

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

E-mail: info@alrc.gov.au

Dear Ms Wynn,

The Financial Services Council welcomes the opportunity to make the following submission to the Australian Law Reform Commission's Issues Paper on Elder Abuse.

The Financial Services Council (FSC) has over 115 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The industry is responsible for investing more than \$2.6 trillion on behalf of 11.5 million Australians. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

1. The FSC notes that the percentage of the Australian population aged 75 and over is set to comprise 14.4% of the population in 2060 (up from 6.4% in 2012). We also note that total private and public investment requirements over this period are expected to be more than five times the cumulative investment made over the previous half century¹. As such we are supportive of well-researched and consultative policy measures that seek to effectively manage the particular risks and challenges these changes represent.
2. Given the constitution of our membership, this submission will specifically regard questions pertaining to elder financial abuse. We encourage further consultation with the relevant industry and community representatives in regards to questions regarding elder abuse in other areas.
3. In 2015 the FSC established the Elder Financial Abuse Working Group comprising representatives from range of member financial services institutions. The terms of reference for this Working Group include taking proactive steps within the financial services industry to raise awareness of and combat the incidents of elder financial abuse, as well as to facilitate access to training for frontline staff and other relevant staff within the industry to recognise and respond to elder financial abuse.

Events held by the Working Group to-date include the Elder Financial Abuse Symposium held in Sydney on the 19th of October 2015, which included an address by the Age and Disability Discrimination Commission Hon. Susan Ryan, NSW Police,

¹ An Ageing Australia: Preparing for the Future, Productivity Commission, Australian Government 22 November 2013, <http://www.pc.gov.au/research/completed/ageing-australia/ageing-australia.pdf>

Alzheimers Australia, National Seniors Australia and the NSW Elder Abuse Helpline. The Working Group has also separately facilitated access to staff training through the NSW Elder Abuse Helpline, and continues to conduct monthly meetings to hear from groups such as Capacity Australia and the Australian Bankers Association whom have done important work in this area. The Working Group continues ongoing efforts to address elder financial abuse within the financial services industry.

4. A key concern highlighted amongst FSC members regarding elder financial abuse is the need to address gaps in the management of Powers of Attorney. Firstly we suggest a need for the harmonisation and nationalisation of Powers of Attorneys laws across states and territories. Secondly we encourage the development of a national register of Powers of Attorney to ensure transparency and clarity across jurisdictions. Reference has been made throughout this submission to the various impacts of this issue and considerations regarding interim and long-term solutions are explored.
5. The FSC suggests that a lack of public awareness regarding elder abuse and the various forms it takes is a critical factor in the prevalence of elder abuse. Given the very different social and cultural expectations about relationships to the older members of our communities, a discussion across the full breadth of the community is key to improving understanding of this issue and of preventing ongoing incidents. As such, any meaningful legislative measures to reduce elder abuse needs to be accompanied by initiatives aimed at educating and informing the public about what elder abuse is, how to identify elder abuse and what actions can be taken in response. Initiatives focussing on financial literacy are other measures that purportedly contribute to long-term prevention of financial abuse. Whilst responses by industries are important in ensuring that appropriate safeguards are in place, these safeguards are not likely to be effective where elder abuse is not prioritised on the public agenda.
6. The FSC is cognisant of the responsibility of the financial services industry to be aware of and responsive to issues that adversely impact the efficiency and governance of our member institutions and the clients they service. We recognise our role in promoting awareness about elder abuse and proactively working towards appropriate policy and governance outcomes.

We thank you for the opportunity to respond to this issue and commend ongoing work into this important area.

Please direct any questions or queries to niyer@fsc.org.au or alternatively on 0423 728 143.

Sincerely,



Nithya Iyer
Senior Policy Manager, Trustees
Financial Services Council

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;**
- **payment for services?**

The FSC suggests that each of the issues of harm or distress, intention to abuse, and abuse via payment for services, can be considered to constitute elder abuse either independently or when they occur in association with one another.

