

Submission to the Royal Commission

INQUIRY INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

To: Honourable Kenneth Madison Hayne AC QC

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TABLE OF CONTENTS

Submission to the Royal Commission	1
Introduction	2
The nature of financial elder abuse	3
The adequacy of protocols	8
Proper advice	14
Electronic communications	14
Complaints handling	15
Authority to operate	15
Conclusion	16

INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas. The fundamental purpose of the LIV is to foster the rule of law and to promote improvements and developments in the law as it affects the public of Victoria. Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues.

This submission has been prepared by members of the LIV's Elder Law Section. Additional input was provided by the LIV's Property and Environmental Law Section.

Overview

This submission will respond to the following two areas, as prompted by the Royal Commission's Terms of Reference: 1) Whether any conduct, practices, behaviour or business activities by financial services entities fall below community standards and expectations; and, 2) The adequacy of the internal systems of financial services entities; and, forms of industry self-regulation, including codes of conduct.

This submission will focus on the financial abuse of older people; specifically, on methods of detection and prevention used by banks and superannuation funds.

The timing of the Royal Commission is significant. The proportion of older people in Australia's population has increased considerably in recent years. Projections indicate that this trend is set to continue.¹ As such, there is a need to ensure safeguards are in place to protect older people when they obtain a service from, or conduct a transaction with, a financial entity.

Several reports on elder abuse precede the Royal Commission. These include: the Australian Law Reform Commission's ('ALRC') *Elder Abuse – A National Legal Response*; the Victorian Royal Commission into Family Violence; the National Ageing Research Institute's *Understanding Elder Abuse: A Scoping Study*; the House of Representatives' Standing Committee on Legal and Constitutional Affairs' *Older People and the Law*;

¹ Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* Report No. 35 (2016).

and, the Financial Ombudsman Service Australia's *Approach to Financial Elder Abuse*. The findings and recommendations of these reports assist in framing this submission.

The nature of financial elder abuse

The World Health Organisation defines elder abuse as:

‘A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’.²

Elder abuse, like family violence, has many facets.³ It may involve physical, psychological, emotional or sexual harm.⁴ Of relevance to the Royal Commission is abuse which occurs within a financial setting. Broadly, this involves the improper use of an older person's property or money, often without their knowledge or permission.⁵

In Victoria, financial abuse is one of the most common types of abuse perpetrated against older people.⁶ The impact can be devastating, particularly for those on a fixed pension or limited income. Recovering from an act of financial abuse is also difficult. This is because there is less time and opportunity to work and save to make good the assets that have been lost through the abuse. Assets, such as houses, furniture and cars, may need to be sold off to restore the older person to a stable financial position.⁷

A perpetrator of financial abuse can be someone an older person hardly knows, or someone they have known for many years.⁸ They could be friends, acquaintances, strangers, professionals or caregivers. Family members are the most common financial abusers.⁹ That is, adult children, spouses or de-facto partners who exhibit ‘inheritance impatience’, or siblings who are competing for their share of family wealth.¹⁰ Family members have special access to older people. As such, they are often in a position to inflict financial abuse through deception, coercion, misrepresentation, undue influence, or theft.¹¹

While the motivations of perpetrators may be complex, and mired in family history, it is possible to identify a common characteristic. That is, an abuser will often have a sense of entitlement. This may stem from a belief that, as they will or should inherit an asset eventually, and they might as well get the benefit sooner rather than later. Alternatively, they may take money or property to prevent other family members from getting the money

² Australian Law Reform Commission, *Elder Abuse – A National Legal Response* Report 131 (2016) 37.

³ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2015) Volume 5 68.

⁴ Above n 2, 40.

⁵ Above n 3, Volume 4 94.

⁶ Seniors Rights Victoria *Your Rights – Elder Abuse* <https://seniorsrights.org.au/your-rights/>.

⁷ Monash University, *Financial Abuse of Elders: A Review of the Evidence* (2009) 14.

⁸ Above n 1.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

or for fear that their inheritance may be lost due to the cost of residential aged care or medical costs incurred by the older person.¹²

Certain events may trigger the abuse. This includes financial stress, family conflict (including siblings competing for control of funds or resources), problem gambling, or drug and alcohol addiction.¹³ In other situations, the perpetrator may simply be ill-equipped to hold a position of trust.¹⁴ For example, they may not understand their obligations in holding a power of attorney. That is, to act in the best interests of the principal and not be influenced by personal interest. Among the duties of attorneys appointed under an enduring power are not to make unauthorised gifts, and to keep the principal's money and property separate from their own (save for where the property is jointly owned or acquired). The perpetrator's behaviour may also gradually change. A caregiver, for example, may initially carry out banking duties responsibly. However, they may then slowly increase the amount and frequency of withdrawals in an opportunistic way.

