



**Law Council**  
OF AUSTRALIA

# **Financial Services Regulatory Framework in Relation to Financial Abuse**

**Parliamentary Joint Committee on Corporations and Financial Services**

**10 July 2024**

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

This submission is informed by contributions from the Law Society of New South Wales, the New South Wales Bar Association, the Law Institute of Victoria, the Law Society of Western Australia, and the Queensland Law Society.

The Law Council is also grateful for contributions to this submission from its National Elder Law and Succession Committee, as well as the Business Law Section's Financial Services Committee and the Legal Practice Section's Australian Consumer Law Committee.

## Executive summary

1. The Law Council of Australia welcomes the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into financial abuse in Australia (**Inquiry**). We support the Inquiry's focus on the role of financial institutions in the identification and prevention of financial abuse, the effectiveness of existing laws to govern the ability of banks to deal with financial abuse, and potential areas for reform.
2. The Law Council recognises that financial abuse is a widespread phenomenon, manifesting in circumstances involving family violence, elder abuse, misuse of enduring powers of attorney (**EPOA**) and other instruments, cybersecurity, and commercial transactions.
3. Since the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, banks have generally enhanced their obligations to respond to financial abuse and to provide inclusive and accessible banking. However, this submission identifies certain areas where improvements can be made in relation to the detection and prevention of financial abuse. This includes:
  - the need for nationally consistent laws relating to EPOAs and a national enduring model document or form, noting that current inconsistencies lead to greater confusion and risk of financial abuse;
  - the critical role of ongoing training for employees of financial institutions on the nature of financial abuse, including the different ways in which it can manifest, and how to monitor for warning signs;
  - shifts to online platforms and more digital service delivery by financial institutions (including phasing out of cheques and branch closures) must be regularly assessed against the potential for such moves to increase the risk of financial abuse; and
  - the need for Commonwealth, state and territory governments to adequately fund specialist legal assistance services that are well-placed to support and educate individuals who may otherwise be vulnerable to financial abuse.
4. As noted throughout this submission, the law in this area is complex and must keep up to date with the increasing shift to electronic platforms in the financial services industry, which has enabled the proliferation of technology-facilitated financial abuse.
5. In light of this, the Law Council supports the Inquiry's focus on potential areas for reform, including employee training, culturally appropriate responses, and enhanced reporting mechanisms. In addition, greater consistency and education in relation to EPOA remains a particularly vital aspect of identifying and preventing the financial abuse of older persons.

## Introduction

6. The cost of financial abuse is exorbitant, with a significant proportion of those affected being over the age of 65 years. It is estimated that, in 2020, there were \$5.7 billion in direct costs for victims of financial abuse and \$5.2 billion in costs for the Australian economy.<sup>1</sup> The 2023 Intergenerational Report found that between 2022–23 and 2062–63, the old-age dependency ratio (which measures the number of people aged 65 and over for every 100 people of traditional working age) is expected to increase from 26.6 per cent to 38.2 per cent, reflecting the size of the population aged 65 and over growing faster than the working age population.<sup>2</sup> This trend, the vulnerability that often comes with ageing, and the significant wealth held by older members of society, may lead to an increased prevalence of financial abuse. As such, the establishment of this inquiry is both timely and important.
7. The Law Council considers that it is vital that the prevalence and impact of financial abuse involving financial institutions be effectively identified, recorded and reported. Financial institutions play a critical role in recognising and preventing financial abuse. Banks are often the first to become aware of unusual transactions and are, therefore, well positioned to detect financial abuse and act early to prevent it. However, care must be taken to strike the right balance between consumer protection measures and the need for financial institutions to operate efficiently and effectively.

## Defining financial abuse

8. The Law Council notes that the term ‘financial abuse’ is not defined in the Inquiry’s Terms of Reference. However, a variety of definitions of the term exist elsewhere, for example:
  - the Council of Attorneys-General’s (as it was then known) *National Plan to Respond to the Abuse of Older Australians* defines financial abuse as:  
*... the misuse or theft of an older person’s money or assets. It can include but is not limited to, behaviours such as using finances without permission, using a legal document such as an enduring power of attorney for purposes outside what it was originally signed for, withholding care for financial gain, or selling or transferring property against a person’s wishes.*<sup>3</sup>
  - the Commonwealth Government’s ‘Money Smart’ website defines financial abuse as ‘when someone takes away your access to money, manipulates your financial decisions, or uses your money without consent’;<sup>4</sup> and
  - the National Plan to End Violence against Women and Children 2022–2032 (**National Plan**) identifies financial abuse as a subset of economic abuse, which:  
*... involves a pattern of control, exploitation or sabotage of money and finances and economic resources, which affects a person’s*

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<sup>1</sup> Deloitte Access Economics and the Commonwealth Bank of Australia, ‘The cost of financial abuse in Australia’ (Research paper, 2022) <[https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost of financial abuse in Australia.pdf](https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost%20of%20financial%20abuse%20in%20Australia.pdf)>.

