

7. Banks and Superannuation

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Summary

7.1 Financial abuse is one of the most common types of elder abuse. Banks and other financial institutions may be in a position to detect and prevent some forms of financial abuse of their customers.

7.2 In this chapter, the ALRC proposes that banks take reasonable steps to identify and help prevent such abuse, and that this be prescribed in the *Code of Banking Practice*, with which subscribing banks must comply. Reasonable steps might include providing information about abuse to older customers, setting up systems to identify abuse, training staff and, in some cases, reporting abuse to relevant authorities.

7.3 Superannuation funds may also be the target of elder financial abuse, particularly less regulated self-managed funds. For example, an individual trustee of a self-managed fund who loses decision-making ability may be vulnerable to abuse. This chapter asks whether self-managed superannuation funds (SMSFs) should be subject to greater regulation to prevent elder abuse.

Financial abuse

7.4 Financial elder abuse often involves taking or spending funds held in an older person's bank account. Legal Aid NSW provided a case study of an 83 year old pensioner named Doris, who found she had a large outstanding balance on her credit card:

Doris was easily confused and her memory was not good. ... Doris said she had not received any credit card statements for some time but she knew how much she was putting on her card and made sure she made the payments every month. [Her bank statements showed that] the amount and frequency of transactions on her credit card increased dramatically over a short period. ... The statements also showed a marked

change in the usual pattern of transactions. For example, there were large online purchases and large cash advances, when Doris had never obtained a cash advance on the card before, nor was aware it was possible. ... Legal Aid NSW argued that the bank should have seen the 'red flags' and contacted Doris to confirm whether she was aware of this unusual activity on her account. Big Bank agreed to waive the debt.¹

7.5 The Top End Women's Legal Service wrote of a 50 year old Indigenous woman named Margaret, who suffered significant health problems. Her husband and carer 'assists her to conduct her financial matters, but also uses her key card without permission to purchase items for himself and often retains Margaret's key card'.²

7.6 Poor health, remote living and poverty in the community are among the factors that may make some older Indigenous people more vulnerable to financial abuse.³ The following case study illustrates these issues:

Queenie is approximately 70 years old. She is Indigenous and resides with family outside a regional centre. Members of her immediate family assist her with day-to-day living and related, including financial, matters.

Queenie is frail, with multiple significant health issues and disabilities. In addition, she has been diagnosed with psychological disorders as a consequence of five decades of domestic violence that included multiple physical assaults causing multiple physical impairments, as well as multiple sexual assaults.

Queenie's family accesses her bank account via her pin number, often without her consent. Queenie feels unable to regain control of her bank account; she does not how to change her pin number, does not have a relationship with her financial institution, speaks limited English, and cannot communicate with her financial institution without assistance.⁴

7.7 The Hervey Bay Seniors Legal and Support Service provided examples of the types of elder abuse that it had observed:

- The older person lives with the abuser and has given them authority to access their bank account, either by giving them the card or through internet banking access. The account is used to pay household expenses and to make cash withdrawals. Often the older person has no knowledge as to the extent of the use of their funds, especially as with internet banking bank, statements are no longer posted through the mail. The use of the funds continues after the older person goes into care and is often only picked up when nursing home fees are not paid.
- The older person has difficulty getting to a bank and gives the abuser access for the purpose of withdrawing funds for them. The abuser withdraws funds for their own use.

1 Legal Aid NSW, *Submission 140*.

2 Top End Women's Legal Service, *Submission 87*. Another stakeholder told the story of a terminally ill elderly man who had given his partner access to his ATM card and pin number, and when he died, 'his partner cleaned out his ATM account': National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.

3 Top End Women's Legal Service, *Submission 87*.

4 *Ibid*.

- The older person authorises use of a credit card for a specific purpose but it is then used for other purposes.⁵

7.8 Banks may not be able to detect all financial abuse. For example, while banks may be more likely to notice large and unusual transactions, financial abuse may also be committed by small, common transactions. Furthermore, some methods of detecting financial abuse, even if possible, might be considered too intrusive.

7.9 Customers will continue to need to monitor their accounts and take an active interest in their own finances. Financial literacy is itself a safeguard from abuse, and some stakeholders noted the importance of government initiatives to improve people's financial literacy. Alzheimer's Australia said that to prevent financial abuse, 'older people require targeted, consumer-friendly information to support their financial literacy.'⁶ The Financial Services Council said that such initiatives were particularly important for women and people from culturally and linguistically diverse backgrounds.⁷ The Top End Women's Legal Service recommended 'increased community financial and legal education to reduce the prevalence of Indigenous elder abuse'.⁸

7.10 Planning for the future will also remain important. For example, some older people may need to consider appointing trusted family or friends to later help them manage their financial affairs and protect them from abuse by others, should they need such help.⁹