In Australia, there are no specific laws which criminalise the financial abuse of older people. Rather, some acts may constitute general fraud under the *Criminal Code Act 1995* (Cth). For example, obtaining a financial advantage by deception,¹⁵ or general dishonesty, such as obtaining a gain,¹⁶ causing a loss,¹⁷ or causing a loss to another.¹⁸ Most instances of financial abuse will also constitute an offence under Victorian criminal law, including: theft,¹⁹ obtaining property by deception,²⁰ obtaining financial advantage by deception,²¹ and false accounting.²²

In contrast, other acts may be addressed by civil law. This includes: professional negligence (regarding investment advisors and banks); consumer protection; property laws (including tenancy); and equity laws (unconscionable conduct, breach of trust, and breach of implied trust).

While the criminal and civil laws described above have a role in deterring abuse and compensation for loss where abuse has occurred, elder abuse presents unique challenges in enforcing these laws. The vulnerability of the older person – reliance on the perpetrators, fear of social isolation, cognitive impairment and illness – are all factors that can affect the ability and will of the older person to seek legal help when financial abuse has occurred. The desire to preserve family and other relationships often deters older people from reporting financial abuse. Some forms of financial abuse, such as 'assets for care' arrangements, which involve an older person making a financial contribution to an asset purchased by another in exchange for a promise for care,

¹² Ibid.

¹³ Above n 2, 44-45.

¹⁴ Ibid.

¹⁵ s 134.2(1).

¹⁶ s 135.1(1).

¹⁷ s 135.1(3).

¹⁸ s 135.1(5).

¹⁹ *Crimes Act 1958* (Vic) s 72.

²⁰ Ibid s 81.

²¹ Ibid s 82.

²² Ibid s 83.

involve a significant depletion of the older person's assets and financial resources. This is one of the most insidious forms of financial elder abuse, as it often occurs with consent of the older person due to the relationship of trust with the perpetrator. With these types of arrangements, the older person often ends up making a substantial financial contribution and not receiving the care.

The following examples of financial elder abuse, derived from court cases, demonstrate its extent and severity:

***Truran v Cortorillo* [2011] VSC 488:**

The plaintiff, a 64-year old widow suffering from loneliness and depression, became infatuated with the defendant, a 56-year old man. She readily agreed to his proposal for marriage. She also agreed to all his financial requests. Their relationship lasted for six months. During this period, the defendant relieved the plaintiff of a substantial amount of money to buy luxury goods; persuaded the plaintiff to transfer to him the title of her home; and, obtained an interest-free loan for his company. The benefits she provided him were worth \$1,071,026.

***Badman v Drake* [2008] NSWSC 1366:**

An elderly woman, Badman, empowered Drake to act for her as a financial attorney. Drake entered a mortgage arrangement and Badman said she would help by giving them the amount needed to clear the mortgage. Under their power of attorney, Drake arranged for the sale of shares and the transfer of the sale proceeds of Badman's house – the intended arrangement was that Badman could live with Drake. At the point of sale and the transfer of funds to Drake, the only solicitor involved was that for Drake in drafting the discharge of mortgage documents. Badman's son sought relief against this transaction.

The court overturned the transaction due to undue influence over Badman. Young CJ reasoned that 'when one is dealing with an elderly person who is lonely and friendless, a person who befriends her must, if they are to gain a personal benefit,

be extremely careful to ensure that there is no unworthy conduct’.

***Lu v R* [2014] NSWCCA 307:**

The defendant started the Dollar Group Pty Ltd – a mortgage loan broker. To expand the business, the defendant promoted to potential clients the idea that they could invest money, through the Dollar Group, with ‘Perpetual’. The defendant supervised the creation of investment forms and guides for would-be-investors which all contained references to Perpetual. The intent was to convince investors that their investment through the Dollar Group would be into Perpetual. Significant sums of money were invested, including life savings and retirement funds. The moneys were dispersed at the discretion of the defendant for various purposes to continue the Dollar Group entity. The scheme ran into difficulties in 2007.

It collapsed in 2008.

