



Elder Abuse Action Australia

## Elder Abuse Action Australia: Submission to the Inquiry into financial services regulatory framework in relation to financial abuse.



ELDER ABUSE ACTION AUSTRALIA ACKNOWLEDGES THE TRADITIONAL CUSTODIANS OF COUNTRY ACROSS AUSTRALIA, THE LANDS ON WHICH WE LIVE AND WORK. WE PAY OUR RESPECTS TO THEIR ELDERS BOTH PAST AND PRESENT AND ACKNOWLEDGE THE CONTINUED CONNECTION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE TO LAND, SEA, SKY, COMMUNITY, AND CULTURE. SOVEREIGNTY HAS NEVER BEEN CEDED. IT ALWAYS WAS AND ALWAYS WILL BE, ABORIGINAL LAND.

### Who We Are

Elder Abuse Action Australia (EAAA) is a national peak body established in 2018 to create meaningful change in response to addressing and eliminating the abuse of older people (elder abuse). Elder abuse has been recognised as a scourge on Australian society and the work of EAAA impacts positively on the older person, their loved ones, their communities, and society more broadly.

In the short period since its inception, EAAA has established itself as the leading authority on elder abuse in Australia and is best known for delivering **Compass.info**. This valuable resource raises awareness of elder abuse by providing comprehensive and practical information and connects people to frontline services tackling the abuse of older people. In 2022 EAAA delivered the very successful National Elder Abuse Conference *Walk the Talk* in Hobart with the next conference *Turn Up The Volume!* to be held in Adelaide this coming July.

### What we do

EAAA was established to confront the often-hidden problem of discrimination, neglect, and mistreatment of older Australians.

As the national voice for action, EAAA campaigns for a society that respects and values older Australians and is free from elder abuse. We use the tools of advocacy, policy development,



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research, and capacity building to raise community awareness of elder abuse and improve the lives of older people.

## Why we do it

Older people are among the most vulnerable of all Australians. As people age, they rely on family, friends, and carers for additional support. But for many, the experience of ageing is soured by discrimination, ageism, exclusion, and abuse.

Older people have the same rights as everyone else. They have the right to be treated fairly, feel safe in their home, and live with dignity and self-determination.

The abuse of older Australians affects individuals and society as a whole. It can limit the participation of older people in their communities and deny those communities the benefits of having older people fully contribute.

EAAA exists to give voice to those older Australians whose safety, rights, dignity, and autonomy are diminished by the people or institutions they deal with.

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## Introduction

Financial abuse, also sometimes known as economic abuse, is one of five forms of elder abuse recognised by the World Health Organization [WHO]<sup>1</sup>. Financial abuse can manifest in various ways, in the context of abuse against older people examples include the misuse of a power of attorney, pressuring someone to change their will, or coercing them into giving or loaning money or property<sup>2</sup>. Older people may be particularly vulnerable to financial abuse due to a multitude of factors including poorer digital literacy, inheritance impatience, ageism, cognitive decline, and an increased likelihood of existing health conditions<sup>3</sup>.

Data from the Australian Bureau of Statistics [ABS] 2021 Personal Safety Survey [PSS] provides some clarity on the extent of financial abuse occurring in Australia, with 3.1% of adult women, or 308,000 women, having experienced financial abuse from an intimate partner within the previous two years<sup>4</sup>. The scale of the problem is echoed by the Australian Institute of Family Studies [AIFS] National Elder Abuse Prevalence Study (hereafter referred to as 'the Prevalence Study') which estimates that approximately 92,000 Australians over the age of 65 experience financial abuse each year<sup>5</sup>.

There is as yet no longitudinal data available on the prevalence of financial abuse in Australia, however we do know that the majority of financial abuse experienced by older people in Australia is perpetrated by family members (53%)<sup>6</sup>, most commonly adult children (33%)<sup>7</sup>. The Prevalence Study also indicates that most financial elder abuse in Australia does

not meet the threshold required to be considered criminal or unlawful, thereby restricting the manner in which banks and other institutions can respond to any abuses they may observe.