Banks responding to elder abuse

Proposal 7-1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

7.11 Banks are often in a good position to detect financial elder abuse and protect their older customers. National Seniors Australia said that employees of financial institutions 'may be in the best, and sometimes the only, position to recognise financial exploitation as it occurs'.¹⁰ The Australian Bankers' Association (ABA) submitted that banks can 'play an important role in recognising potential financial abuse'.¹¹

5 Hervey Bay Seniors Legal and Support Service, *Submission 75*.

6 Alzheimer's Australia, *Submission 80*.

7 Financial Services Council, *Submission 78*.

8 Top End Women's Legal Service, *Submission 87*.

9 Although guardianship powers, powers of attorney and other such arrangements are also sometimes abused, as discussed in Chapters 5 and 6.

10 National Seniors Australia, *Submission 154*.

11 Australian Bankers' Association, *Submission 107*.

7.12 There is an industry guideline on how banks might respond to elder abuse, but it is voluntary and unenforceable. If requirements were instead set out in the *Code of Banking Practice*, as proposed, they would be legally enforceable and therefore likely to be more effective in preventing elder abuse. A similar amendment might also be made to the *Customer Owned Banking Code of Practice*, to better protect customers of many building societies and credit unions.

7.13 Seniors Rights Victoria submitted that there should be standard mandatory protocols for banks in relation to elder abuse, and that the industry guidelines on elder abuse should be made mandatory and incorporated into the *Code of Banking Practice*.¹² National Seniors Australia submitted that the financial services sector should ‘use codes of practice to better address the risk of financial elder abuse among older clients’.¹³

7.14 While most other stakeholders did not discuss potential legal mechanisms for requiring or encouraging banks to respond to elder abuse, many said there should be greater training for staff, greater reporting of suspected abuse to authorities, and other obligations on banks to identify and respond to financial abuse.

The Code, guidelines and other regulation

7.15 Banks that adopt the *Code of Banking Practice* are ‘considered to be contractually bound by their obligations under the Code’.¹⁴ The ABA, which developed the Code, states that:

The principles and obligations set out in the Code apply to the majority of banking services delivered to individuals and small businesses across Australia. ... The Code gives individual and small business customers important rights and confirms existing rights.¹⁵

7.16 The Code does not currently include provisions relating to elder abuse. The Code is now being reviewed, and one question being considered is whether the Code should ‘require banks to train their staff in the nature and impact of domestic and family violence, including economic abuse, and in identifying customers who may be experiencing domestic and family violence when making an application for credit’.¹⁶

7.17 Currently, guidance for banks on elder abuse is set out in the ABA’s industry guideline, *Protecting vulnerable customers from potential financial abuse*. The ALRC acknowledges the value of this resource. However, this industry guideline is voluntary and ‘does not have legal force or prescribe binding obligations on individual banks’.¹⁷ The ALRC proposes that banks should have binding obligations to protect their older customers from abuse, to the extent that this is reasonable.

12 Justice Connect and Seniors Rights Victoria, *Submission 120*.

13 National Seniors Australia, *Submission 154*.

14 Australian Bankers’ Association, *Code of Banking Practice—FAQs* (2013) 1.

15 Ibid.

16 Progressive Code Issues Register, *Code of Banking Practice*, Independent Review 2016, www.cobpreview.cameronralph.com.au/issues.htm.

17 Australian Bankers’ Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013 1. However some of the guideline may reflect pre-existing legal obligations.

7.18 Banks are also regulated in relation to fraud and unauthorised transactions, which may sometimes be elder abuse. For example, the *ePayments Code*, administered by the Australian Securities and Investments Commission, ‘regulates electronic payments, including ATM, EFTPOS and credit card transactions, online payments, internet and mobile banking, and BPAY’, and includes ‘rules for determining who pays for unauthorised transactions’.¹⁸

Reasonable steps

7.19 Banks and other financial institutions should be required to take reasonable steps to prevent the financial abuse of their customers. A flexible ‘reasonable steps’ standard may be preferable to prescribing specific steps that banks must take, because with advances in technology, banks might reasonably be expected to do more in the future to identify and respond to potential abuse.¹⁹

7.20 The ABA guideline, *Protecting vulnerable customers from potential financial abuse*, sets out many steps that banks should take, including:

- staff should be ‘trained to identify potential financial abuse as part of their fraud prevention programs’;
- where abuse is suspected, staff should consider talking to the customer—and ask ‘clear, factual, and non-threatening questions’;
- staff should check third party authorisations and documentation—‘If a third party presents a withdrawal form or instructions, bank staff should verify the third party’s authority by directly contacting the customer or checking associated documentation (ie power of attorney document)’;
- staff might seek advice from others in the bank—eg, managers, internal lawyers, fraud, security—and delay transactions until further investigation work is done; and
- staff might also seek advice from the Public Advocate or other relevant agency, but without identifying the customer.²⁰

7.21 The guidelines also discuss administration, guardianship and powers of attorney, stating, in part:

Before an administrator or guardian can be provided with access to, and information on, a customer’s accounts or facilities, banks should ask for written proof of their status, such as certified copies of an instrument or order. Once verified, banks should note the appointment or authority on the customer’s accounts or facilities. ... Banks need to understand the level of access the attorney has over their customer’s account

18 Australian Securities and Investments Commission, *ePayments Code*, March 2016, 2.

19 The *Code of Banking Practice* already includes a ‘reasonable steps’ clause: ‘We recognise the needs of older persons and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services.’

