

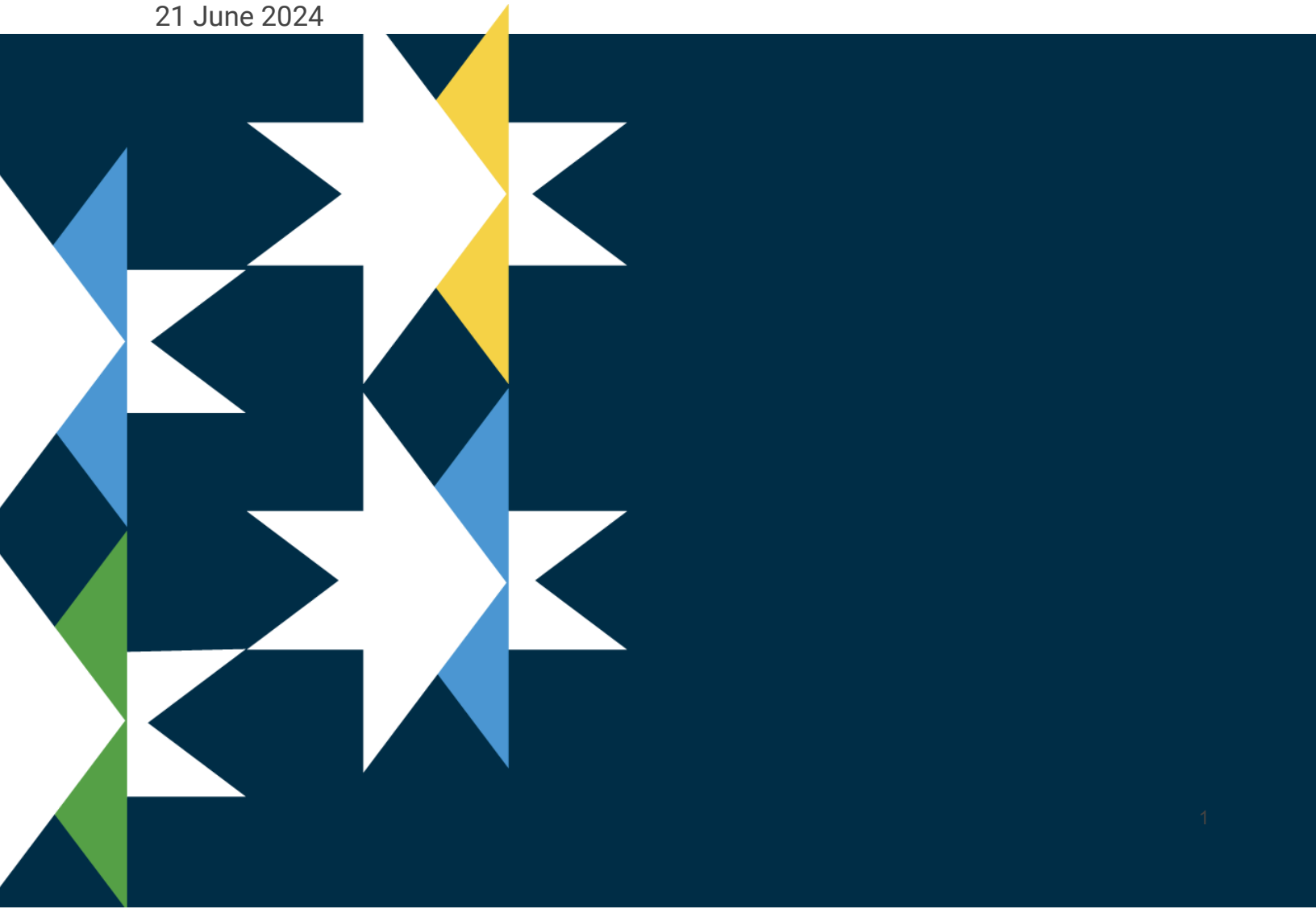


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# Financial Services Regulatory Framework in Relation to Financial Abuse

Submission by Super Consumers Australia

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# Introduction

Poor industry practices and inadequate legal and regulatory settings in super are creating and exacerbating highly adverse outcomes for victim-survivors of financial abuse.