The risk factors for older people to experience financial abuse have been exacerbated in recent years through the closure of bank branches and the resulting increased digitisation of banking and financial services<sup>8</sup>. Large numbers of older people report a lack of confidence in managing their finances in the online world and are thus granting account access or pin numbers to family members for assistance<sup>9</sup>, a recent estimate found that approximately 25% of Australians over the age of 65 had provided either account access or a pin number to a family member for this reason<sup>10</sup>.

This increased access is not however the only means through which financial abuse is perpetrated, with coercion and manipulation for financial gain the most common experiences reported by older people<sup>11</sup>. The likelihood is that this is greatly under-reported as in such cases it is not uncommon for both the person experiencing and the person perpetrating the abuse to be unaware that the acts are in fact abusive; reliance on parents or older generations for financial assistance has become increasingly normalised with anecdotal evidence suggesting a rise in 'inheritance impatience' and other forms of entitlement in adult children and grandchildren<sup>12,13</sup>. In the midst of the current cost of living crisis and the financial stress that accompanies it, there may also be an increased motivation to perpetrate such abuses to reduce personal financial burdens.

The prevalence of abuse combined with the lack of clarity for many around what does and does not constitute financial abuse are the tip of the iceberg in terms of the challenges in responding to the financial abuse of older people. The Prevalence Study found that only one third of those who experienced financial abuse sought help, and that of those, only half reported that help-seeking to be effective in addressing the abuse<sup>14</sup>. If those figures are extrapolated to raw numbers, we can estimate that of the approximately 92,000 older people experiencing financial abuse only 30,000 seek help and only 15,000 seek help that effectively addresses the abuse. This does not mean that effective assistance in responding to financial abuse is not available, only that the help being sought was ineffective.

In contrast to this underwhelming result of help-seeking, data from Inside Policy's Final Evaluation of the Elder Abuse Service Trials (hereafter referred to as 'the Service Trials'), found that more than half of clients had experienced financial abuse, and more than 92% of clients surveyed reported an overall positive outcome as a result of liaising with the services trials<sup>15</sup>.

Efforts to educate on and better understand abuse is one key tactic to combatting financial abuse, but providing effective assistance to those experiencing abuse is of equal importance. This is not something that can be managed through the financial services industry or through financial regulations alone, it is something which must be approached in a collaborative manner across industries, government, and communities to ensure appropriate assistance is available to all those who need it.

This is not to imply that there is no role for financial services and the associated regulatory framework to play in addressing abuse. The current regulatory framework is limited with neither the National Consumer Credit Protection Act 2009 [Cth]<sup>16</sup>, nor the Australian Securities and Investments Commission Act 2001 [Cth]<sup>17</sup> providing the same protections to

customers as the Banking Code of Practice<sup>18</sup>. Whilst the Code of Practice is binding for signatory banks, customers of banks outside the 17 who are signatories are not provided the same protections. This voluntary method of compliance to hold banks to higher standards and provide customers with greater protections is insufficient and should be addressed through legislated regulations.

Banks are in a unique position to be able to identify financial abuse, however even those banks who are compliant with the Code of Practice are limited in how they can act in response to it for a number of reasons including:

- The lack of transparency or consistency of financial enduring powers of attorney across Australian jurisdictions. This lack of standardisation is exacerbated by the fluidity of the Australian population, with principals and attorneys often residing in different states or territories and individuals moving across jurisdictions at different times.
- The lack of a register, either national or jurisdictional, for financial enduring powers of attorney, results in there being no method through which a financial institution or other relevant body can determine the validity or currency of a power of attorney document. EAAA notes that a National Register was a key recommendation of the Australian Law Reform Commission's [ALRC] Report *Elder Abuse – A National Legal Response*<sup>19</sup> in 2017, but that no progress has been made on this issue.
- The Privacy Act 1988 [Cth] provides for some exemptions to National Privacy Principle Two, however it does not allow for an exemption in the event of financial abuse unless it is with the consent of the client, or in order to report suspected unlawful behaviour<sup>20</sup>. Much of the behaviour that constitutes financial abuse does not meet the threshold to be considered unlawful activity<sup>21</sup>, leaving institutions observing and aware of abuses occurring with no way to respond without breaching privacy principles.