20 Australian Bankers’ Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013.

or facility because a power of attorney can be tailored to certain types of decisions or transactions.²¹

7.22 In a 2016 report about financial elder abuse, a US federal regulator, the Consumer Financial Protection Bureau, recommended that banks and credit unions: train staff to recognise and respond to abuse; use fraud detection technologies; offer ‘age-friendly’ services; and report suspicious activity to authorities, whether or not reporting was mandatory in their state.²²

7.23 Many stakeholders in this Inquiry stressed the importance of banks responding to elder abuse. Training staff was the most commonly suggested step, with some stakeholders submitting that such training should be mandatory.²³ For example, Alzheimer’s Australia said banks and other financial service institutions should have ‘measures in place to prevent and address financial abuse of people with dementia, including staff education and training’.²⁴ National Seniors Australia submitted that relevant codes of practice should require that staff be trained to:

- recognise signs of abuse and recognise the common profile of a vulnerable customer and/or potential abusers;
- understand protocols to deal with suspected abuse; and
- understand enduring powers of attorney and administration orders made by tribunals.²⁵

7.24 The Financial Services Institute of Australasia submitted that its members ‘broadly support strategies to strengthen educational and ethical standards for financial services professionals to identify and appropriately respond to cases of elder abuse’.²⁶

7.25 Capacity Australia said that it had produced training on elder abuse for accountants and financial planners, but is ‘struggling with engaging the interest of the industry’, and that therefore training should be required.²⁷

7.26 Providing information to older customers about financial abuse and discussing with customers how they might protect themselves are other steps banks might take.²⁸

21 Ibid 5.

22 Consumer Financial Protection Bureau (US), *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* (2016).

23 Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; People with Disability Australia, *Submission 167*; Legal Aid NSW, *Submission 140*; Consumer Credit Legal Service (WA), *Submission 112*; Office of the Public Advocate (Vic), *Submission 95*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*; Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

24 Alzheimer’s Australia, *Submission 80*.

25 National Seniors Australia, *Submission 154*.

26 Financial Services Institute of Australasia, *Submission 137*.

27 Capacity Australia, *Submission 134*.

28 ‘National Seniors recommends that financial service providers be supported to deliver information to clients about the potential risks of elder abuse and the mechanisms that can be put in place to protect against future abuse’: National Seniors Australia, *Submission 154*.

Reporting abuse

7.27 Reporting suspected abuse may also be a reasonable step for banks to take in some circumstances. A number of stakeholders submitted that banks should report elder abuse to a relevant authority.²⁹

7.28 Before reporting abuse to the police or other authority, banks should consider discussing the suspected abuse with the customer who may be being abused.³⁰ Where the older person has a guardian, attorney or other substitute decision-maker for financial matters, the bank might also, or instead, contact that person (assuming it is not that person who is suspected of the abuse).

7.29 In Chapter 3, the ALRC proposes that state and territory public advocates and public guardians be given additional powers to investigate elder abuse, particularly when a suspected victim is unable to seek help themselves. The ALRC also proposes that people who report suspected abuse be given immunity from certain legal obligations that might otherwise prevent them from reporting abuse. This should remove an impediment to reporting abuse that banks have identified. The ABA submitted that

legal obligations including privacy laws and anti-discrimination laws as well as obligations of confidentiality and concerns about possible actions in defamation provide challenges for banks in reporting suspected financial abuse. Although the ABA does not support mandatory reporting, the industry would like to see the establishment of clear reporting guidelines for banks to follow if a bank chooses to report what it believes to be suspected financial abuse as well as a government body to which banks can report suspected financial abuse, and statutory immunity for banks choosing to report suspected financial abuse.³¹

7.30 Some customers might object to banks ‘interfering’ in their affairs—questioning how they or their family and friends spend their money, suggesting they are being abused, or reporting suspicions to the police or other authorities. Some customers may consider this an invasion of their privacy. Such objections may be even stronger if it is felt that the interference is partly because one is considered old. There is no doubt that banks must act with tact and sound judgment. As the ABA guidelines state:

Intervening in a customer’s financial matters or questioning them without due consideration and sensitivity may embarrass the customer, and possibly damage the bank’s relationship with their customer. In cases of suspected financial abuse, it is important to be vigilant and cautious.³²

29 See, eg, Seniors Rights Victoria, *Submission 171*; Financial Services Institute of Australasia, *Submission 137*; Consumer Credit Legal Service (WA), *Submission 112*; Australian Bankers’ Association, *Submission 107*; The Public Trustee of Queensland, *Submission 98*; Alzheimer’s Australia, *Submission 80*; Law Council of Australia, *Submission 61*.

