bequeathed to his children, but unbeknownst to them they were not beneficiaries of
- An elder client gifted more than \$900,000 to her son over two years. This resulted in a family argument among siblings. The action was considered to jeopardise the financial strategy put into place to provide sufficient funding for the client's desired lifestyle and health care needs
- An elder client's bank account – where superannuation and investment income is credited – was accessed electronically by a son. The balance was depleted and the money spent for his own purposes
- Spam emails and telemarketing directed at elderly people
- Property spruiking for older people to invest in property via their retirement savings, which can result in self-managed superannuation funds being established regardless of the balance and whether licensed financial advice was provided or recommended to be sought
- An elderly person with dementia cared for by a child with power of attorney who when taken shopping by other children would be taken advantage of through funds withdrawn
- Executors who are related to an elderly person initiating changes of a will unbeknownst to other beneficiaries
- A person with cognitive impairment was allegedly coerced to withdraw from a bank account and give proceeds to a relative. Another person with elderly cognitive impairment was asked to change their will in favour of an apparent abuser, and
- A holder of an EPOAs used client's money for their own personal use even where it was not provided for in the EPOA document.

It is difficult to assess in most of these examples whether each would respectively be considered to be a case of elder abuse because a combination of elapsed time, incomplete information (such as about relevant mitigating factors), or due to professional concerns about privacy and confidentiality. We understand from our members that where there is a suspected incidence of abuse, the elderly person is often not willing to report a problem or otherwise "create a fuss" because they wish to protect the abuser or because they worry about alienating their relative or carer.

Financial advisers have anecdotally reported that in cases of suspected elderly abuse they feel constrained from reporting or stopping the suspected financial abuse where the client initiates the action, instructs the

adviser authoritatively and in writing to act contrary to their best interests or otherwise provides a mandate for their representatives or relatives to withdraw funds. Some advisers have said they feel prone to claims by elderly clients' family members of not acting in the best interests of their client.⁴

These same anecdotal reports also confirm that advisers face the dilemma of acting on client's instructions where these may be inconsistent with Best Interest Duty recommendations. This is because, like lawyers, if a financial adviser fails to act on the client's instructions they are aware that they may breach a professional duty – that is, to act with due diligence/care and acting only upon the client's instructions. Further, declining to act on a client's instructions can and does lead to clients terminating the relationship with the adviser and finding another adviser who will act on their instructions.

Most advisers in conflict of interest situations remind clients and/or their representatives of the disadvantages or other detrimental effects of the requested action on the client's finances and future lifestyle, especially when actions may not be in the best interest of the client. This is familiar to advisers because they know this is what their Best Interest Duty requires of them. The difficulty for advisers lies in knowing about what to do next after they provide a personal financial product advice recommendation or what to do when the effect on the elderly person may not be one of financial abuse or one that draws on or affects the financial strategy of a financial adviser's client.

Professional associations, licensees and other organisations do their best to provide guidance to advisers about what the law expects of them in these sorts of situations and to provide advice on their options when faced with ethical dilemmas. But with different State laws applying to powers of attorney, aged care, health systems, social services systems, advanced care directives and sometimes the legal system or rules in each State or Territory, the specific knowledge needed to guide the adviser can be difficult to find or isolate. Further, professionals often lack the specific training which would allow them to follow through with cases of suspected maltreatment of older people.

A further issue observed by AFA members is with the terms offered by the trustee services for management of an elderly person's affairs. The terms are generally based as a percentage of the estate – 5 per cent is a common rate – and largely unable to be negotiated by principals. When compared to the fees offered by financial advisers who are subject to conflicted remuneration provisions, the trustee terms appear to take advantage of vulnerable elderly people at a time when they may be injured or incapacitated and therefore disenfranchised or unable to negotiate better terms. Our members query to what extent these contracts could be better regulated to prioritise the principals' needs and existing strategies.

These examples and situations highlight that our members' experiences with potential elder abuse situations, their expertise with financial systems positions and their role as financial advisers to the elderly and their relatives positions the **AFA to recommend ways to make things easier for elderly people and to tighten the safeguards for our senior citizens**. Further, as custodians of financial and personal information about the elderly, financial advisers are also part of the system that safeguards our elderly.

We have recommended measures that are within our field of expertise, drawing upon the experiences of financial advisers and companies within our network.