<sup>2</sup> Commonwealth of Australia, *Intergenerational Report 2023: Australia’s future to 2063*, 48.

<sup>3</sup> Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians [Elder Abuse] 2019–2023* (2019) <<https://www.ag.gov.au/sites/default/files/2020-03/National-plan-to-respond-to-the-abuse-of-older-australians-elder.pdf>> 3.

<sup>4</sup> Money Smart, Financial Abuse: Protect yourself and your money (Web Page, 2024) <<https://moneysmart.gov.au/living-in-retirement/financial-abuse>>.

*ability to obtain, use or maintain economic resources, threatening their economic security and potential for self-sufficiency and independence.*<sup>5</sup>

9. The National Plan goes on to state that:

*[Financial abuse] manifests in different ways but generally is a type of controlling behaviour where the perpetrator controls finances and assets to gain power and control in a relationship. Tactics can include controlling access to or taking/spending someone's money without permission, pressuring someone to loan money and refusing to pay back loans, forcing someone to transfer their assets into someone else's name, and preventing someone from gaining employment, thereby limiting their financial autonomy.*<sup>6</sup>

10. It would be helpful if a clear and uniform definition of 'financial abuse' was adopted nationwide, to ensure that all relevant stakeholders understand what is meant by this term.
11. While much of this submission focusses on financial abuse in the context of the illegal or improper use of an older person's property or finances, financial abuse is one form of abuse that can take place within a broader pattern of behaviour by a perpetrator, including other forms of abuse. Therefore, to address this issue in a holistic manner, the issue of abuse in Australia more generally needs to be closely examined, with a view to developing appropriate policy solutions.
12. Indeed, financial abuse is a common form of domestic and family violence in which perpetrators seek to control a victim-survivor's money, finances, and ability to acquire, use and maintain economic resources. Financial abuse often results in victim-survivors accruing large debts and being excluded from financial products and other essential services, thereby experiencing financial hardship.
13. Feedback provided to the Law Council from legal services that represent vulnerable consumers has highlighted the very tangible impacts of domestic and family violence in relation to financial and credit products and services. These impacts include:
- debt accrued by an abusive partner via online application in the victim-survivor's name on a fraudulent basis, having accessed identification documents, without the victim-survivor's knowledge or consent, and for the abusive partner's benefit;
  - coercion of victim-survivors by an abusive partner into entering loan facilities, including via an online application, where a victim-survivor receives no or little benefit, yet remains either solely or jointly and severally liable for the debt;
  - coercion of victim-survivors by an abusive partner into guaranteeing a business purpose loan facility, often using their property (including vehicles and homes) as security;
  - coercion of victim-survivors by an abusive partner into applying for early release of superannuation, including via online application, draining a victim-survivor's retirement assets; and

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<sup>5</sup> Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022-2032* (2022), 53.

<sup>6</sup> Ibid 53-54.

- weaponising of life insurance products by an abusive partner against a victim-survivor where threats are made to remove their beneficiary status.
14. In the context of intimate-partner violence, financial abuse can result in victim-survivors being left economically dependent on their partner, restricting their capacity to leave the relationship and create safety for themselves and their family, including children. In this way, financial abuse is a commonly used tactic which may be employed to perpetuate the cycle of violence and control.
15. The Australian Consumer Law Committee of the Law Council's Legal Practice Section notes that a victim-survivor who is raising issues of financial abuse with a financial institution may be treated inconsistently by different institutions, or even within different areas of the same institution. For example, the victim-survivor may be:
- referred to the lender's 'fraud team' and investigated by that team as part of a fraud investigation;
  - required to provide police reports and/or evidence of the abuse, in circumstances of fear of retribution from the perpetrator;
  - required to repeatedly describe their circumstances, multiple times to multiple people, without the issue being flagged;
  - referred to specialist teams with best practice referral and trauma-informed approaches on some products, but not others (for example, a credit card, compared to a home loan with the same institution); and/or:
  - released from the debt, but they may also be advised they will not be able to access the service again, essentially excluding them from access to financial and credit products and services (for example, Buy Now Pay Later).
16. The inconsistency in approaches and responses can be dangerous for victim-survivors. At worst, responses risk triggering further instances of family and domestic violence; at best, victim-survivors who are already living with the trauma of family and domestic violence are left confused about how to enforce their rights.
17. It will be important for this Inquiry to have regard to the range of initiatives occurring at the Commonwealth, State and Territory level about responses to domestic and family violence, including the Standing Council of Attorneys-General's recent development of the National Principles to Address Coercive Control in Family and Domestic Violence, which refers explicitly to financial and economic abuse and exploitation.<sup>7</sup> The Law Council also notes the First Action Plan under the National Plan, which draws attention to the impacts of economic abuse as a subset of family violence, noting that this can result in victim-survivors leaving their homes with no resources to rebuild their lives.<sup>8</sup>

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<sup>7</sup> Commonwealth of Australia, National Principles to Address Coercive Control in Family and Domestic Violence (2023).