The defendant was found guilty of 21 counts of cheating or defrauding being a director of a company. There were 11 separate victims. These included an elderly man who lost his life savings and had to go on an old age pension. Another elderly couple lost all the property they owned and had to postpone their retirement.

***Farrell v Stephenson* [2008] NSWSC 1350:**

A son and his wife procured transfers of his mother’s properties for little or no consideration. No solicitors were used for the transfers and the mother never received independent legal advice. At the time, the mother was elderly, suffering the early stages of dementia, was easily manipulated and suggestible and had reduced capacity to manage her own affairs and protect her own interests. The son and his wife then mortgaged those properties and used the money for a series of unsuccessful property investments.

The residual proceeds (after the developments had been sold) were being held in a solicitor's trust account. The court held the properties were obtained by equitable fraud and undue influence.

Academic reports have highlighted additional examples of financial elder abuse. These include:

- Making investment decisions that advantage the perpetrator.²³
- Forcing an older person to change their will to benefit specific individuals.²⁴
- Denying an older person access to their money or preventing them to control their assets.²⁵
- Losing an older person's savings because of forgery and fraud.²⁶
- Taking a loan with a promise of repayment but not paying the money back.²⁷
- Stealing money or using an older person's bank and credit card without consent.²⁸
- Sale or transfer of any property or assets without authority or consent.²⁹
- Being pressured to lend money to relatives or friends.³⁰
- Family members moving into an older person's home without their consent and without a prior agreement on sharing costs.³¹
- Forging a vulnerable person's signature, forcing them to sign a document or misleading them about what they are signing, including blank withdrawal forms.³²
- Using a vulnerable person's money for purposes other than what the person wanted.³³

²³ Above n 7, 9-10.

²⁴ Ibid.

²⁵ Above n 2, 43.

²⁶ Above n 7, 9-10.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Above n 2, 43.

³² Ibid.

³³ Ibid.

- Cashing a vulnerable person's cheque without permission or authorisation, or withholding portions of the funds.³⁴
- Deceiving, coercing or unduly influencing a vulnerable person to sign a deed, contract or power of attorney. This can be done through promises of lifelong care or through the use of a power of attorney authorising the perpetrator to access an older person's financial assets.³⁵

The adequacy of protocols

The LIV submits that financial services providers are in the best position to recognise, and prevent, financial elder abuse. Further, the LIV submits that currently, internal systems of financial services entities and forms of industry self-regulation fall short of providing an adequate response.

The LIV submits that, in responding to financial abuse, banks need to balance protecting the dignity and autonomy of their customer whilst also ensuring protection and freedom from exploitation and abuse. The autonomy of older customers should not be afforded less respect than the autonomy of others. However, in cases where there is suspected abuse of vulnerable people, protection should be given additional weight.

When a vulnerable customer is being exploited, it is challenging for banks to know what to do. For example, Australia's banks have been criticised for being inconsistent in their approach to individuals using Power of Attorney ('**POA**') documents during transactions.³⁶

The LIV recognises that bank staff may be reluctant to become involved in family financial disputes, even if they are suspicious of financial abuse. Staff may feel they are unable to seek further evidence. A potential solution is to impose requirements on Australian banks and financial institutions to adopt automatic monitoring of activity on accounts. This system would alert individuals if unusual transactions occur. However, to avoid discrimination against older people by assuming they need greater monitoring of their accounts than others, any member of the community could subscribe to such a monitoring system. Such a system would only work in cases where: 1) the victim had cognitive capacity to effectively understand and act on this knowledge, and 2) where the victim was confident enough and able to act on the information. The unique challenges to reporting instances of financial elder abuse (as outlined in Paragraph 15) mean that the two pre-conditions to the effectiveness of the monitoring system may not be met. This step alone will not be sufficient to combat financial elder abuse, but having such a system may reduce instances of abuse by deterring family and friends of older persons because of the risk of detection.

³⁴ Above n 7, 9-10.

³⁵ Above n 2, 43.

³⁶ Hailey Renault, 'Police Guardian Calls on Aged Carers, Big Four Banks to Report Financial Elder Abuse Earlier' <<http://www.abc.net.au/news/2018-02-23/public-guardian-calls-for-better-reporting-of-financial-abuse/9477722>>.