Further the FSC agrees with the definition of elder abuse presented by the World Health Organisation which notes that “elder abuse can be defined as a single or repeated act, or lack of appropriate action, occurring within any relationships where there is an expectation of trust, which causes harm or distress to an older person. Abuse of an older person can include physical, psychological, emotional, sexual, chemical or financial abuse. It can also include intentional or unintentional neglect.”²

Additionally, the FSC agrees that elder financial abuse is the illegal or improper use of an older person’s property or finances. This includes misuse of a power of attorney, forcing or coercing an older person to change their will, taking control of a person’s finances against their wishes and denying them access to their own money.³ We do however note that elder financial abuse is complex, in particular society’s own view of older members of our communities and relationships within today’s diverse family structures may mean definitions need to be expanded upon in light of new information.

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?

The FSC agrees with the ALRC that there is a lack of systemic evidence and research into elder abuse and as its specific forms, including elder financial abuse.

A 2016 report by the Australian Institute of Family Studies highlights that the absence of systemic research into elder abuse hampers accurate insight into the factors that increase the risks of abuse and the measures that may prevent them.⁴ Nevertheless, the FSC notes that data collected by state-based helplines have been pivotal in gaining preliminary context regarding the scale and nature of elder abuse and the prevalence of different forms of elder abuse across the country.

Research completed by State Trustees Limited has also made a significant contribution to the information base for responding to elder financial abuse. The findings of this research suggest that gaps in research include:

² World Health Organization, Ageing and life-course programmes, Elder Abuse, http://www.who.int/ageing/projects/elder_abuse/en/

³ Elder Abuse in New South Wales, NSW Parliament Legislative Council, General Purpose Standing Committee No. 2, Report 44 <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2387>

⁴ Understanding issues, frameworks and responses, Research Report No. 35 – February 2016, Australian Institute of Family Studies <https://aifs.gov.au/publications/elder-abuse/3-what-known-about-prevalence-and-dynamics-elder-abuse>

- Inconsistent definitions and reporting formats of research which limits comparability of data;
- A need for tailored research methods to cater for the sensitivities and lifestyles of particular cultural groups. This includes varying research approaches across cultural and linguistically diverse (CALD) communities and Aboriginal and/or Torres Strait Islander communities with respect to the different risk factors across communities.
- A need for tailored research methods towards particular geographically located groups, such as those living in rural areas.

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?

There is little evidence of older people being coerced, defrauded, or abused in relation to their superannuation money. It is possible that this related to a low incidence of elder financial abuse in the superannuation industry as a direct result of the extensive regulatory and legal requirements currently imposed on the industry. However, as no centralised reporting framework exists this may also limit the collection of data in this area.

The FSC has received feedback from industry that in line with broader financial abuse risk areas, if incidents of elder financial abuse in superannuation were to be perpetrated on super monies the area of preventative focus should be on reducing misuse of legal instruments such as Powers of Attorney. This is because accessing funds from superannuation is tightly restricted (as discussed below).

As the population ages and more people move to the drawdown phase of superannuation, they are likely to choose to have regular payments made from their superannuation to assist with their living expenses. Even in these situations, for both APRA-regulated and SMSFs the payment of pensions occurs through a financial institution. This requirement also acts to limit the scope of potential abuse through super.

An explanation of the legislative protections relevant to elder financial abuse currently operating in superannuation are noted in Appendix 2. These protections include fiduciary duties as dictated by s62 of the Superannuation Industry (Supervision) Act 1993 and the best interest duty under s961B of the Corporations Act 2001. In addition, criminal laws regarding theft or fraud, statutes regulating the use of powers of attorney and equitable remedies of breach of fiduciary duty are also relevant to the superannuation industry.