<sup>8</sup> Commonwealth of Australia, First Action Plan 2023-2027 under the National Plan to End Violence against Women and Children (2023), 36.



## The prevalence and impact of financial abuse

18. While the economic cost of financial abuse in Australia was estimated as \$5.2 billion in 2022,<sup>9</sup> it is difficult to ascertain the true cost. This is because financial abuse often occurs in private settings, and is not always reported or identified, for reasons including gendered and/or cultural expectations, cognitive impairment, or owing to the victim's unwillingness or inability to seek help due to age, stigma, isolation, safety risks and/or removal of personal agency.
19. Concerningly, the financial abuse of persons in positions of vulnerability is common. The 2023 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) received reports of financial abuse of people with a disability by family members, which was likely to co-occur with other forms of abuse.<sup>10</sup> The Law Council recognises that people with disability may be uniquely vulnerable to specific tactics by perpetrators of financial abuse, such as the improper use of National Disability Insurance Scheme (**NDIS**) funds or carers' allowances, and the deprivation of fundamental resources, such as medication and disability aids.<sup>11</sup>
20. As noted above, financial abuse is also a well-known feature of intimate partner violence, commonly occurring alongside other forms of domestic and family violence and being reported by 48 percent of women and 35 percent of men experiencing emotional abuse.<sup>12</sup> Further, as highlighted at the Commonwealth Bank Financial Abuse Leadership Summit in July 2023, financial abuse can be part of a pattern of coercive behaviour where a perpetrator controls a person's finances and assets to gain power and control in a relationship.<sup>13</sup>
21. Finally, financial abuse of older people is regrettably common. Perpetrators are often people who are trusted, and relied upon, by an older person, such as family members or care staff. Family members are most likely to commit financial abuse of an older person, with children accounting for 33 percent of past cases.<sup>14</sup> It is well recognised that financial abuse in this context is under-reported, as only a small proportion of cases are reported to an authority.<sup>15</sup>

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<sup>9</sup> Deloitte Access Economics and the Commonwealth Bank of Australia, 'The cost of financial abuse in Australia' (Research paper, 2022) <[https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost of financial abuse in Australia.pdf](https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost%20of%20financial%20abuse%20in%20Australia.pdf)>.

<sup>10</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report, Volume 3 (2023), 120.

<sup>11</sup> The overall prevalence of economic abuse is higher for women (15.7 percent) than men (7.1 percent) and was reported by 78 to 99 percent of women who have sought help from domestic violence services. See Gendered Violence Research Network, Understanding Economic and Financial Abuse and Disability in the Context of Domestic and Family Violence (September 2021) 8, 27, 37-38.

<sup>12</sup> Gendered Violence Research Network, Understanding Economic and Financial Abuse in Intimate Partner Relationships (October 2020) 6, 10.

<sup>13</sup> The Hon Justine Elliot MP, speech to the Commonwealth Bank Financial Abuse Leadership Summit (27 July 2023), <<https://ministers.dss.gov.au/speeches/11871>>.

<sup>14</sup> Australian Institute of Family Studies, National Elder Abuse Prevalence Study (Report, 2021), 72.

<sup>15</sup> Ibid 85.

## Approaches taken by financial institutions to identify, record and report financial abuse

22. In 2017, the Australian Law Reform Commission (**ALRC**) recommended in its Report titled *Elder Abuse—A National Legal Response* (**Elder Abuse Report**) that banks be required to do more to stop the financial abuse of older people, while recognising that there are limits to what banks can do to stop some types of financial abuse of older people by trusted family, friends and carers.<sup>16</sup>
23. The Law Council acknowledges that—following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**)—banks have taken positive steps to enhance their obligations to respond to financial abuse and to provide inclusive and accessible banking. For example, several financial institutions have published policies on financial abuse, and these policies should be considered by the Inquiry.<sup>17</sup> The Commonwealth Bank of Australia, ANZ, Westpac and the National Australia Bank have also changed their terms and conditions on a range of bank products to state that financial abuse is unacceptable conduct.<sup>18</sup>
24. However, amidst rapidly evolving technology and banking services, and the prevalence of domestic and family violence, elder abuse and cybersecurity risks, the Law Council supports this Inquiry exploring whether the current framework sets consistent standards of good practice and meets community expectations.
25. While larger and well-resourced financial institutions are adequately equipped to detect unauthorised transactions, transactions that take place in an elder abuse or coercive control context are often authorised by the customer. It is, therefore, more difficult for the financial institution to look behind what appears—at least on the surface—to be a lawful transaction that a customer seeks to undertake.
26. The Law Council understands that financial institutions have internal processes in place to flag or identify a customer as ‘vulnerable’, and this may result in restrictions being placed on the customer’s account. The constant challenge with this approach is that stricter protocols are put in place to access funds, which may lead to delays in the release of funds. Such delays can result in an individual being unintentionally left without sufficient funds to access essential items, creating an ongoing challenge for financial institutions to strike the correct balance between consumer protection and legitimate, timely access to funds.