A study undertaken in 2008 examined financial and credit issues for Victorians.³⁷ The study involved interviews with financial counsellors, bankers, legal practitioners and consumer advocates. The key issues addressed included: increased marketing of credit products and reverse mortgages, difficulty of older people repaying credit loans, and banks offering credit increases without adequate determination of the older persons' capacity to pay.³⁸ The study recommended providing greater education about managing debt, further training of financial advisors, regulations on the provision of reverse mortgages and asset stripping, encouraging banks to adequately explore clients' capacity to repay credit loans before credit is advanced, and the provision of free education seminars on internet/phone banking services.³⁹ The report recommended a central national register for financial POAs. Arguably, this would assist the banking industry to fulfil their responsibilities by enabling staff to check on purported attorney's authority to use the POA, any conditions on the exercise of this power, and would provide certainty that the POA presented was the most recent POA executed by the principal.

The Australian Banking Association's ('**ABA**') guidelines, *Protecting Vulnerable Customers from Potential Financial Abuse*, provide steps that banks should follow when elder financial abuse is suspected. These steps include:

- a. Staff should be trained to identify potential abuse as part of their fraud prevention programs;
- b. Where abuse is suspected, staff should consider talking to the customer and ask clear, factual and non-threatening questions;
- c. 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, such as a POA;
- d. Staff might seek advice from others in the bank, such as managers, internal lawyers, fraud, security, and delay transactions until further investigation work is done; and,
- e. Staff might also seek advice from the Public Advocate or other relevant agency, but without identifying the customer.

However, these guidelines are voluntary and unenforceable. The LIV would add to these guidelines that, as a preventative measure, bank staff should receive training on POAs to understand the matters for which power

³⁷ Loddon Campaspe Community Legal Centre, 'Financial and Consumer Credit Issues for Older Consumers in Central Victoria' (2008).

³⁸ Ibid 4-6.

³⁹ Ibid 7-10.

has been given, when the power commences, and any conditions or limitations that the principal has placed on the attorney's exercise of power.

The LIV understands that the Financial Ombudsman Service ('**FOS**') approaches matters of financial elder abuse on the basis that the relationship between financial institutions and their customers is contractual.⁴⁰ Whilst a financial institution does not owe its customer a broad duty of care, nor a general duty to advise a customer that a transaction or product is not in their interest,⁴¹ it does have a duty to exercise reasonable care and skill in carrying out the customer's instructions in relation to financial transactions.

FOS Determination No: 430602 (18 January 2017)

An elderly retiree (the applicant) had been the victim of a lengthy combination of scams and blackmailing over 2011-2015. In early 2015, the applicant made two lump sum withdrawals from his allocated pension, depleting it significantly. The funds were deposited into his nominated bank account. The funds were disbursed over time to the engineers of the scam.

The applicant submitted that the financial services provider ('**FSP**') should not have allowed him to withdraw the funds from his pension. It was argued that the FSP misled the applicant by not advising him at the time of the first withdrawal that he could not return funds into his allocated pension account.

The FOS found that the FSP did not breach its obligation to the applicant by implementing his withdrawal requests.

FOS Determination No: 462666 (25 September 2017)

In 2016, the applicant made two separate transfers, weeks apart, overseas from his FSP account. The first transfer was of \$398,455.70, the second transfer was of \$90,500. Losing the funds, the applicant submitted that he was the victim of a scam.

⁴⁰ Financial Ombudsman Service Australia, 'The FOS Approach to Financial Elder Abuse' (2017), 6.

⁴¹ Ibid.

The issue was whether the FSP had met its obligations in relation to the transfer. A further issue was whether the FSP responded appropriately to the information that the transfers may have been the result of a scam.

The determination was partly in favour of the applicant. The FSP did not meet its obligations in relation to the second transfer. It was found that the FSP did not comply with its own procedure in authorising the transfer.

The FSP reimbursed the applicant the sum of \$90,500.

FOS Determination No: 472675 (2 August 2017)

The applicant, a victim of a scam, requested, on two separate occasions, that funds be transferred overseas. The applicant later became aware that he was the victim of a scam. The issue was whether the FSP should have made further enquiries before completing the transfers.

The FOS found in favour of the applicant. The FSP was aware of the POA for the applicant. As such, the FSP should have made further enquiries and contacted the Power of Attorney. In failing to do so, the FSP breached its obligation to the applicant. Had the FSP contacted the POA, it is likely that the transfers would not have been made.

The *Code of Banking Practice* ('**Code**') is the banking sector's customer charter for its members (signatory banks). It is intended to relay best practice standards, setting out the sector's key commitments and obligations to customers. These include standards of practice and disclosure, as well as principles of conduct for their services. It applies to personal and small business bank customers.