30 ‘Financial service providers need to be supported to be able to educate clients and to be able to identify and report abuse to clients’: National Seniors Australia, *Submission 154*.

31 Australian Bankers’ Association, *Submission 107*.

32 Australian Bankers’ Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013 2.

7.31 Where the older person or their representative can take steps to prevent the abuse, or to seek help from others, then it should not be necessary for the bank to notify anyone else. Older people should generally be able to decide for themselves how to respond to abuse. The need to respect people's autonomy is, for some, the key reason underpinning their objection to mandatory reporting. State Trustees Victoria submitted that mandatory reporting 'may be seen by the elderly as intrusive and patronising'.³³ The ALRC does not propose that banks be required to report all instances of suspected abuse to authorities, but rather that reporting abuse will sometimes be the appropriate step to take.

Authorising third parties to operate bank accounts

Proposal 7-2 The *Code of Banking Practice* should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

7.32 Retail banks in Australia typically have a standard form that customers may submit to authorise someone else to operate their bank account on their behalf. This is known as an 'Authority to Operate'. Giving a trusted person access to one's bank account will sometimes be convenient or even necessary, particularly for an older person who finds it difficult to use online banking services or visit a bank branch. However, it may also increase the risk of financial abuse. The ALRC proposes that additional protections be introduced to limit this risk, through amendments to the *Code of Banking Practice*.³⁴

7.33 'Authority to Operate' forms typically require the signatures of both the bank customer and the person authorised to access the account. There is no requirement for others to witness the signing of the form and often no requirement for the customer to attend the branch to submit the form. There is therefore a risk that the forms will be completed and submitted fraudulently. The older person's signature might be forged, or unreasonable pressure might be placed on the older person to sign themselves. Some customers may not understand the arrangement or its risks, particularly if they have not visited a bank branch or otherwise sought advice. Some may not have the decision-making ability to authorise the person to operate the bank account.

33 State Trustees Victoria, *Submission 138*.

34 Similar changes should also be made to the *Customer Owned Banking Code of Practice*.

7.34 Authority to Operate arrangements have been said to be ‘easily obtained’, ‘not generally required to be witnessed’, and may ‘easily’ be used for financial abuse.³⁵ In Victoria, they have been said to undermine the protections in the powers of attorney legislation.³⁶

7.35 The ALRC proposes that banks introduce additional protections to limit the potential for these arrangements to be abused. These protections should be set out in the *Code of Banking Practice*³⁷ and might include a requirement that:

- signatures be witnessed by two people, one of whom should be a doctor, lawyer or of another prescribed profession;
- the customer sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.³⁸

7.36 Some may object that authorities to operate are commonly used by many bank customers, not just older people. Banks and customers may also object to the additional administrative burden. However, the safeguards proposed by the ALRC are relatively modest; they do not impose a significant administrative burden and seem unlikely to deter customers from using these arrangements.

Superannuation

7.37 A significant portion of the wealth of older people is held in superannuation funds.³⁹ Abuse of an older person may include the use of deception, threats or violence to coerce the person to contribute, withdraw or transfer superannuation funds for the benefit of the abuser. Abuse could also include making certain investment decisions that may advantage the abuser now or in the future. Other issues relating to possible elder abuse include questions about the ability of a person acting under a power of attorney to deal with superannuation.

7.38 The Australian Prudential Regulation Authority (APRA) is the prudential regulator for the superannuation industry, but it does not regulate self-managed superannuation funds (SMSFs). SMSFs are supervised by the Australian Tax Office. The Superannuation Complaints Tribunal deals with complaints about the decisions and conduct of trustees of superannuation funds (other than SMSFs).

APRA regulated funds

7.39 Stakeholders identified instances of financial abuse of older people through unauthorised access to superannuation funds.⁴⁰ However, there appeared to be more

35 Law Council of Australia, *Submission 61* citing the views of the Law Institute of Victoria.

36 *Ibid.*

37 Such protections might be one of the ‘reasonable steps’ to prevent abuse, which the ALRC proposes should be included in the *Code of Banking Practice*: see above.

38 For example, compare with governing the making of power of attorney, guardianship and other such instrument: see Ch 5.

39 Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2013-14: Superannuation in Australia, 2003-04 to 2013-14, Cat No 6523.0* (2016).