Superannuation is typically the largest asset people have after their home.<sup>1</sup> The scale and nature of the risk of financial abuse in super is therefore different to other financial services and needs specific consideration. Super funds, like other financial services, play an important role in recognising and responding to financial abuse when administering accounts, interacting with members, and distributing money.

The current legal and regulatory settings for super, as well as industry practices, are not configured to recognise the dynamics and realities of financial abuse, or meet the needs of victim-survivors. There is evidence that this is causing deep and broad consumer harm in three main areas:

- Super funds' engagement with victim-survivors and administration of their accounts,
- The distribution of super death benefits, and
- The risk of elder abuse.

This submission will make recommendations in response to the following Terms of Reference of the inquiry:

1. The prevalence and impact of financial abuse, including:
  - the approaches taken by financial institutions to identify, record and report financial abuse, and any inconsistencies arising therein.
  - the impact of the shift of financial products to online platforms.
2. The effectiveness of existing legislation, common law, and regulatory arrangements that govern the ability of financial institutions to prevent and respond to financial abuse, including the operation of:
  - legislation and statutory instruments for superannuation.
3. Other potential areas for reform, such as prevention, protection, and proactive systems, including:
  - employee training.

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<sup>1</sup> ABS, *Household income and wealth*, <https://www.abs.gov.au/statistics/economy/finance/household-income-and-wealth-australia/2019-20#household-income-and-wealth>

## Summary of Recommendations

**Recommendation 1:** Implement minimum member service standards requiring super funds to prevent, identify, and respond to financial abuse consistently and in line with best practice.

**Recommendation 2:** Amend Section 10 and 10A of the SIS Act to allow super funds to consider financial abuse circumstances when determining claimed beneficiaries' eligibility, including where a binding nomination is in place.

**Recommendation 3:** Update AFCA's approach document on super death benefit complaints to outline how it determines whether a super fund's decision on death benefit distribution was 'fair and reasonable in all the circumstances' in the presence of financial abuse.

**Recommendation 4:** Ensure that super death benefit claim evidence requirements for victim-survivors are in line with best practice and accommodate consumer vulnerability.

**Recommendation 5:** Waive the financial dependence cohabitation requirement in Section 10A of the SIS Act in cases of DFV, as is the case when physical, intellectual, or psychiatric disability is present.

**Recommendation 6:** Undertake a broad-based and independent review of the super death benefit distribution system to fully examine its adequacy and whether it is fit-for-purpose.

**Recommendation 7:** Minimum member service standards in super should outline best practice approaches to disrupting elder abuse.

# Super member engagement and administration

On the whole, super funds are simply not prepared or incentivised to respond to financial abuse in line with best practice. Evidence of this is clear.

In a survey of 10,000 partnered women, more than 1 in 10 (14%) victim-survivors experiencing financial abuse reported being pressured or coerced into giving a perpetrator access to their superannuation.<sup>2</sup> Australian Financial Complaints Authority (AFCA) determinations show egregious examples of super industry responses to financial abuse and domestic and family violence (DFV). AFCA files are littered with examples like a super fund sending updated address details to the address a member is fleeing,<sup>3</sup> or insisting on online-only account administration despite a member's lack of internet access due to leaving a DFV circumstance.<sup>4</sup> Poor account security standards in super mean it is possible for perpetrators to access super accounts, changing beneficiaries<sup>5 6</sup> or making account withdrawals without the victim-survivor knowing.<sup>7</sup>

While some financial abuse-specific guidelines exist in super,<sup>8</sup> it is clear that these are not prompting appropriate industry responses across the board. Unlike other sectors, there is no requirement for funds to adhere to best practice responses to financial abuse, or even have a publicly available DFV or financial abuse prevention policy.<sup>9</sup>

At a minimum, super fund industry responses to financial abuse need to:

- Minimise the need for customers to repeat disclosure,
- Include robust payment monitoring and flagging to identify abuse,
- Protect victim-survivors' privacy and accounts from perpetrator access,
- Incorporate best practice support service referrals and customer service responses, and
- Involve developing a DFV and/or financial abuse policy, ensuring this is available publicly on funds' websites.