A response to financial abuse cannot be enacted or achieved through legislation and financial institutions alone, but financial institutions may be able to identify it and legislation may make it easier for them to do so and to then take action to respond to abuses.

Financial abuse is a scourge on Australian society and due to a variety of factors which are exacerbated by increased digitisation and inheritance impatience, older people experience increased vulnerability. Financial abuse is complex and may consist of a wide variety of different acts meaning that a multifaceted and collaborative approach must be taken to prevent and respond to abuse going forward. EAAA is therefore grateful for the opportunity to provide the following four recommendations to this inquiry to both reduce and respond to financial abuse:

1. **Universal Funding for Elder Abuse Service Trials.**
2. **Harmonisation of Power of Attorney Legislation**
3. **Mandatory Register/s of Power of Attorney documents.**
4. **Amendments to National Privacy Principle Two to allow for disclosure in the event of abuse.**

## Recommendation One: Universal Funding for Elder Abuse Service Trials.

In 2019 three service trial models were developed and implemented as a part of the first *National Plan to Respond to the Abuse of Older People (Elder Abuse) 2019-2023*<sup>22</sup>. These service trials were intended to assist those experiencing abuse to respond to, and ideally eliminate the abuses that were occurring. Twelve different service trials were implemented with at least one model in every state and territory around Australia, with the three different models providing different types of support and assistance to older people experiencing abuse.

### Specialist Elder Abuse Units:

Specialist Elder Abuse Units operate through the collaboration of lawyers, social workers, and other specialist staff to create personalised case plans that respond to the needs of an individual. This was the most common service trial model with five sites implementing the service in New South Wales (Legal Aid Commission of NSW), Victoria (Eastern Community Legal Centre), South Australia (Uniting Communities), Western Australia (Kimberley Community Legal Services), and Tasmania (Legal Aid Commission of Tasmania).<sup>23</sup>

### Health Justice Partnerships:

Health Justice Partnerships provide the means for health care workers or social workers to refer those who are identified as potentially being subjected to elder abuse, or who are at high risk of experiencing abuse to specialised legal support services. Health-Justice Partnerships were rolled out in New South Wales (Justice Connect), Victoria (Eastern Community Legal Centre), and Queensland (Caxton Legal Centre).<sup>24</sup>

### Case Management and Mediation Services:

Case Management and Mediation Services are designed to work with the older person and their family, loved ones, or the culprit of the abuse to address the underlying cause of abuse/s. This service trial model was implemented in Queensland, Western Australia, the Northern Territory, and Canberra and surrounds with all services being provided by the jurisdictional arm of Relationships Australia.<sup>25</sup>

Utilising data from a nine-month period Inside Policy was tasked with undertaking an evaluation of the Service Trials. All three service trial types were commonly utilised by people experiencing financial abuse, with 43% of all abuse perpetrated by adult children of the older person<sup>26</sup>.

Financial abuse was experienced by 56% of all clients to Specialist Elder Abuse Units, with 21% being deprived of their property, and 14% experiencing abuse or misuse of a power of attorney<sup>27</sup>.

An assessment of the clients assisted by Health-Justice Partnerships found that 44% experienced financial abuse with the most common form being a deprivation or right to ownership of property (14% of all clients)<sup>28</sup>.

Similar findings are true within Case Management and Mediation Services where 48% of clients were experiencing financial abuse, though for this service type psychological abuse was found to be higher with significant overlap of clients experiencing both psychological and financial abuse<sup>29</sup>.

The effectiveness of these trials is highlighted by the surveys conducted as a part of the evaluation framework whereby the vast majority of clients of all three service trial types surveyed reported overall positive outcomes as a result of the assistance rendered.