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<sup>16</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (ALRC Report 131, (June 2017), 9.12.

<sup>17</sup> This includes policies published by the Financial Services Council, the Australian Banking Association and the Australian Financial Complaints Authority.

<sup>18</sup> See Centre for Women’s Economic Safety, *Australia’s Big Four Banks Move Against Financial Abuse* (Media Release, 18 October 2023) <<https://cwes.org.au/wp-content/uploads/2023/10/1810-Big-4-CWES-D2D-TandCs-FINAL-web.pdf>>.

27. Insofar as privacy issues are concerned when financial institutions use or disclose personal information to provide extra care with customers who are experiencing vulnerability, the Law Council notes Proposal 17.3 of the Attorney-General's Department's Privacy Act Review Report 2022:

*Further consultation should be undertaken to clarify the issues and identify options to ensure that financial institutions can act appropriately in the interests of customers who may be experiencing financial abuse or may no longer have capacity to consent.*<sup>19</sup>

28. The Government agreed-in-principle with this proposal in its Response to the Report, stating:

*In response to specific concerns that were raised about the ability for entities to use or disclose personal information to provide extra care with customers who are experiencing vulnerability, the Government agrees in-principle further consultation should be undertaken to identify options to ensure financial institutions can act appropriately in the interests of customers who may be experiencing financial abuse or may no longer have capacity to consent (proposal 17.3).*<sup>20</sup>

29. The Financial Services Committee of the Law Council's Business Law Section notes that banks may provide financial assistance—such as waiving debt and providing cash advances—to customers who have experienced financial abuse. Additionally, some banks have established dedicated staff in a specialised team who are trained to deal with vulnerable customers: for example, Westpac's Indigenous Customer Call Centre.

## Inconsistent approaches to enduring powers of attorney

30. In its Elder Abuse Report, the ALRC observed that, in a significant minority of cases, the financial abuse is facilitated through a misuse of an EPOA.<sup>21</sup> The Law Council's 2018 Justice Project Final Report also reflected findings that financial elder abuse, including behaviour perpetrated under EPOA arrangements, was on the rise and of significant concern to many legal practitioners nationwide who deal with vulnerable older persons.<sup>22</sup> In response to these concerns, the Law Council released its *Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse* in 2020, to assist legal practitioners to mitigate risks of elder financial abuse, and to identify and respond to clients who are potentially subject to such abuse. An updated Guide was released in 2023.<sup>23</sup>
31. Given that EPOAs are often central in cases of financial abuse, the Law Council recommends that the Committee carefully consider the way in which banks and other financial institutions store and use EPOA documents as a means of authorising withdrawals from customers' bank accounts. Often, institutions use their own authorisation form rather than relying on an existing (scanned) EPOA

<sup>19</sup> Attorney-General's Department, Privacy Act Review Report (February 2023), 165.

<sup>20</sup> Government Response to the Privacy Act Review Report (28 September 2023), 14.

<sup>21</sup> Australian Law Reform Commission, Elder Abuse—A National Legal Response (ALRC Report 131, June 2017), 5.3.

<sup>22</sup> Law Council of Australia, *Justice Project Final Report* (2018), Older Persons Chapter, 9-12.

<sup>23</sup> Law Council of Australia, *Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse* (June 2023) < <https://lawcouncil.au/publicassets/95ac343a-6a0a-ee11-9482-005056be13b5/Best%20practice%20guide%20for%20legal%20practitioners%20in%20relation%20to%20elder%20financial%20abuse%20June%202023.pdf> >.

document. This may confuse customers and employees when various parties seek to access bank accounts.