Super funds are bound by stringent access requirements such that transfers and withdrawals from superannuation funds are restrictive. For example:

- A rollover (when a person's super fund is transferred to another super fund in their own personal name or to an SMSF where they are a trustee) is subject to stringent checks by the superannuation fund where funds are withdrawn from.

- A transfer from a person's super fund to another person's super fund is only allowed in limited situations such as death or divorce, and in these events additional checks and paperwork is required; and
- A withdrawal can only be made once a condition of release is met and for most Australians, this means reaching their preservation age, and even in this circumstances, withdrawals can only be transferred to the superannuation trustee's nominated bank account.
- SMSFs are covered by the same requirements; and in almost all cases withdrawals of funds occur through a bank account transaction out of the SMSF to the payee's account. Again pension payments and lump sum withdrawals of funds from a SMSF should only be transferred to the superannuation trustee's nominated bank account. The compliance to the rules are administered by the Trustees. In many cases, the administration of a SMSF is outsourced to a professional service (including Accountant, Advisors and auditor), these parties implement the instructions of the Trustees and depending on the service arrangement may provide advice and guidance to assist the Trustees with the management of the fund and/or investment management decisions.
- Transaction, such as withdrawals must be authorised by one or (if stipulated) more signatories of the fund.
- SMSF Trustees are required to review ATO documentation setting out the roles and responsibilities of Trustees and sign a declaration of their comprehension of these key areas before setting up a SMSF. Each year annual all trustees must continue to make a declaration of compliance with their Trustee responsibilities to submit with their Annual financial statements and member reports.
- For all super funds types, once assets are transferred or withdrawn from the super fund, they are beyond the control or supervision of the superannuation trustee. In most cases (including for SMSFs) withdrawals or sales of assets must be transacted via a Financial Institution.

In light of such comprehensive protections already in place, the FSC suggests that preventive measures regarding elder financial abuse in superannuation are expected to be most effective at the community-level and in the context of inter-jurisdictional exchange of information.

Namely through:

- Increased awareness of elder financial abuse at a community, authority-level (police, doctors etc.) and business-level (broader than just the superannuation industry and financial services industry) as key to improving understanding of this issue and of preventing incidents.
- A comprehensive process for registering Power of Attorney documents as key to helping the superannuation industry to protect vulnerable clients. A more considered and efficient framework could offer more protection for consumers and industry through greater transparency of validity and currency of documents. .

Financial Institutions

The FSC acknowledges that financial institutions play a significant role in responding to the issue of elder abuse, particularly in regards to elder financial abuse.

Many financial institutions have pursued internal governance measures and the introduction of financial instruments and services that aim to prevent, curtail or identify incidents of elder financial abuse. Examples include mandatory joint-access requirements for certain financial instruments as well as the creation of a surety insurance bond which provides access to pursue compensation for privately managed estates subject to mismanagement by private managers⁵.

Best practice governance controls tend to encompass codes of conduct for financial services staff. Aside from respective regulatory requirements, financial institutions monitor and supervise representatives, implement clear policies on conflicts of interest and how they must be either managed or avoided, provide appropriate training and continue to emphasize professionalism and ethics in the financial sector. Importantly, implementing a hard-line stance on such codes and ensuring that such conduct is met with severe consequences (e.g. termination and reporting to the relevant representative at ASIC) is also increasingly common.

However, where elder financial abuse is being inflicted by a family member or other acquaintance in relation to the victim's superannuation funds or investments, intervening presents a significant challenge due to the relationship that exists between the victim and the family member. For example, a victim may willingly and knowingly agree to transfer funds to a family member as a result of their relationship even though the transaction may not be in their best interests. However, unless the victim lacks capacity, expresses a concern with the transaction or is prepared to follow appropriate advice not to complete the transaction, there is a fundamental difficulty with interrupting the wishes of that person.

The points referred to in Questions 25 and Question 26 encompass the legislative measures identified by the FSC as paramount to facilitating meaningful responses by the financial services industry to the issue of elder financial abuse.