40 Townsville Community Legal Service Inc, *Submission 141*.

reports of misuse of bank accounts and other financial assets than superannuation funds.⁴¹ This may be partly because APRA regulated funds are subject to significant access controls. This was noted by the Financial Services Council which explained that:

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 circumstance, withdrawals can only be transferred to the superannuation trustee's nominated bank account.⁴²

7.40 Notwithstanding these access controls, additional protection may be afforded through the ALRC's proposals in relation to powers of attorney in Chapter 5 and banking earlier in this chapter. The link between financial abuse of superannuation and banking was described in the case study provided by the North Australian Aboriginal Legal Service:

An older Aboriginal man who had accessed his superannuation, had his bank card stolen by his daughter who went on to withdraw a substantial amount of money from his account.⁴³

7.41 The Financial Services Council submitted that to prevent abuse of superannuation funds, 'focus should be on reducing misuse of legal instruments such as Powers of Attorney'.⁴⁴ The interaction between superannuation and powers of attorney in the context of elder abuse was demonstrated in the following case study provided by Advocare Inc (WA):

Enid is an elder woman who nominated her daughter Cathy as her Enduring Power of Attorney. Enid has tolerated financial abuse by Cathy for many years as she has no-one else to assist her with things she finds too difficult to do on her own. Cathy is now pressuring Enid to transfer superannuation funds into Cathy's bank account, claiming that Enid will get a better return on investment. Enid was advised not to sign anything but is still vulnerable as she chose not to revoke her EPA.⁴⁵

7.42 Similarly, ASIC stressed the importance of better regulating powers of attorney, as it would be difficult for superannuation fund trustees to determine whether certain actions by an attorney under an enduring document are elder abuse. Some examples include:

...instructions to take a portion of a superannuation benefit as a lump sum rather than a pension may as much reflect the importance to the elder fund member of paying down

41 Seniors Rights Victoria, *Submission 171*.

42 Financial Services Council, *Submission 78*.

43 North Australian Aboriginal Legal Service, *Submission 116*.

44 Financial Services Council, *Submission 78*.

45 Advocare Inc (WA), *Submission 86*.

debt, or facilitating new accommodation arrangements as action by an abuser to access superannuation money for their own benefit.

... instructions to continue drawdown of only the statutory minimum amount of an account based pension may reflect the active management of the elder person's longevity risk, rather than maximising the value of a death benefit that may become payable to an abuser.

... instructions in relation to the part commutation of an elder person's account based pension may as much reflect the need to meet a 'lumpy expense', such as in relation to health care, as action by an abuser to access superannuation money for their own benefit.⁴⁶

7.43 Accordingly it is proposed that, with respect to APRA regulated superannuation funds, the best protections against elder abuse will be achieved by enhanced protections in relation to powers of attorney.

Self-managed Superannuation Funds

Question 7-1 Should the *Superannuation Industry (Supervision) Act 1993* (Cth) be amended to:

- (a) require that all self-managed superannuation funds have a corporate trustee;
- (b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;
- (c) impose additional compliance obligations on trustees and directors when they are not a member of the fund; and
- (d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?

Question 7-2 Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?

7.44 The legal framework for SMSFs was established in 1999.⁴⁷ SMSFs have less than five members. Importantly, all fund members are also either individual trustees for the fund or directors of the corporate trustee.⁴⁸ As at June 2016, there were 577,236

⁴⁶ Australian Securities and Investments Commission, *Submission 125*.

⁴⁷ *Superannuation Legislation Amendment Act (No. 3) 1999*. SMSF were previously known as excluded funds.

⁴⁸ The only exception is single member funds with individual trustees where there must be two trustees one of whom is the member.

SMSFs in Australia with a total of 1.1 million members.⁴⁹ There are currently over \$620 Billion in assets managed by SMSFs (about 29% of super assets in Australia).⁵⁰

7.45 Around 70% of SMSFs have two members and 22% are single member funds.⁵¹ The most common structure is a husband and wife super fund. While some SMSFs are established and managed by very wealthy investors, 45% of SMSFs have total balances of less than \$500,000.⁵² Evidence suggests that there is a high prevalence of SMSFs being used as part of a family business structure, typically with the business premises owned by the SMSF and leased to the family business.⁵³

Emerging risk

7.46 The ALRC received a small number of submissions raising concerns regarding financial abuse of older people involving SMSFs.⁵⁴ This may reflect the current demographics of those with SMSFs. Only 8.8% of SMSFs have members aged over 75 years of age⁵⁵—the most vulnerable cohort for elder abuse. However, 55% of SMSF members are aged between 55 and 74 years of age.⁵⁶ This suggests that, in the coming decades, a greater number of older and more vulnerable individuals will have a SMSF.