- *86.5% of clients of Specialist Elder Abuse Units reported an overall positive outcome, with 5.8% reporting an overall negative outcome.*
- *95.7% of clients of Health-Justice Partnerships reported an overall positive outcome, with 2.6% reporting an overall negative outcome.*
- *86.4% of clients of Case Management and Mediation services reported an overall positive outcome, with 3.6% reporting an overall negative outcome.<sup>30</sup>*

These numbers are not only an improvement on the mid-point evaluation and on the outcome-based goals of the Service Trials, but they are also a vast improvement on other data regarding help-seeking by older people to address or respond to abuse, and in particular to financial abuse<sup>31</sup>.

The Prevalence Study indicates that of the one third of older people who experience elder abuse who did seek help or assistance, only half believed that this help-seeking was effective<sup>32</sup>. This illustrates the enormous impact that the service trials have had in responding to financial abuse of older people, and for banks and other financial institutions they provide referral pathways for clients experiencing abuse whether they are wanting to take a legal approach or would prefer mediation.

The problem lies in the unequal access to these services, and the fact that existing trial sites are significantly overburdened and under-resourced. Providing universal access to each of these services across all states and territories, in regional and urban areas, and allowing services sufficient resourcing to service the demand is one of the most effective currently known ways to respond to the financial abuse of older people.



## Recommendation Two: Harmonisation of Power of Attorney Legislation.

In 2017 the ALRC Report, *Elder Abuse – A National Legal Response*, outlined the strong support for harmonisation of state and territory laws in relation to enduring documents to reduce the complexity and overlap in current systems whilst assisting professionals in locating and utilising the relevant powers and information, particularly in border communities or where principals and attorneys are located in separate jurisdictions<sup>33</sup>. The ALRC ultimately recommended a single nation-wide enduring document be developed in the first step towards national harmonisation<sup>34</sup>. The value of harmonisation of enduring powers of attorney was then echoed in the *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* under Priority Area 4: Planning for Future Decision Making. Harmonisation was intended as a medium-term goal, indicating that it should be completed within a 2–3-year time frame<sup>35</sup>.

In the intervening period, minimal progress has been made in relation to harmonisation, however the reasons it is required, and the manners in which it would assist in reducing and responding to financial abuse, particularly of older people, have not changed.

In our first recommendation to the Inquiry, EAAA outlined that 14% of all clients of Specialist Elder Abuse Units were experiencing misuse or manipulation within a power of attorney arrangement<sup>36</sup>. Harmonisation will not remove the ability for enduring documents to be misused however a simplification of the process will allow clearer education on responsibilities and obligations of an attorney, with the potential to resolve the unintended misuse of attorney powers which are anecdotally believed to make up a high proportion of misuse cases.

In 2019 the Victorian Office of the Public Advocate produced a *National Guide to Powers of Attorney* on behalf of the Australian Guardian and Administration Council<sup>37</sup>, however this document is limited in its scope in that it is intended to provide a 'national' guide on something that remains a jurisdictional issue. In practice this means that the Guide must be read alongside relevant state or territory documentation, undermining the practicality and purpose of a simplified guide.

Enduring power of attorney legislation is crucial, however such documents are also unavoidable complex, harmonisation is one way through which we can reduce this complexity, not only allowing for greater education of attorneys and principals alike but providing greater understanding of their scope and limitations to financial institutions and other professionals when dealing with an attorney who is acting on behalf of a principal.