⁴ Anderson, *Abuse and Neglect Among the Elderly*, Journal of Gerontological Nursing (1981), Vol.7, pp.77-85 and more recently Kosberg, J. *Preventing elder abuse: identification of high risk factors prior to placement decisions*, Gerontologist (1988), Vol.28, No.1, pp.43-50.

Summary of the AFA's recommendations

The AFA considers that to adequately protect elderly citizens, the following measures could be considered further by the Commission to address elderly abuse:

1. Harmonise the current State laws for Powers of Attorney, Guardianship, Advanced Care Directives and Offices of Public Advocates.
2. Centralise the State registers through a national register of Powers of Attorney documents (especially Enduring Powers of Attorney), with an agency appointed to oversee the administration, registration, revocation, enforcement and complaints about entries on this register.
3. National guidance on establishing and amending Enduring Powers of Attorney. These to be appropriately worded for the principal's needs and objectives to address the practice of 'over-authorising' attorneys with broad scope of power.
4. Establish a national Elderly Citizens Public Advocate or Ombudsman. This could be created to provide a complaints protection mechanism. It would go beyond the current Aged Care Complaints Commission to also subject Attorneys acting under a Power of Attorney to the same jurisdiction. Also cover other players who are able to be regulated. It would provide an information service to the remainder of the public and professionals to help them make informed decisions on potential elder abuse situations.
5. Amend the Uniform Defamation Laws to extend the class of protected reports defence to good faith complainants acting as concerned citizens or as concerned professionals.
6. Develop an 'At Risk Matrix System' to identify those potentially at risk of elderly abuse; provide guidance on how to engage effectively with those people; what supports should be offered or utilised; and the records and notifications procedures for those people.

Reasons for the AFA's recommendations

Recommendation 1 – Harmonise state laws

The AFA considers that ongoing differences in State laws that relate to Powers of Attorney, Guardianship, Advanced Care Directives and Offices of Public Advocates need urgent attention. Although in some cases the differences between jurisdictions can be as small as different witnessing rules, in other cases the differences can involve different timeframes, capacity elements, complaints processes and lodgement requirements. The differences:

- Create confusion for the people who arrange safeguards for their clients and relatives
- Can cause cross-jurisdictional difficulties for interstate relatives and when elderly principals move jurisdiction
- Create different records and registers that could be used to register inconsistent or differing instruments over the same principals, and
- Ultimately add to the total regulatory system structural costs through unnecessary duplication.

The AFA considers that where there is insufficient justification for separate State laws to exist in a modern society, State laws should be harmonised with the assistance of the Federal government or Federal agencies to bring a uniform national system or framework that will best serve the interests of all Australians equally.

Recommendation 2 – National register of Powers of Attorney documents

Linked to the above, several AFA members agree with the Commission's proposal in the Issues Paper to establish a national register of Powers of Attorney and an oversight agency. Although we are not aware of any specific criticisms about the manner that the State registers are operating their respective systems, the feedback we received was that the presence of different systems contributes to the difficulties faced when issues arise about Powers of Attorneys. Further, a centralised national online register could encompass Enduring Powers of Attorney, medical guardians, and medical care directives.

The AFA considers that a centralised national system would be particularly helpful for confirming that authorities are current and valid, to reduce the distress to elderly principals arising from conflicting documents and to facilitate a more effective system to resolve those conflicts and disputes. We envisage that the agency created to administer such a system would need to be a statutory body.

Recommendation 3 – National guidance on Enduring Powers of Attorney

Based on feedback we have received, it appears that many Enduring Powers of Attorney are drafted with very wide terms and broad powers for the attorney. It appears that this unfortunate practice is likely due to a desire to avoid subsequent legal costs required to amend the document in future if the principal's care needs increase.

Financial advisers would also appreciate better guidance on how professionals like themselves could be appointed decision makers. There is currently no legal impediment on a professional person being appointed as an attorney under a Power of Attorney. However, financial adviser licensees are generally not willing to permit their advisers to take on such a role. The AFA considers this to be sometimes a misguided approach

and not always in the best interests of a client. With clearer guidance about the situations that could warrant a professional who is independent of a family to be appointed as a decision-maker or decision-facilitator, guidance around how to structure the situation to protect the licensee and guidance for the families of principals, the AFA considers that elderly people could have greater access to professional assistance.