32. While the Law Council appreciates that financial institutions have implemented procedures with respect to EPOAs with a view to protecting the privacy of their customers and preventing elder abuse, it is important that such steps do not adversely impact upon an instrument that has been validly appointed. The Law Council is aware of concerns from its membership that financial institutions may use onerous and inconsistent procedures when responding to reports of financial abuse, which includes unreasonably rejecting validly executed EPOAs.
33. Importantly, the more difficult it is for an EPOA to be properly executed and relied upon, the more likely it is for account holders to turn to informal means to have their affairs managed. These informal means are usually outside the regulatory purview of oversight bodies and, by extension, render the individuals who use them more susceptible to financial abuse.
34. The current variation of laws relating to EPOAs across states and territories in Australia makes it difficult for a wide variety of stakeholders (including, for instance, financial institutions, health professionals, and aged and disability service providers) to engage with the relevant legislation when trying to detect whether an attorney is acting beyond the scope of their powers.
35. To the extent that inconsistencies lead to greater confusion and risk of financial abuse, the Law Council continues to call for nationally consistent laws relating to EPOAs and a national enduring model document, or form. Indeed, the mitigation of elder financial abuse is the guiding principle that underpins the Law Council's existing model provisions for nationally consistent EPOA laws,<sup>24</sup> in addition to the suite of recommendations contained in the Law Council's 2023 submission to the Attorney-General's Department on this issue.<sup>25</sup> The Law Council commends this body of work to the Committee.
36. The ALRC has also recommended, as a means of minimising the potential for misuse of EPOAs, the adoption of nationally consistent EPOA laws, the development of an enduring model document, and a national register of enduring documents.<sup>26</sup> While the Law Council generally supports each of these elements, our position remains that a national register should be developed after the implementation of nationally consistent laws relating to EPOAs and a national enduring form.<sup>27</sup> This is consistent with the approach adopted by the Standing Council of Attorneys-General, which has agreed that greater consistency in state and territory EPOA laws, and a greater emphasis on education and awareness raising aimed at reducing elder abuse occurring through EPOAs, should be the focus of future law reform work.<sup>28</sup>

<sup>24</sup> Law Council of Australia, *National Roundtable – Enduring Power of Attorney Law Reforms – Communiqué* (6 August 2021) <<https://lawcouncil.au/media/news/national-roundtable-enduring-power-of-attorney-law-reforms>>.

<sup>25</sup> Law Council of Australia, *Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (2023), <<https://lawcouncil.au/resources/submissions/achieving-greater-consistency-in-laws-for-financial-enduring-powers-of-attorney>>.

<sup>26</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (ALRC Report 131, (June 2017), [5.3]–[5.4], [5.17], [5.140]–[5.151] and recommendation 5-3.

<sup>27</sup> Law Council of Australia, *National Register of Enduring Power of Attorney* (2021) <<https://lawcouncil.au/resources/submissions/national-register-of-enduring-powers-of-attorney>>.

<sup>28</sup> Standing Council of Attorneys-General, *Communiqué* dated 22 September 2023, 5.

37. Regardless of the progress towards regulatory harmonisation for EPOAs, financial institutions must continue to take steps to identifying and reducing the incidence of financial abuse, including through employee training and risk management processes. These efforts, however, must not prevent attorneys appointed under an EPOA, often many years earlier, from being able to commence using the powers granted (when the appointor had functional capacity) for the benefit of the appointor, once the appointor no longer has capacity, or is too frail to attend a financial institution in person.

## The shift of financial products to online platforms

38. The use of online platforms and more digital service delivery by financial institutions have the potential to make it easier to commit financial abuse. It is easier for a person (who is not the customer) to pretend to be that customer when they are not required to physically enter a bank branch and interact with a human bank teller. As such, perpetrators of financial abuse may target frictionless, online application processes, where they can assume the identity of the victim.
39. In the Law Council's view, the current legislative and regulatory arrangements struggle to keep pace with technological advancements in the sale of financial and credit products. It is critical that there be regular review of these arrangements, to ensure they are fit for purpose in the digital age, and have sufficient safeguards in place to prevent technology-facilitated financial abuse.
40. The Law Council is particularly concerned with the use of online platforms to apply for loans or credit cards in a financial abuse victim's name, or to take control of a victim's bank account to transfer funds. Further, a real risk emerges from the rise of artificial intelligence (**AI**) voice sampling technologies to make fraudulent phone calls, for the purpose of manipulating an individual to send money or provide sensitive banking information.
41. To address these risks, the Banking Code Compliance Committee (**BCCC**) has recommended that banks:<sup>29</sup>
- explore ways to proactively detect financial abuse, as they do with frauds and scams;
  - ensure that the development and use of AI technology to support customers meets Australia's Artificial Intelligence Ethics Principles and Framework; and
  - conduct rigorous testing and monitoring of the use and outcomes experienced by customers engaging with the bank via online channels, including reviewing the customer needs disclosed in internal systems and the appropriateness of the bank's response.
42. The Law Council is supportive of steps towards implementation of these recommendations. We also support steps towards an agreed approach across the banking sector as to the use of data to proactively identify customers who are at greater risk of experiencing financial abuse, and who may require additional monitoring and care. This may include customers who are socially isolated and live in rural, regional or remote areas impacted by bank closures, customers who are subject to an EPOA or administration appointment, customers with a disability, and older Australians living in a residential aged care facility.

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<sup>29</sup> Banking Code Compliance Committee, Banks' compliance with Part 4 of the Banking Code: inclusivity, accessibility, and vulnerability (Report, December 2021), p. 5.



43. Capturing this information may be done by:

- completing a designated form when in-taking a new customer; and/or
- prompted via a change of address, due to moving into a residential aged care facility; and/or
- the bank becoming aware of an EPOA or administration appointment.