## Recommendation Three: Mandatory Register/s of Power of Attorney Documents.

EAAA has already outlined the limited data available on the prevalence of misuse of enduring documents such as powers of attorney, and whilst the implementation of recommendation two of this submission will assist with reducing the complexity of such agreements it will not allow for the easy identification of the currency and validity of a power of attorney document. This is something that was recognised by the ALRC in their 2017 report, leading to recommendation 5.3 which states:

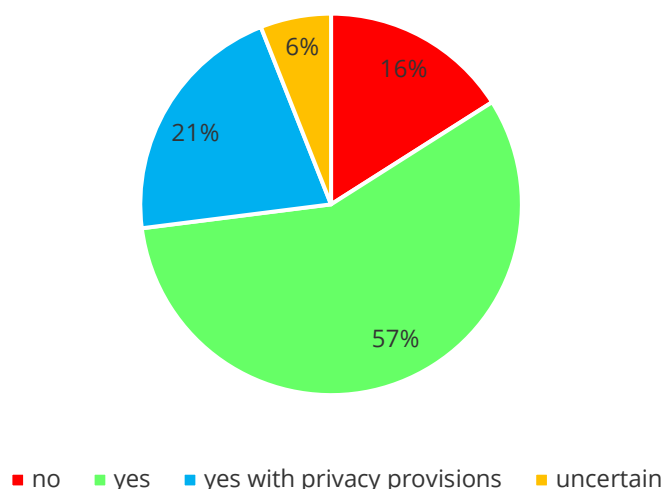
*'A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators should be established. . .'*<sup>38</sup>.

The report outlined the numerous benefits of an appropriately designed register in reducing financial abuse whilst simultaneously placing only a limited burden on the principal or their solicitor and most importantly ensuring that *"revoked instruments are unable to be used"*<sup>39</sup>. The present system has limited protective mechanisms for preventing the use of revoked powers of attorney, requiring the physical destruction of the documents to ensure they are no longer utilised. This is not only an impractical solution but places significant and unnecessary burden on the principal who is required to locate and physically destroy all certified copies of the documents that may exist.

EAAA notes that the National Plan recognised the seriousness of the misuse of invalid or revoked powers of attorney and the limited mechanisms in place to prevent these and committed to investigating the feasibility of a mandatory national register to address this<sup>40</sup>. EAAA was further encouraged to see the 2021 consultation into a National Register of Powers of Attorney as a part of a framework to protect the rights of older Australians<sup>41</sup>. Submissions to this consultation overwhelmingly supported the implementation of a register with 57% of submissions received in favour of the register and a further 20% in favour on the condition that provisions to protect the privacy of both principals and attorneys were included<sup>42</sup>. The reliance of physical documents and the destruction of physical documents was deemed impractical, unnecessary, and insufficient to protect principals against the use of an invalid or revoked instrument. It is highly discouraging that despite the overwhelming outcome of this consultation there has been no progress made on the implementation of such a register in the intervening three years since this consultation occurred.



### Support for a National Register Amongst Published Submissions to the 2021 Consultation,



In the absence of such a register, noting that no state or territory in Australia currently has its own mandatory register for enduring documents, there is no way for financial institutions to confirm that a power of attorney is valid, current, and has not been revoked. This is unacceptable when such a simple solution exists that would prevent such abuses from occurring. EAAA further draws the Inquiry's attention to the 2021 paper published by the Council of Attorneys-General which found that a mandatory online register would be highly effective in reducing financial abuse through:

- Increasing transparency as to the existence and status of the instrument.
- Providing of clarity as to the role and powers of the attorney.
- Minimising of the extent through which documents can be forged or amended without the consent of the principal.
- Reducing of the ability of an attorney to utilise a revoked instrument.
- Allowing institutions to identify the existence, scope, and currency of an instrument<sup>43</sup>.

EAAA maintains its strong and unwavering support for a mandatory national register, however in its absence, states and territories must act to introduce jurisdictional registers in an effort to reduce financial abuse and provide greater transparency to financial institutions about the scope, currency, and validity of power of attorney instruments.