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

The FSC notes that there has been significant difficulty in obtaining evidence of elder abuse in banking or financial systems primarily due to a lack of clarity regarding the rights of institutions to record private information of their clients based on suspicion of elder abuse.

A case study obtained from State Trustees Limited which provides a common example of how elder financial abuse occurs in cases of disability is included in Appendix 1.

Additionally, range of organisations and institutions have collected evidence regarding elder abuse in banking or financial systems.

1. The FSC notes case studies provided to the ALRC by the ABA.
2. The National Elder Abuse Helpline has collected significant evidence of elder financial abuse. As per the 2013-14 report, elder financial abuse was found to be the most

⁵ <http://www.tag.nsw.gov.au/surety-bond-scheme.html>

prevalent form of elder abuse reported, comprising nearly 40% of calls received (this was followed closely by psychological abuse at 35% whilst other forms of elder abuse each represented 10% of calls or less).

Of these, common forms of elder financial abuse incidents reported included: forced changes to legal documents, misappropriation of money, denying access to personal funds, forging signatures, misuse of a bank card or enduring Power of Attorney.⁶

3. National Seniors Australia notes that in Queensland alone, \$45.9 million was estimated to be misused in elder financial abuse between 2014 and 2015⁷. State Trustees reports that on average \$113,000 is the amount of money appropriated⁸.
4. The FSC acknowledges that there is a lack of research in this area and that more information is needed to better understand this issue. However, we also note that in the absence of legislative clarity and a nationally consistent approach towards monitoring, additional reporting measures risk being costly and ineffectual. Additionally, as evidenced by the cases studies in the appendix, the complexity of incidents of elder financial abuse make it difficult to implement a one-size-fits-all approach.

This is an area that requires further research that has to-date been hampered by a lack of guidance on how to record, report and disclose incidents of financial abuse within financial institutions as consistent with legal requirements. Much of the evidence to-date has been anecdotal.

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?

Australian Financial Services licensed organisations are currently subject to an extensive legislative and regulatory framework that requires licensees to identify risks and to take proactive steps (including training, monitoring and supervision) to ensure that their representatives do not breach the law. These requirements include ensuring that financial services are provided efficiently, honestly and fairly. There are also prohibitions on dishonest, misleading and unconscionable conduct in the provision of financial services.

As such, the financial services industry is already required to put in place measures and take steps that are designed to eliminate or reduce the risks that would give rise to elder abuse by their own representatives. While there is no legal requirement to report to the Australian Securities and Investment Commission (ASIC) those financial services representatives who engage in dishonest, misleading or unconscionable conduct, it is, to a degree, industry practice that such representatives are reported to ASIC. As such, where elder abuse is present and has been identified, then such behaviour would generally be reported to ASIC.

⁶ Elder Abuse Helpline, National Report
<http://www.elderabusehelpline.com.au/uploads/pdf/Elder%20Abuse%20National%20Annual%20Report%202013-14.pdf>

⁷ Elder Abuse Prevention Unit, Uniting Care, Funded by the Queensland Government
http://www.eapu.com.au/uploads/annual_reports/2014%20-%202015%20EAPU%20Annual%20Report_Final.pdf

⁸ State Trustees Limited elder finance abuse cases appointed to from January 2014 to December 2015.

Further, AFS licensees are not provided with any statutory protections with respect to reporting the suspicion of elder abuse perpetrated by family members. In the absence of such protections, licensees face the risk that reporting a mere suspicion may lead to defamatory action, breaches of the privacy law and allegations of age discrimination.

The FSC proposes that the below areas are critical to facilitating effective and efficient responses from financial institutions regarding safeguards against elder abuse.