Part C of the Code sets out the key commitments of signatory banks. Clause 7 of Part C states that banks 'recognise the needs of older persons and customers with a disability to have access to transaction services'. It further states that 'reasonable measures should be enacted to enhance their access to these services'. However, the LIV is concerned that Clause 7 does not adequately address elder abuse. Similar concerns have been raised by the ALRC.⁴² Specifically, that the Code should provide examples of 'reasonable measures'.⁴³

⁴² Above n 2, 299-303.

⁴³ Ibid 303.

The ALRC noted that this could include the following: training for staff,⁴⁴ using software to identify suspicious transactions,⁴⁵ and reporting suspected abuse to the relevant authorities.⁴⁶

The LIV submits that 'reasonable measures' should include taking affirmative action to detect and prevent elder financial abuse. All banking staff should be well-equipped to identify when abuse is occurring. Attention should be given, in particular, to instances in which an individual displays a growing interest in an older person's assets, including their financial accounts and real property; unusual bank account activity; and, financial transactions that the older person has difficulty explaining. Banks should also be aware that a financial abuser may accompany the customer to various branches to make transactions, in the hope that banking staff will not notice a pattern in the withdrawals. Banks appear to have sophisticated account monitoring systems that allow them to identify in real time suspicious activity, such as potential credit card fraud. It is the LIV's submission that banks ought to be able to develop their systems to allow them to identify suspicious activity on older persons' accounts.

LIV members have relayed the following actions which banks identify as suspicious:

- When a third party presents a form containing the customer's signature, but the rest of the form is filled out in different handwriting;
- When withdrawals or transfers are made on behalf of the customer without prior direct contact from them;
- When a customer withdraws a large or unusual amount of cash while accompanied by a new acquaintance;
- If a customer appears to be coerced into making transactions by a family member, friend or other person. The customer may remain silent whilst the other party does all the talking;
- When a customer appears not to understand or is not aware of recently completed transactions;
- When a customer gives implausible explanations, or is confused about what they are doing with their money;
- When a customer makes unusual or erratic transactions, such as sudden withdrawals from multiple branches or banking channels within a short space of time. For older clients, it could be that they make transactions they would not otherwise be capable of doing, such as using an ATM or debit card;

⁴⁴ Ibid 304.

⁴⁵ Ibid 306.

⁴⁶ Ibid.

- A sudden register for internet banking, when all their prior banking has been in person at a branch;
- When an elderly customer expresses concern about missing funds, or personal and financial documents, or indicates their mail is no longer being delivered to their home;
- When there is pressure on an older person to be a guarantor for another person when they lack sufficient knowledge about the transaction or lack the capacity to make an informed decision.

The LIV submits that banks should provide information to older customers on how they can protect themselves and prevent financial abuse. Further, staff need to be aware that a customer who is being financially abused will likely not respond meaningfully if they are questioned when the suspected abuser is with them.

In 2017, the Independent Review of the Code was released. It recommended that the Code should oblige signatory banks to design and make available their banking services in a way that is inclusive and has regard to the needs of customers.⁴⁷ This would take into account factors and circumstances including age, health and disability.⁴⁸

Older people with disabilities can experience problems when managing their financial affairs. As relayed in the ALRC's report, *Equality, Capacity and Disability in Commonwealth Laws*, "people with disabilities have an equal right to make decisions for themselves".⁴⁹

The ALRC recommended that the ABA should encourage banks to recognise supported decision-making.⁵⁰ The LIV agrees with this recommendation. The ABA should issue guidelines, reflecting the *National Decision-Making Principles*.⁵¹ Guidelines should also recognise that:

⁴⁷ Phil Khoury, 'Report of the Independent Review of the Code of Banking Practice' (2017) 166.

⁴⁸ Ibid,

⁴⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) 23.

⁵⁰ Ibid 185.

⁵¹ Ibid.

- a. customers should be presumed to have capacity to make decisions about access to banking services (unless there is evidence to the contrary);
- b. customers can communicate decisions concerning banking services, even if they can only do so with supports;
- c. customers are entitled to support in making and communicating decisions; and
- d. banks should recognise supporters and respond to any reasonable requests, consistent with other legal duties, such as privacy of information obligations.
- e. The LIV further submits that the Code should be amended to impose a new obligation on signatory banks: to develop policies that recognise customers should be presumed to have the ability to make decisions about banking services, unless there is evidence to the contrary.