## **Recommendation Four: Amendment to National Privacy Principle Two to allow for disclosure in the event of abuse.**

Abuse of all kinds can too often be invisible, going unseen and undetected<sup>44</sup>, in the case of financial abuse however the same digital transformation which may make perpetration of abuse easier has also made it easier for financial institutions to detect abuses when they occur<sup>45</sup>. Many banks have developed their own systems to flag unusual transactions or other suspicious activity such as the movement of large amounts of money following the implementation of a power of attorney agreement. These systems vary in strength and effectiveness in identifying abuse but are all positive steps in the right direction to combat abuse, however identification of abuse is only the first step and financial institutions are limited in their ability to respond further. Banks and financial institutions that have identified observable abuse may be unable to act to protect customers despite their best intentions due to privacy principles which prevent them from taking action without the express consent of the customer<sup>46</sup> who may not want to take action, particularly against a family member, or may not be capable of taking action or providing consent.

National Privacy Principle Two dictates that an organisation must not use or disclose personal information for a purpose other than the primary purpose of collection unless one of the following exemptions applies:

1. That the disclosure is a permitted and related purpose to the primary purpose of collection.
2. That prior customer consent has been obtained.
3. That it is due to the reporting of suspected unlawful activity<sup>47</sup>.

The shortfall of these exemptions is that financial abuse, in and of itself, is not considered an unlawful activity unless it happens to fit within the definition of another crime such as theft or fraud. A vast majority of the financial abuses experienced by older people do not fit within these definitions as they are more likely to be linked to coercive control or the misuse of a power of attorney<sup>48</sup>.

Jurisdictions including South Australia and New South Wales are currently progressing legislation towards the criminalisation of coercive control, however the proposed legislation in both states applies to coercive control as it occurs in intimate partner relationships alone<sup>49,50</sup>. This means that coercive control of an older person by, most commonly, an adult child does not fall within the remit of the legislation and will not be considered a criminal or unlawful act. In layman's terms it does nothing to assist financial institutions who observe such abuses from utilising the information they have to assist in responding to the abuse. Coercive control or manipulation of an older person cannot be reported without the risk of serious liabilities which in turn means that without the express consent of the person experiencing abuse banks are largely restricted in taking any action to mitigate it.

In a similar fashion, the misuse of a power of attorney may not always be considered unlawful activity and a financial institution may be limited in their ability to take action in response to an observed misuse. In practice, this may be further exacerbated in a situation where the principal does not have the capacity to provide consent for the information to be shared in order to prevent further abuses from occurring.

This is undoubtedly a complex problem, and it is essential that the importance of the right to privacy is not minimised. EAAA also strongly believes that the proposed laws relating to the criminalisation of coercive control are insufficient, ageist, and fail to recognise the abuses experienced by older people, who data shows have a higher prevalence of experiencing coercive control than the general population.

In the absence of other mechanisms to act in response to abuse, EAAA urges the Inquiry to investigate an amendment to Privacy Principle Two to allow for an exemption to disclose on the basis of financial abuse. Taking this action now in a proportional manner that maintains the importance of the right to privacy, not only provides banks and others a pathway to assist those experiencing abuse but also provides future pathways for new forms of financial abuse into the future.

## Conclusion

The statistics show that financial abuse is rampant in Australia<sup>51,52</sup>, and in many ways increased digitisation of the banking sector has made it easier to perpetrate these abuses. Older people are disproportionately affected by financial abuse due to a variety of factors including protectionism, ageism, and a lack of confidence managing digital systems. There are measures that can be taken to address this issue, but it will require a coordinated and collaborative approach. Banks and financial institutions, alongside community organisations and service providers, must work together to identify and respond to abuse. This includes expanding the elder abuse Service Trials to allow for universal access for those who need them, as well as updating legislation to allow for more transparent and simple use of powers of attorney and a revision to the privacy act to allow those who observe financial abuse to take action in response.

To be effective our response to financial abuse must incorporate all parts of the system and community as opposed to a piecemeal approach, focusing solely on regulatory reform which is insufficient as a standalone tactic.

EAAA appreciates the opportunity to make this submission and urges the Inquiry to work with other areas of government, taking a whole of government approach to addressing this complex issue more effectively. It is only through collaboration across the system that we can protect those most vulnerable to financial abuse and create a safer financial environment for all Australians.

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