However, the Law Council cautions against more onerous banking procedures being instituted without proper industry consultation, to ensure that sufficient care is taken to strike the right balance between customer protection and business efficiency.

44. Relatedly, the Government's proposed phasing out of cheques by 2030<sup>30</sup> may also have an impact on the incidence of elder financial abuse in Australia. The use of cheques is prevalent amongst older Australians, and cheques enable a degree of 'financial independence'. Customers may currently have the confidence to use a cheque book, but not have the same level of trust or confidence in electronic banking. The Law Council's response to the proposed phasing out of cheques can be found in an earlier submission to the Treasury, dated 19 February 2024.<sup>31</sup>

45. Finally, the risk of elder financial abuse is further exacerbated by bank branch closures, as local bank employees have historically provided personalised support to customers, and have played a more proactive role in detecting unauthorised transactions by perpetrators. Many older Australians are heavily reliant on in-person banking to manage their finances, and pushing those individuals into unfamiliar territory, such as online banking and mobile phone applications, may leave them reliant on someone else to manage their finances.

## Effectiveness of existing regulatory arrangements

46. Financial institutions must be members of the Australian Financial Complaints Authority (**AFCA**), an external dispute resolution scheme that customers can access for free. The Law Council observes that AFCA has issued useful guidance on financial elder abuse, which imposes reasonable expectations on banks, and should be considered in the context of this Inquiry.<sup>32</sup> AFCA also has a document outlining its approach to joint accounts and family violence.<sup>33</sup>

47. The Banking Code of Practice seeks to protect vulnerable customers, and includes a range of characteristics relevant to vulnerability, including language barriers, socioeconomic constraints, age-related concerns, and instances of abuse or health challenges. In its review of the existing regulatory framework as part of this Inquiry, the Committee should consider enshrining similar provisions in the law, so that customers of all Australian financial institutions receive the same level of basic protection.

48. When considering the appropriateness of reform to existing regulatory arrangements, careful efforts must be made to avoid any unintended consequences of imposing prescriptive requirements on financial institutions. For example, an

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<sup>30</sup> Treasury, A Strategic Plan for Australia's Payment System (7 June 2023), <<https://treasury.gov.au/publication/p2023-404960>>.

<sup>31</sup> Law Council of Australia, Winding down Australia's cheques system: Consultation Paper (19 February 2024), available at <<https://lawcouncil.au/resources/submissions/winding-down-australias-cheques-system-consultation-paper>>.

<sup>32</sup> See AFCA, The AFCA Approach to financial elder abuse (2019) <[https://www.afca.org.au/sites/default/files/2019-12/afca\\_approach\\_-\\_financial\\_elder\\_abuse.pdf](https://www.afca.org.au/sites/default/files/2019-12/afca_approach_-_financial_elder_abuse.pdf)>.

<sup>33</sup> See AFCA, AFCA Approach Documents (Web Page, 2018) <<https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>>.

unintended consequence of the comprehensive credit reporting regime is that one borrower on a joint loan can inflict financial abuse by refusing to make repayments of the loan. This can adversely impact the credit history of both borrowers, and can make it more difficult for the victim of the financial abuse to obtain credit in the future. It would, therefore, be helpful for financial institutions to have some discretion and 'safe harbours' to manage potential unintended impacts on financial abuse victims and be in a position to provide enhanced support to vulnerable customers.

## Other potential areas for reform

### Accessibility of financial product design

49. The Law Council commends the publication of the *Accessibility and Inclusion Principles for Banking Services (Principles)* by the Australian Banking Association (ABA),<sup>34</sup> which, consistent with the findings of the final report of the Disability Royal Commission, emphasises that 'providing accessible information, guidance and training about disability rights is an important part of making [disability] rights a reality'.<sup>35</sup> The Principles refer to disability rights legislation and suggest that banks provide accessible information to customers informing them of their right to make a complaint with the Australian Human Rights Commission for alleged disability discrimination.<sup>36</sup>
50. The Law Council notes that a report from the BCCC, assessing banking compliance with Part 4 of the Banking Code (which contains key obligations requiring that all people, irrespective of their circumstances, experience fair outcomes from their bank) found that progress towards ensuring customers experience fair outcomes across the industry is inconsistent.<sup>37</sup> The BCCC also found that there are gaps in staff awareness and service delivery, and that compliance monitoring frameworks are not adequate to assess front-line staff adherence to Part 4 of the Banking Code.<sup>38</sup>
51. The Law Council considers that poor compliance by financial institutions may be a by-product of the deficiencies of the *Disability Discrimination Act 1992* (Cth) (DDA), as highlighted by the Disability Royal Commission, which stated that the DDA 'creates little incentive for employers, schools, service providers and other duty-holders to take active measures to prevent disability discrimination'.<sup>39</sup>
52. This Inquiry is well placed to investigate methods to strengthen financial institutions' compliance with Part 4 of the Banking Code to ensure that customers experience fair outcomes. This may include greater scrutiny of accessibility and inclusion

<sup>34</sup> Australian Banking Association, *Accessibility and Inclusion Principles for Banking Services* (Report, December 2023).