7.47 The risk of vulnerability to financial abuse in relation to a SMSF arises in part because the regulatory framework for SMSFs was designed on the premise of self-protection. This model for SMSFs supported reduced government intervention through regulation:

As members of self managed superannuation funds will able to protect their own interests these funds will be subject to a less onerous prudential regime under the [*Superannuation Industry (Supervision) Act 1993 (Cth)*]*SIS Act*.⁵⁷

7.48 The different regulatory framework for SMSFs and the larger industry and retail funds regulated by APRA was explained in the following terms:

APRA considers they have a responsibility for ensuring trustees [of those larger superannuation funds for which APRA is the responsible regulator] have properly formulated their investment strategies as set out in trustee documentation and that this can be demonstrated through practical implementation. ... The Tax Office's approach is, however, consistent with past Tax Office practice and the Government's original policy intent. This intent specified that whilst SMSFs are a key vehicle in the accumulation of retirement savings, they do not require onerous prudential supervision as members should be able to protect their own interests.⁵⁸

49 Australian Taxation Office, *Annual SMSF Population Analysis Tables* (2016).

50 Australian Prudential Regulation Authority (APRA), *Statistics: Quarterly Superannuation Performance June 2016* (2016).

51 Australian Taxation Office, above n 49.

52 Ibid.

53 Julie Castillo, 'The SMSFs Trustee-Members' (2012) 40(3) *Australian Business Law Review* 177, 178.

54 Office of the Public Guardian (Qld), *Submission 173*; Financial Services Institute of Australasia, *Submission 137*.

55 Australian Taxation Office, above n 49.

56 Ibid.

57 Explanatory Memorandum, *Superannuation Legislation Amendment Act (No. 3) 1999*.

58 Australian National Audit Office, 'The Australian Taxation Office's Approach to Regulating and Registering Self Managed Superannuation Funds Report No. 52, 2006-7' (Text, 2007).

7.49 A regulatory framework that relies on self protection may be problematic, as a larger number of SMSFs come under the control of older people who may have diminishing decision-making ability. The risk associated with trustee capacity was noted by Financial Services Institute of Australasia (FINSIA):

the issues of population ageing and cognitive decline are a ‘silent tsunami’ for self-managed super funds (SMSFs), exposing investors in this sector to financial abuse, including fraud and inappropriate investment advice.⁵⁹

What happens when a trustee loses capacity?

7.50 As set out above, each member of the SMSF must also be a trustee or a director of the corporate trustee.⁶⁰ A key exception to this requirement is that, if a person has lost legal capacity and has appointed an enduring power of attorney, the attorney may become the trustee or director of the corporate trustee.⁶¹

7.51 Importantly, the law *permits* an attorney to become a trustee or director of the corporate trustee for the purposes of the fund’s compliance with superannuation law. The law does not *require* the attorney to become the trustee nor does superannuation law override the particular terms of the trust deed and/or constitution of the corporate trustee.⁶² The trust deed and constitution of the corporate trustee must allow for the appointment of the attorney as trustee and the processes set down in the document must be followed. If the attorney becomes a trustee or director they do so in their personal capacity and not in their capacity as attorney.⁶³ In that role they are bound by the general law of fiduciary duties of trustees or the *Corporations Act 2001* (Cth), and not the state and territory powers of attorney legislation. Those fiduciary duties are similar to those owed by an attorney to their principal, however as outlined in Chapter 5 additional statutory obligations have been imposed on attorneys that would not apply when acting in their personal capacity in relation to SMSFs.

7.52 If the attorney does not take over the management of the SMSF, the fund is likely to become non-compliant, unless the principal’s interest in the fund can be paid out, the fund is able to be wound up, or the management transferred to an APRA licensed trustee.

7.53 The Office of Public Guardian (Qld) (OPG) provided a case study that highlights the risk of financial abuse in the context of SMSFs and the particular complexities that arise where a trustee loses decision-making ability. The case study concerned a man in his 80s named ‘Peter’:

Among Peter’s many financial assets was a self-managed superannuation fund (SMSF), of which Peter had been appointed director of the trustee company of the fund. A couple of years after moving in care, Peter was diagnosed with dementia, at which time Peter’s attorneys, appointed under an enduring power of attorney,

59 Financial Services Institute of Australasia, *Submission 137*.

60 With single member SMSF, the sole member must be either the director of the corporate trustee or one of two individual trustees (see *SIS Act*, s 17A)

61 *Superannuation Industry (Supervision) Act 1993* (Cth) s 17A.

62 Australian Tax Office, *Self-Managed Superannuation Funds Ruling*, SMSFR 2010/2, 21 April 2010 2.

63 *Ibid.*

assumed control of Peter's financial affairs. A complaint was made to the OPG that the attorneys were financially mismanaging Peter's funds. Peter was aged in the late 80s at the time of the complaint.