Recommendation 4 – Elderly Citizens Public Advocate / Ombudsman

The Commission's Issues Paper highlighted some reasons why elder abuse is under-reported, including the elderly client's unwillingness to report the abuse, privacy laws, and potential defamation charges against those who report abuses. Many of our responding members reported that they were also not aware where they could report concerns that were outside the jurisdiction of the Aged Care Complaints Commissioner. There appears to be a need to create an elderly citizens public advocate or an elderly person's ombudsman.

The AFA appreciates that to be effective, a complaints scheme or Ombudsman requires valid authority to enforce decisions and settlements. Any potential abuser who is not subject to some form of registration (e.g. as aged care facilities are) may accordingly not fall within the jurisdiction of such a scheme. An appropriately empowered authority could nevertheless provide an information service to the public and concerned citizens about other options available to address any particular issues.

To facilitate this issue, the AFA considers that a statutory scheme should be established to:

- Administer uniform rules nationwide providing accessible dispute resolution for aged care facilities, registered Powers of Attorney and any other sector that is not currently covered under an equally empowered dispute resolution scheme.
- Promote greater awareness and understanding of elder abuse issues and the protection of senior Australians' rights. To reduce confusion that often comes with different terms, rules and penalties that apply across different states, the same terms and penalties for breaches should be used nationwide.
- Administer a national helpline to receive reports of abuse, to support the abused, and to escalate matters to guardianship boards, the police, and relevant support organisations.

The AFA appreciates that this is not a simple matter because as highlighted in our introduction, elder abuse issues and responses involve complex policy and practice structures ranging across different levels of government and various frameworks within the private sector. However, we respectfully suggest that one avenue to begin to address the issues and establish a national authority as we have described could be through the Council of Australian Governments process – which we understand was a pathway that national family violence and child protection laws were established.

Recommendation 5 – Amend the Uniform Defamation Laws

The Commission's Issues Paper highlighted that obligations of confidentiality and concerns about a possible action in defamation may serve to constrain reports of suspected elderly abuse. These are very real concerns for many financial advisers and there is no clear or simple response to give them when faced with potential abuse due to the many complications that are often involved with the respective situation.

We consider that a solution could be to extend the class of protected reports defence under the Uniform Defamation Laws to reports of suspected abuse made in good faith. We recognise that a defence would not prevent someone claiming they were defamed and the defence would be subject to judicial scrutiny. This may continue to deter reports of elderly abuse. Equally though it could provide concerned parties with a sense of reassurance that the law is on their side.

Like the other recommendations we have made, we acknowledge that this is not a simple or straightforward solution. By making the defence available to only 'good faith' reports introduce a whole history of interpreting that phrase and complexities will therefore remain. Nonetheless, the AFA considers that there is a symbolic benefit in extending a defence for this situation that should not be overlooked or dismissed in the Commission's consideration of the option.

Recommendation 6 – Develop 'At Risk' Matrices

The AFA considers that a statutory federal scheme / agency could develop an At Risk Matrix to potentially identify those at risk of elderly abuse (e.g. early onset dementia, past family financial issues, etc.) and then provide guidance on how to engage effectively with those people, provide guidance on the supports that should be offered or utilised and stipulate the records and notifications procedures for interactions with those people. This is not about taking elderly people's freedom away or forcing them to do things they don't want to. The At Risk system is envisaged primarily as a guidance and identification tool to support the agencies and corporate institutions who deal regularly with elderly people for their living needs but who are not quite at a degree or scale of risk that places them within the scope of the Offices of Public Advocates or subject to potential guardianship orders.

This is because we consider that there is a cohort of elderly people who fall between full capacity and self-determination and those who would benefit from a measure of assistance and protection of the State. The examples of page 2 show that there are some people who do not yet qualify for State support through a guardianship order or through the jurisdiction of the Public Advocates and who are not within existing systems of care, such as aged care facilities or senior citizens support networks, but who nevertheless could benefit from some additional support, alternative processes and targeted guidance. The system would also serve as providing additional reassurance to the relatives and support people of our elderly that there are specialist systems and supports for their loved ones.

The types of people that we consider at this preliminary formulation stage could be deemed to be in an At Risk Person category could be:

- People diagnosed with early onset dementia or other cognitive impairment conditions (such as Alzheimer's Disease, brain injury, stroke, etc.)
- People who have other defined medical conditions (to be determined by an appropriately qualified panel of medical experts, lawyers and social services professionals)
- Principals who make an Enduring Power of Attorney
- People who have been subject of a report to Department of Human Services for suspected abuse or maltreatment
- People who are receiving in-home assistance from support agencies – such as Blue Care and St Vincent De Paul

- People who have previously sought assistance for depression, anxiety, social isolation, or attempted suicide
- People who are over a threshold age (such as 95, but to be determined by an appropriately qualified panel of professionals)
- People who voluntarily opt-in to be considered to be an At Risk Person.