1. Elder financial abuse identified as an offence with associated penalties. Currently, elder financial abuse is often treated as a criminal offence categorised under fraud or theft, however it is not identified specifically in law. This hampers both appropriate legal action as well as the ability for institutions to identify, record and track the issue more broadly.
2. Legislative clarity regarding appropriate responses by financial institutions in identifying and responding to elder abuse with due consideration to the particular nature of the relationship with the customer. As noted by the ALRC, the protections offered in some US states regarding immunity provisions for financial institutions disclosing incidents of elder abuse may have useful application in Australia. The FSC is comfortable with further exploration of how relevant legislation and codes might be amended to ensure similar protections for Australian financial institutions. However, any such measures would need to be approached with caution and assurance to the private and trusted nature of the relationship between the client and financial services staff. This is to avoid the unintended consequence of discouraging victims of elder financial abuse to interact with financial services staff for fear of private matters being publicised.
3. Laws and frameworks governing Powers of Attorney to be reviewed and improved by:
 - Harmonisation and uniformity of laws governing Powers of Attorney across states and territories to ensure national application. Ideally this would ensure that various state and territory laws regarding Powers of Attorney share identical terms to ensure transferability of application. Interim measures may require an improvement in consistency of application while such laws are reviewed and streamlined.
 - Development of a national register of Powers of Attorney that can be accessed across all jurisdictions. This register may operate similarly to the Justice of the Peace register.
 - New Powers of Attorney appointments supported with guidance that provides clear instructions to attorneys and agents, and understandable information to individuals, so they are aware of their duties and can make informed decisions appropriate to their circumstances.

The FSC notes the ALRC's suggestions regarding compulsory training for Powers of Attorney. Whilst we support this idea in principle, we agree that too many safeguards or onerous training requirements may deter appointments and jeopardise existing arrangements. Rather, we suggest that guidance can be

provided on a less formal basis, whilst still ensuring communication of key information.

One example may be an informal guidance document that includes a checklist of duties and resources and contacts for support. Some of the Powers of Attorney duties cited could include: to act honestly, diligently and in good faith, exercise reasonable skill and due care, to not use position to profit, avoid acting where there is or may be a conflict of interest, not disclose confidential information and to keep appropriate records⁹. Such a guidance would need to be straightforward enough not to deter peoples from accepting appointment as Powers of Attorney, whilst providing appropriate information regarding the roles, responsibilities and available resources and support.

4. A partnership response from Government, business and community. This may involve establishing a taskforce or expert committee involving experienced representatives from relevant sectors to identify and articulate the current issues in this area and to provide informed policy recommendations. This may also be a matter for the Council of Australian Governments to facilitate cross-jurisdictional coordination and collaboration.
5. A national awareness raising campaign, including resourcing national points of contact that provide appropriate avenues for redress such as elder abuse hotlines. The FSC notes the success of previous government campaigns around social welfare issues such as domestic violence and suggest the potential suitability of a similar model of public awareness. Importantly for the issue of elder abuse, the FSC notes the significant work in both community support and data collection done by State-based helplines such as the NSW Elder Abuse Helpline (NSW), the Older Persons Abuse Prevention Referral and Information Helpline (ACT), the Elder Abuse Prevention Unit (QLD), Aged Rights Advocacy Service Alliance for the Prevention of Elder Abuse (SA), Tasmanian Elder Abuse Helpline (TAS), Senior Rights Victoria (VIC) and Advocare (WA). While business and community organisations have a significant a part to play in preventing and responding to incidents of elder financial abuse, any measures implemented are likely to be only partially effective where this issue is not visible or prioritised on the public interest agenda.
6. Initiatives to improve financial literacy, particularly towards women and persons from culturally and linguistically diverse backgrounds. These two demographics have been identified to be at higher risk of elder financial abuse as per research by the State Trustees as well as the experiences of other community organisations. Elder financial abuse is found to be most often committed by male children against female widows. This has been attributed to both cultural conventions regarding management of finances as well as to the increasing mortality of women and a lack of financial literacy amongst this demographic. A study of elder financial abuse published in the United States concurred with this finding and suggests that a lack of familiarity with financial

⁹ Office of the Public Advocate Victoria

www.publicadvocate.vic.gov.au/powers-of-attorney/advice-for-attorneys

matters by married or widowed women contributes to the risk of financial abuse¹⁰.