The [OPG] investigated the matter and identified ... that the attorneys were not competent to manage Peter's financial affairs due to the complexity, and their lack of understanding of the laws regulating SMSFs.

The investigation identified that, following Peter's loss of capacity to make decisions, no changes had been made to the SMSF and Peter remained the director of the trustee company. The accountant, who had managed the accounting for Peter's business for years, was transacting on the SMSF after Peter lost capacity. ... The attorneys did not take any action to ensure that the SMSF was compliant after Peter lost capacity, and were allowing the accountant to make decisions in relation to the SMSF when he had no authority to do so.⁶⁴

Super System Review

7.54 In 2009, the Australian Government established a review into the 'governance, efficiency, structure and operation of Australia's superannuation system', known as the Super System Review Panel (the Panel).⁶⁵ The Panel identified a number of policy principles that it suggested should guide regulation of SMSFs. The first three principles focused on the importance of SMSFs as a vehicle for self-directed retirement planning:

Principle 1 — Ultimate responsibility

Principle 2 — Freedom from intervention

Principle 3 — ... but not complete absence of intervention.⁶⁶

7.55 In its Issues Paper the Panel raised a number of issues for discussion with respect to the regulation of SMSFs. In their final report, there were a number of these issues that were not the subject of a recommendation on the basis of the policy principles.⁶⁷ Principally, in those cases, the Panel was of the view that SMSF members had chosen to take responsibility for the management of their retirement savings and on that basis should not be subject to further regulatory intervention.

7.56 Notwithstanding the thorough examination of the SMSF sector by the Panel, the ALRC considers that there are a number of specific issues that may be re-examined from the perspective of reducing elder abuse, particularly among those older people who may have impaired decision-making ability. Alzheimer's Australia has submitted that approximately 20% of people over 65 years may develop dementia.⁶⁸ Accordingly, what happens when a SMSF trustee loses decision-making ability is of critical concern in managing the risk of elder abuse.

7.57 In particular, the ALRC is interested to hear from stakeholders as to whether it would be appropriate and effective to amend the *Superannuation Industry*

64 Office of the Public Guardian (Qld), *Submission 173*.

65 Super System Review Panel, *Super System Review Final Report* (2010).

66 *Ibid* 219.

67 See, eg, *Ibid* 225.

68 Alzheimer's Australia, *Submission 80*.

(*Supervision*) Act 1993 (Cth) (*SIS Act*) to set out in legislation the steps that are to be taken when a trustee or director of the corporate trustee has lost legal capacity. These legislative parameters could provide a safety net in the event that the trustee has not themselves put in place an effective succession plan.

Corporate trustee or individual trustees

7.58 The majority of SMSFs have individual trustees rather than a corporate trustee.⁶⁹ The Panel noted that it is ‘widely accepted by professionals and the ATO that a corporate trustee is superior’.⁷⁰ Benefits included:

- perpetual succession—the corporate entity cannot die, so it enables better control in the event of member death or incapacity;
- greater administrative efficiency;
- greater flexibility to pay benefits as lump sums or pensions;
- greater estate planning flexibility; and
- reduced risk of deliberate or accidental intermingling of fund and personal assets, in breach of the covenant in s 52(2)(d) of the *SIS Act*.⁷¹

7.59 The Panel concluded that it:

is attracted to the potential benefits provided by the corporate trustee structure and is concerned about the large proportion of new SMSFs choosing not to use a corporate trustee. However, consistent with principle 2 regarding freedom from intervention, the Panel believes that the solution here is a better standard of advice, an aim which is addressed by other recommendations.⁷²

7.60 Beyond the noted benefits of a corporate trustee, there are also a number of particular challenges with individual trustees in the context of an older person who is a trustee and member of a SMSF, losing decision-making ability. These situations may facilitate elder financial abuse.

7.61 Where there are individual trustees of a SMSF, a succession event will require a transfer of all property to the new trustee. Assuming the trust deed allows for the succession, there are complex legal questions as to how the transition on loss of legal capacity will be managed, particularly who will sign the transfer of property from the trustee who has lost legal capacity. The outgoing trustee will be unable to sign the transfer as they do not have legal capacity. In addition, their attorney may not sign on their behalf because the principal’s role as trustee is personal and not capable of being delegated to their attorney under a power of attorney.⁷³

7.62 There may also be unintended consequences in terms of who become individual trustees, particularly in the cases of single member funds which require two individual

69 Australian Taxation Office, above n 49.

70 Super System Review Panel, above n 65, 223–224.

71 Ibid.

72 Ibid 224.

73 Therese Catanzariti, ‘“There in Spirit” Powers of Attorney in the SME Context’ (13 Wentworth Chambers, 2012) 3.

trustees (in the absence of a corporate trustee). There is also a greater risk of fraud. The transfer of property in the name of individual trustees may enable, in situations where there is a loss of decision making ability, the sale of property and the fraudulent retention of the funds by the trustee.⁷⁴

7.63 Given the greater protection afforded by a corporate trustee, the ALRC is interested to hear from stakeholders whether there should be a change in the law requiring a corporate trustee for new SMSFs.