<sup>35</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability - Final report - Executive Summary, *Our vision for an inclusive Australia and Recommendations* (Report, September 2023) 60-61.

<sup>36</sup> Australian Banking Association, *Accessibility and Inclusion Principles for Banking Services* (Report, December 2023), 7.

<sup>37</sup> Banking Code Compliance Committee, *Banks' compliance with Part 4 of the Banking Code: inclusivity, accessibility and vulnerability* (Report, December 2021).

<sup>38</sup> *Ibid*, 3.

<sup>39</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability - Final report - Executive Summary, *Our vision for an inclusive Australia and Recommendations* (Report, September 2023) 53.

initiatives undertaken by financial institutions, such as through regular reporting requirements.

## Employee training

53. In the Law Council's view, additional training for the employees of financial institutions on the nature of financial abuse and elder abuse, including the different ways in which it can manifest, and how to monitor for warning signs, will greatly assist in enabling employees to take proactive steps to identify and prevent financial abuse. The Law Council notes that the voluntary guideline published by the ABA, *Preventing and responding to financial abuse (including elder financial abuse)*,<sup>40</sup> is a useful contribution in this respect.
54. While this ABA guideline includes several pertinent recommendations concerning employee training and awareness of policies, it does not expressly refer to supported decision-making, and neither do other similar documents. The Law Council considers that training—informed by supported decision-making principles—would spread greater awareness of a presumption of capacity for older persons and would promote increased accessibility of information.
55. The Law Council acknowledges that there may be a reluctance on the part of financial institutions to encourage a supported decision-making approach or co-decision-making arrangements, owing to concerns that it may expose banks to liability and legal risks, as banks are not qualified to establish whether a customer has capacity or not. To deal with this concern, the Law Council supports ABA guidelines and associated commentary to, at a minimum, encourage banks to explore options for further developing forms of supported decision-making in a flexible way, for example, through contractual means.
56. The Law Council encourages further employee training in proactive measures to accommodate the needs of individuals living with disability, given that, as discussed earlier in this submission, these individuals are particularly vulnerable to financial abuse. It is imperative that employees of financial institutions—especially those in costumer-facing roles—understand the importance of clear communication, to ensure customers fully understand the details of all transactions, assisted by appropriate support persons or legal representatives when required, to mitigate risk.
57. As noted above, the Law Council also supports the work of the ABA in seeking to increase its members' collective understanding of relevant instruments, such as EPOAs, and guidance as to suggested protocols for responding to requests relating to such instruments.<sup>41</sup> In the Law Council's view, education, and well understood and transparent processes on the part of financial institutions, are key elements to ensuring that instruments such as EPOAs are used in accordance with the terms of the appointment. A better understanding, through employee training, of the various ways in which a person or entity can be authorised to deal with the bank account of another person will assist in combatting financial abuse.

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<sup>40</sup> Preventing and responding to financial abuse (including elder financial abuse), Australian Banking Association, March 2021 <<https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Financial-Abuse-Industry-Guideline.pdf>>.

<sup>41</sup> Responding to requests from a power of attorney or court-appointed administrator, Australian Banking Association, October 2020 <<https://www.ausbanking.org.au/wp-content/uploads/2020/11/Banking-Industry-Guideline-Power-of-Attorney.pdf>>.



## Supporting financial institutions to better detect and respond to financial abuse

58. The Law Council suggests that it would be beneficial for financial institutions to work more closely with existing organisations that address and prevent instances of financial abuse, such as state-based ageing and disability commissions, which can respond to reports of abuse of an older person or adult with disability. If financial institutions identify potential instances of financial abuse, then the assistance of other services and entities will be required in order to investigate further, notify and provide support to possible victims, and navigate any consequences that may follow.
59. Further, the Law Institute of Victoria (LIV) has pointed to powers of regulatory bodies in the context of the new Commonwealth Aged Care Act<sup>42</sup> as playing an important role in responding to financial abuse. In this context, the LIV recommends that the forthcoming Aged Care Act should confer own-motion powers to the Aged Care Complaints Commissioner to monitor, investigate, and enforce compliance with a representative's duty. Alternatively, the LIV recommends that own-motion inquiry powers be vested in an appropriate statutory body within each State and Territory. This recommendation stems from a recognised need for additional safeguards to monitor, investigate and enforce compliance of representatives appointed under the new Aged Care Act, who may misuse their representative status to financially abuse an older person.
60. The LIV acknowledges that there are several other means of strengthening oversight of older Australians experiencing financial abuse, including establishing an independent Aged Care Ombudsman, or creating a dedicated specialised team within AFCA to deal with complaints concerning elder financial abuse.