7. Government endorsement and promotion of industry guidance documents (such as those produced by the Australian Bankers Association) to ensure consistency between institutional governance practices and legislation. This may also extend to endorsement of training programs, such as those offered by Capacity Australia, to provide a first point of call for institutions seeking external staff training.

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?

As noted previously, evidence of elder financial abuse has been difficult to obtain and limited data is available on the specific nature of elder financial abuse committed. However, by way of example, of 190 cases of elder financial abuse reported to State Trustees Limited between December 2014 and December 2015 in Victoria, approximately 20% were found to be administrators and 27% guardians (appointed Powers of Attorney)¹¹. Such findings reinforce views among the FSC membership that misuse of enduring Powers of Attorney is a key area of risk for elder financial abuse and in regards to financial abuse generally that given the nature of the authority granted by a power of attorney is difficult to manage.

A key lever for the prevention of misuse of Powers of Attorney and to ensure appropriate avenues of redress is through the harmonisation and nationalisation of Powers of Attorneys laws across states and jurisdictions. Currently, terms used vary across states and territories, making enforcement and transferability of issues highly problematic.

In seeking to resolve this issue, the Victorian Parliament Law Reform Committee's Inquiry into Powers of Attorney in 2010 made the following recommendations:

- Creation of a Powers of Attorney Act;
- Consistent names for documents and powers;
- Consistent names to parties to an Enduring Powers of Attorney e.g. 'principal' and 'representative';
- Easier to understand forms;
- One document for all types of Enduring Powers of Attorney;
- Publication in multi-languages; and
- Education around Enduring Powers of Attorney targeted towards seniors¹².

With regard to the nationalisation of Powers of Attorney laws, the FSC notes that there is an appropriate vehicle for such an act in the Australian 'Applied Laws' legislation, whereby a law enacted in one jurisdiction is then applied in other states/territories. Circumstances creating a special opportunity for enacted of such a law include the same political party in office in most

¹⁰ Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America, National Research Council (US) panel to Review Risk and Prevalence of Elder Abuse and Neglect, Bonnie RJ, Wallace RB, editors.

<http://www.ncbi.nlm.nih.gov/books/NBK98784/>

¹¹ State Trustees Limited elder finance abuse case data from January 2014 to December 2015.

¹² *Inquiry into Powers of Attorney*, Victorian Parliament Law Reform Committee, August 2010,

http://www.parliament.vic.gov.au/images/stories/committees/lawreform/powers_of_attorney/Report_24-08-2010.pdf

Australian jurisdictions.¹³ This would allow for a new scheme to sit alongside existing arrangements without a need for repeal of existing laws and allow for a gradual change to the new scheme.

The FSC further notes that the Australian Bankers Association has also long-been advocating for similar uniformity and consistency in substitute decision-making arrangements.¹⁴

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 host and manage the register?

The FSC strongly supports research into the development and implementation of a national register for Powers of Attorney. We acknowledge that presently records of Powers of Attorney are kept by individual states and territories, and it is thus the responsibility of each jurisdiction to provide respective safeguards. As such, a national register represents significant cooperation between the different states and territories.

We expect that in order to achieve this outcome long-term, interim measures that facilitate inter-state and inter-territorial exchange of information and provide avenues for verification of Powers of Attorney between states and territories that can be implemented swiftly are an important requirement for greater efficiency. This may include a national database, phone-line or online resource.

With regards to the management of the register, we suggest exploration of suitable models such as the one currently used for the Justice of the Peace register.

Question 31: Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?

The FSC has not to-date seen evidence to suggest that the limitations to the statutory duties of powers of attorney contributes to occurrences of elder financial abuse or elder abuse generally.