Improving the documentation for SMSFs

7.64 The Panel noted some of the challenges created by the regulatory regime for SMSFs which requires a fund to be established by private documentation rather than by legislation.⁷⁵ Establishment by private documentation results in most individuals being reliant on professional advice for the establishment of their SMSF.⁷⁶ Advisers are typically accountants and financial advisers. Lawyers may or may not be engaged to draft the trust deed and the constitution for the corporate trustee.

7.65 It has been suggested by a number of advisers in the SMSF sector that most documentation for the establishment of SMSFs are off-the-shelf products, including standard trust deeds and corporate constitutions.⁷⁷ Many of these documents do not properly provide for succession events on loss of capacity by a trustee.⁷⁸ This creates a number of problems as outlined above, which heighten an older person's risk of financial abuse. The adequacy and currency of SMSF trust deeds is currently not scrutinised at all, either by the ATO, or the approved auditor.

7.66 Accordingly, the ALRC is interested to hear from stakeholders about how documentation for SMSF could be improved to protect against poor documentation facilitating abuse in the context of loss of decision-making ability. In particular, the ALRC is interested to hear from stakeholders as to whether there should be restrictions on who may provide advice on, and prepare documentation for, the establishment of SMSFs.

Access to the Superannuation Complaints Tribunal

7.67 If a member of an APRA regulated superannuation fund has a dispute with the fund, the member may access the Superannuation Complaints Tribunal (SCT) for dispute resolution.⁷⁹ There is no access to the SCT for members of SMSFs. Essentially this is because members are also trustees and therefore a dispute between a member and the fund is essentially circular. In its Issues Paper, the Panel raised the potential of extending the jurisdiction the SCT to SMSFs,⁸⁰ but concluded against it. This

74 Super System Review Panel, 'Phase Three: Structure (Including SMSFs) Issues Paper' (14 December 2014) 19.

75 Super System Review Panel, above n 65, 270.

76 Castillo, above n 53, 181.

77 Grant Abbott, *Guide to Self Managed Super Funds* (CCH, 3rd ed, 2006) 83.

78 Ibid 87.

79 *Superannuation (Resolution of Complaints) Act 1993* (Cth)

80 Super System Review Panel, above n 74.

conclusion was based on a view that a large proportion of disputes would relate to individuals who were displeased with a SMSF trustee decision regarding a binding death nomination and otherwise in relation to complex family law disputes.⁸¹

7.68 Where a SMSF member is no longer a trustee because they have lost decision-making ability, there may be a role for the SCT in providing a low-cost forum for disputes. There may be also a role for the SCT in providing advice to trustees on request, and in approving conflict of interest transactions similar to the role played by state civil and administrative tribunals in relation to enduring powers of attorney. The ALRC is interested in stakeholder views about whether the jurisdiction of the SCT should be extended to SMSFs.

Additional obligations on trustees and directors

7.69 As outlined in Chapter 5, there are now a range of statutory obligations imposed on attorneys under state and territory powers of attorney legislation, in addition to general law fiduciary duties owed to the principal. The ALRC is proposing additional safeguards. However, as noted at paragraph 7.51, when an attorney becomes a director or trustee in relation to a SMSF, they do so in their personal capacity and not in their capacity as attorney. Accordingly, they would not be bound by the additional statutory obligations that have been imposed on attorneys under state and territory powers of attorney legislation.⁸²

7.70 The ALRC is interested to hear from stakeholders as to whether these protections are sufficient. For example, SMSFs are commonly used as part of family business structures and there may be situations where a child runs the family business and is also trustee of their parents' SMSF which has an interest in that business. This raises potential for conflicts of interest to arise which may be treated differently under general trust law than the state and territory powers of attorney legislation (eg, under state and territory enduring power of attorney legislation, such as Victoria, entering into a transaction where the attorney has a conflict of interest requires prior approval by the principal or tribunal).

Consistency in language around decision-making ability

Different language is used to describe a lack of decision-making ability across commonwealth legislation. For example, the *SIS Act* uses the term 'legal disability' and the *Corporations Act 2001* (Cth) uses the term 'mental incapacity'. Moreover, decision-making ability (legal capacity) is defined in subtly different ways across the states and territories, as set out above in Chapter 5. Differences in terminology can have practical consequences in terms of whether there is an authority to act. The ALRC reiterates its past recommendation for consistent terminology for decision-making ability.⁸³

81 Super System Review Panel, above n 65.

82 Catanzariti, above n 73. The relevant duties include: *Corporations Act 2001* (Cth) ss 180–182

83 See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