## Other matters

### Funding and operation of relevant advisory and advocacy bodies

61. The Law Council considers that current funding of specialist legal assistance is inadequate in light of the acute and widespread nature of financial abuse of older persons and those with vulnerabilities within the community.
62. While private solicitors may take on appropriate cases involving financial abuse on the basis of a conditional costs agreement (i.e., a 'no win no fee' basis), it is essential that the legal assistance sector is adequately funded to support victims of financial abuse to pursue available legal remedies.
63. While services providing advice and community information are important, many cases relating to financial abuse require court proceedings to be initiated. Therefore, funding for legal bodies providing representation services is particularly critical. The successful prosecution of these cases act as a valuable deterrent to other potential perpetrators of financial abuse.
64. The Law Council points to the recently released Final Report of the Independent Review of the National Legal Assistance Partnership, which highlighted that current funding levels for legal assistance services—including those responding to financial abuse—are insufficient to meet the legal assistance needs of the Australian

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<sup>42</sup> Department of Health and Aged Care, About the new Aged Care Act (Web Page 2024) <<https://www.health.gov.au/our-work/aged-care-act/about>>.

community.<sup>43</sup> It is critical that that Legal Aid Commissions, community legal centres and specialist financial counselling services receive a significant boost in resources to adequately respond to the legal need and other challenges associated with financial abuse.

## Arrangements in relevant overseas jurisdictions

65. The Inquiry may wish to have regard to comparative arrangements in relevant overseas jurisdictions, including publicly funded studies concerning financial abuse of older people in Canada and the United States. The Law Council refers the Committee to the following relevant publications:

- Canadian Medico-Legal Journal ‘The Canadian approach to elder financial abuse from a legal and clinical perspective: A narrative review’ (September 2022).<sup>44</sup>
- Canadian Bar Association: ‘Silent Epidemic: The Alarming Rise of Elder Abuse and Urgent Need for Estate Law Reform’ (October 2023).<sup>45</sup>
- US Securities and Exchange Commission ‘Elder Financial Exploitation Why it is a concern, what regulators are doing about it, and looking ahead’ (June 2018).<sup>46</sup>
- US Department of Justice, Report to the Nation, Fiscal Years 2019—2020 (2021).<sup>47</sup>
- US Treasury Financial Crimes Enforcement Network Advisory on Elder Financial Exploitation (June 2022).<sup>48</sup>
- American Bar Association, ‘Tackling the High Cost of Abuse: Working with Older Victims of Financial Exploitation’ (July 2023).<sup>49</sup>
- American Association of Retired Persons Report, ‘The Scope of Elder Financial Exploitation: What It Costs Victims’ (June 2023).<sup>50</sup>

<sup>43</sup> Dr Warren Mundy, *Independent Review of the National Legal Assistance Partnership* (Final Report, March 2024).

<sup>44</sup> See Frances Carr, The Canadian approach to elder financial abuse from a legal and clinical perspective: A narrative review, *Medico-Legal Journal* 91(4), September 2022 <<https://journals.sagepub.com/doi/10.1177/00258172221112710>>.

<sup>45</sup> See Sara Haider, Silent Epidemic: The Alarming Rise of Elder Abuse and Urgent Need for Estate Law Reform, The Canadian Bar Association (October 2023), <<https://www.cba.org/Sections/Elder-Law/Resources/Resources/2023/EssayWinner2023Elder>>.

<sup>46</sup> See US Securities and Exchange Commission, Elder Financial Exploitation (June 2018), <<https://www.sec.gov/files/elder-financial-exploitation.pdf>>.

<sup>47</sup> See Office for Victims of Crime, 2021 Report to the Nation: Fiscal Years 2019-2020 <<https://ovc.ojp.gov/2021-report-nation/elder-abuse-financial-exploitation>>.

<sup>48</sup> See US Treasury, Financial Crimes Enforcement Network, Advisory on Elder Financial Exploitation (15 June 2022) <<https://www.fincen.gov/sites/default/files/advisory/2022-06-15/FinCEN%20Advisory%20Elder%20Financial%20Exploitation%20FINAL%20508.pdf>>.

<sup>49</sup> See Erica Costello, Tackling the High Cost of Abuse: Working with Older Victims of Financial Exploitation, American Bar Association (16 July 2023) <[https://www.americanbar.org/groups/law\\_aging/publications/bifocal/vol44/bif-vol44-issue6/high-cost-of-abuse/](https://www.americanbar.org/groups/law_aging/publications/bifocal/vol44/bif-vol44-issue6/high-cost-of-abuse/)>.

<sup>50</sup> See American Association of Retired Persons, The Scope of Elder Financial Exploitation: What it Costs Victims (June 2023) <<https://www.aarp.org/content/dam/aarp/money/scams-and-fraud/2023/true-cost-elder-financial-exploitation.doi.10.26419-2Fppi.00194.001.pdf>>.