This list is not intended to be exhaustive, nor is it the AFA's or the Commission's role to decide who should be identified as an At Risk Person. We consider this to be the role of a body of appropriately experienced and qualified professionals from multiple disciplines. The same body who determines the indicators of an At Risk Person would also provide their expert input on the types of guidance that could be created for the governmental agencies and corporate institutions through whom elderly people:

- Access their income, investments and assets
- Receive and are assessed for social security benefits
- Receive medical treatment
- Receive social, housing and domestic supports, and
- Receive State protection.

Through a system that provides consistent guidance about how to identify signs of abuse and maltreatment, how to probe further into an elderly person's affairs without unreasonably breaching personal privacy, how to report examples of abuse and maltreatment and directs concerned people to the network of supports and assistance the AFA considers that our elderly will be much better protected than they currently are. Ultimately, any guidance created and any identification tools need to pass the community expectation, privacy and human rights tests. The AFA considers that a balance can be struck between vigilance, protection and personal freedoms.

We understand that there are already similar systems and identification tools in operation and initiated by appropriately qualified organisations. One example of this is the Online Elder Abuse Tool Kit that Seniors Rights Victoria have developed.⁵ Our recommendation is to take this type of system to the national level, centralise the system, expand it to target particular government agencies and corporate institutions and equip the system with professionally developed guidance, record keeping procedures and checks and balances for unwilling participants.

Likewise, we understand that many financial institutions and companies have policies, procedures and systems in place to assist in identifying, preventing and reporting incidents where elder abuse is suspected or encountered. But these are often developed in isolation of each other, with support from differing State-based organisations and create inconsistencies that could result in people falling through gaps. The aim of this recommendation is to further the work of these organisations by providing consistent guidance for these organisations.

This idea was raised by a previous AFA Adviser of the Year Award Winner who has conducted research into cognitive decline. We consider that this idea should be explored further to weigh:

- The benefit to elderly principals
- The benefit to the community of a system of targeted safeguards, guidance and record keeping

⁵ Seniors Rights Victoria Online Elder Abuse Tool Kit is available at <http://www.seniorsrights.org.au/toolkit/toolkit/signs-of-elder-abuse/>

- The benefit to the staff of government agencies and corporate institutions through consistent and informed guidance
- The cost to individual freedom
- The risk of the system being abused or putting principals at risk of harm
- The risk that such a system could motivate adverse behaviours amongst principals and their relatives to avoid the system, and
- The potential for any subsequent mental health effects associated with being profiled as an At Risk Person.

The AFA acknowledges that this system could be controversial because such a system can effectively profile people who may not agree that they are at risk of elderly abuse and impinge upon their individual freedoms and right to self-determination. The intention, however, is not to place these elderly principals into State care, an aged care facility or to put them on a self-harm watch list. The intention is simply to expand on existing systems that help members of the public to identify elderly people who are potentially at risk of abuse or maltreatment and then to give guidance to the agencies and corporate institutions who need guidance on how to effectively engage with those people and how and to whom to report incidences of suspected abuse.

We consider that the risk of people being incorrectly categorised as an At Risk Person could be managed through a complaints or independent review process that draws on professional advice and assessment of capacity and welfare factors, as well as requiring a weighing of the principal's needs.

Closing remarks

Whilst it is a complex problem, the AFA considers that there are many possible options to reduce incidences of elder abuse and to better support reporting of abuse. One of the most significant difficulties is when the abused do not wish to report it. A single authority to administer uniform rules could provide reassurance to others that there are other options that may not necessarily need an elderly person's consent. A single national authority could also be responsible for coordinating awareness campaigns, education and guidance to assist those who are well placed to identify the abuse and ultimately reduce the rate of incidence.

Australia's elderly people have raised families, worked hard and contributed in many different ways to build our society to what it is today. Our society must foster an environment that can provide them with adequate care and protection when they need it most. Financial advisers are well placed to support the elderly and their families with professionalism and care for their well-being.

If you require clarification of anything in this submission, please contact us on 02 9267 4003.

Yours sincerely,



Brad Fox
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Association of Financial Advisers Ltd