¹³ Australian Parliamentary Counsel's Committee, Protocol on Drafting National Uniform Legislation, Fourth Edition, 2014, <http://www.pcc.gov.au/uniform/Uniform-drafting-protocol-4th-edition.pdf>

¹⁴ Australian Bankers Association, *Uniformity of substitute decision-maker laws*, 14 June 2013

APPENDIX

1. Evidence regarding elder financial abuse as provided by State Trustees Limited

The following case occurred in Victoria between December 2014 and December 2015. Names and ages have been changed to protect the identities of the individuals concerned. It is noted that recent changes in the Power of Attorney act in Victoria have improved access to compensation from attorneys by victims of financial abuse and that these changes contributed to the scenario below.

CASE STUDY:

Andriana is an 84-year-old widow. After her husband passed away two years ago Adriana's son, Joseph, moved home to help and support his mother. At first the arrangement worked well. Joseph helped his mother with her banking and the payment of her bills. He took her to all of her appointments. Over the next two years Andriana became increasingly reliant on her son and isolated from the community, friends and her daughter, Angela.

Angela became suspicious of her brother when her mother, in a state of distress, confided in her that Joseph was having money problems and that he had asked his mother for financial help. Andriana showed her daughter some bank statements with a series of large withdrawals over a twelve-month period totalling \$120,000. Andriana seemed embarrassed and emotionally conflicted. She wanted to help her son but felt pressured by him.

Andriana then disclosed that Joseph had recently had her sign some documents and she wasn't sure what they were for. When Angela attempted to clarify this with her brother Joseph responded by denying the allegations about borrowing money and stated that he was his mother's power of attorney (financial) and responsible for helping her with her money. This surprised Angela because her mother had always told her that she wanted Angela to be her power of attorney. Over the next few month's Joseph wouldn't answer calls from his sister and wouldn't allow her to see their mother.

Angela wasn't sure what to do. She was increasingly concerned about her mother's health and noticed that her mother's memory was beginning to fail her and she was becoming increasingly confused with relatively simple matters. Angela decided to seek some legal advice. As a result, she decided to make an application to the Victorian Civil and Administrative Tribunal (VCAT) to request they review the conduct of Joseph as attorney.

As a result of the application to VCAT the power of attorney which nominated Joseph as attorney was revoked and an independent Administrator was appointed. VCAT was able to do this because it was deemed that Andriana, due to early signs of dementia, no longer had capacity to make or revoke a power of attorney. Investigations revealed that over a two- year period Andriana's funds decreased by \$180,000 through a series of \$1000 withdrawals and one large transfer of \$40,000. At first the transfers happened sporadically and were reportedly to help Joseph pay some bills. It was later discovered

that Andriana had suffered psychological abuse from her son and as a result was under pressure to accede to his requests. Once Joseph began to use his power of attorney the withdrawals increased significantly in periodicity.

2. Existing legal protections offered under superannuation legislation

In addition to the statute and common law listed in the issues paper that protects superannuation members from financial abuse i.e. criminal laws regarding assault, theft or fraud, statutes regulating the use of powers of attorney and equitable remedies of breach of fiduciary duty, the following legislative duties greater enhance members' protection:

- The sole purpose test under s62 of the Superannuation Industry (Supervision) Act 1993 which applies to both super fund trustee and self-managed super fund (**SMSF**) trustee and stipulates that trustees need to take appropriate action to protect the fund's assets amongst others, for the sole purpose of providing retirement benefits for its members;
- The sole purpose test imposes an overall restriction on superannuation funds, essentially all super assets must be used for the retirement benefit of the member.
- The best interest duty under s961B of the Corporations Act 2001 which ensures that professional advice including in relation to superannuation needs to be provided to clients in their best interest to ensure the advice is fit for purpose;
- Staff of a financial services provider including superannuation owe their clients a common law duty of care in tort to exercise reasonable skill and care within the parameters of their duties - even if the relationship between the staff of a financial services provider is not one which is fiduciary in nature.