Proper advice

The LIV submits that the proportion of first-home buyers who receive a contribution from their parents towards a deposit has increased significantly in recent years. This is because housing prices (both buying and renting) have increased and young people find it harder to save a deposit of their own. Often, parents are not seeking financial advice or legal advice before making gifts or loans to their children. Parents lending money to their children carries a number of risks; particularly, later disputes about whether the funds were a gift or a loan. This can fracture relationships between parents and children.

The risk to older people is increased when they do not have the liquid funds to make a gift, and instead are making gifts that deplete their own pension pool, or are using equity, such as borrowing against their own home, which may be their only significant asset. The risk to older parents is compounded in situations where they are not only contributing funds towards the purchase of their child's property, but are also appointed as guarantor as security for their child's mortgage. The LIV submits that it is imperative that parents taking on this liability receive proper independent advice from lenders, such as banks and credit unions, in addition to independent legal and financial advice.

Electronic communications

Digital technology has revolutionised banking practices. Younger customers embrace online services in higher numbers than older generations. An Australian Bureau of Statistics study of internet banking found that only 51 percent of those aged 65 years and older are internet users.⁵² An older person who has little or no

⁵² Above n 45, 174.

understanding of the internet can easily be duped by a person who understands the operation of internet banking.

Complaints handling

Clauses 37 and 38 of the Code impose obligations on signatory banks regarding internal and external dispute resolution processes, respectively. These processes are free of charge. The ABA also claims this is consistent with external dispute resolution standards and guides that the Australian Securities and Investment Commission (ASIC) publish for application to Australian financial services and credit licensees.

When financial abuse occurs in a relationship of trust or dependence (as the majority of reported cases do), the customer may not make a complaint for a number of reasons. These include: fear of reprisal, such as, loss of or damage to the relationship with the perpetrator; further loss of independence; reluctance to believe or admit that someone they trust is exploiting them; or fear that no one will believe them if allegations of abuse were made. The victim may want to protect the perpetrator from legal repercussions, even though they want the abuse to stop.

An older person may find it difficult to report financial abuse if they have limited mobility, cognitive impairment, speak English as a second language, or are entirely dependent on family members or others for support and access to services.

Furthermore, they may not realise that financial abuse is taking place, particularly if information is being withheld from them, or account statements and other mail have been redirected.

Authority to operate

The LIV submits that the Code should increase witnessing requirements for arrangements which allow the authorisation of third parties to access accounts.

Many retail banks have a standard form which enables customers to authorise a third party to operate their bank account on their behalf. At times, this will be convenient or even necessary, especially in cases where an older person has difficulty using online banking or visiting a bank branch. However, the potential for financial abuse is also increased.

These forms often require the signatures of the bank customer and the authorised person. It is not required that others witness the signing of the form. Further, some banks have no requirement for the customer to attend the branch to submit the form. This creates a high risk that such forms will be falsely completed and submitted. For example, an older person's signature might be forged, or pressure placed on them to sign. In addition, an older person may not understand the arrangement or have the decision-making capacity to give authorisation.

In Victoria, the LIV considers that authority to operate forms undermine the protections in the powers of attorney legislation, by authorising substitute decision-making minus the statutory safeguards created by stringent witnessing and execution requirements.

The LIV submits that the Royal Commission should recommend that the current authority to operate process be abolished and replaced with a requirement for a power of attorney, or a tribunal appointed administrator to be used where a third party seeks to access and operate a person's financial accounts.

If the Royal Commission was unwilling to accept this recommendation, it should consider the reform proposed by the ALRC, namely, that banks introduce additional protections to limit the potential for these arrangements to be abused. These protections should be set out in the Code and might include a requirement that:

- signatures be witnessed by two people, one of whom should be a person who can receive affidavits (as set out in the *Evidence (Miscellaneous Provisions) Act 1958*);
- the customer sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

The LIV submits that the safeguards proposed by the ALRC are relatively modest; they do not impose a significant administrative burden on banking and financial institutions and enable the customer to give (and document) full and informed consent to the use of such arrangements.

CONCLUSION

Should you have any queries about this submission, please contact Rebecca Park, Lawyer to the Elder Law Section (03 9607 9436 or rpark@liv.asn.au), or Alex Laurence, Paralegal to the Elder Law Section (03 9607 9565).

Yours sincerely,



Belinda Wilson

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