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<sup>2</sup> ANROWS 2021, *Intimate partner violence during the COVID-19 pandemic: A survey of women in Australia*,

<https://anrowsdev.wpenginepowered.com/wp-content/uploads/2021/10/4AP10-Boxall-Morgan-IPV-During-Covid-ANROWS-RR.1.pdf>

<sup>3</sup> AFCA determination 610019, <https://service02.afca.org.au/CaseFiles/FOSSIC/610019.pdf>

<sup>4</sup> AFCA determination 656835, <https://service02.afca.org.au/CaseFiles/FOSSIC/636835.pdf>

<sup>5</sup> AFCA determination 845663, <https://service02.afca.org.au/CaseFiles/FOSSIC/845663.pdf>

<sup>6</sup> ABC News 2024, *Travis Paul Barnard jailed for stealing girlfriend's superannuation savings after unexpected death*, <https://www.abc.net.au/news/2024-06-07/travis-paul-barnard-girlfriend-superannuation-theft/103951514>

<sup>7</sup> AFCA determination 768952, <https://service02.afca.org.au/CaseFiles/FOSSIC/768952.pdf>

<sup>8</sup> FSC

<https://www.fsc.org.au/resources/1874-the-fsc-guide-to-the-prevention-of-elder-financial-abuse-2019/file> and ASFA

[https://www.superannuation.asn.au/wp-content/uploads/2023/10/BP\\_Vulnerable\\_Consumers\\_Paper\\_v3.pdf](https://www.superannuation.asn.au/wp-content/uploads/2023/10/BP_Vulnerable_Consumers_Paper_v3.pdf)

<sup>9</sup> AFCA determination 768952, op. cit., p. 5

**Recommendation 1:** Implement minimum member service standards requiring super funds to prevent, identify, and respond to financial abuse consistently and in line with best practice.

## Super death benefits

There have been numerous instances where financially dependent victim-survivors were denied access to a perpetrator's super due to legal technicalities,<sup>10 11</sup> while people who were alleged to have committed financial abuse were able to financially benefit from the death of the person they allegedly abused.<sup>12 13</sup>

Victim-survivors of financial abuse should not have to provide enormous amounts of documentation to prove they were financially dependent on a perpetrator who has passed away just to claim on a deceased perpetrator's super. When DFV is involved, a victim-survivor should not have to be living with a deceased perpetrator at the time of death in order to be considered a spouse, and therefore financially dependent. At the moment, death benefit distribution decisions can't explicitly consider whether financial abuse occurred and how that impacts the nature and extent of claimant's financial dependence.

These settings are unacceptable and are indicative of a death benefit system that is not fit for purpose.

### Super death benefit rules

For complex reasons, super isn't automatically treated as part of a person's estate when they pass away. Instead, super fund members nominate beneficiaries directly to their fund to receive any super and life insurance they held – this is known as a 'death benefit'.

Who can you leave your super to?

Under the law, a person can typically leave their death benefit to a 'financial dependent', or their legal representative. A 'financial dependent' includes:

- a 'spouse' (legal spouse or a person who, although not legally married to the person, lives with the person on 'a genuine domestic basis in a relationship as a couple')<sup>14</sup>
- Someone they have an 'interdependency relationship' with.<sup>15</sup>

An 'interdependency relationship' exists if all the following conditions are met:

- The two people have a close personal relationship; and

<sup>10</sup> AFCA determination 909611, <https://service02.afca.org.au/CaseFiles/FOSSIC/909611.pdf>

<sup>11</sup> AFCA determination 849882, <https://service02.afca.org.au/CaseFiles/FOSSIC/849882.pdf>

<sup>12</sup> *Ievers v Superannuation Complaints Tribunal* [2016] FCA 936

<sup>13</sup> AFCA determination 701195, <https://service02.afca.org.au/CaseFiles/FOSSIC/701195.pdf>

<sup>14</sup> SIS Act, Section 10

<sup>15</sup> SIS Act, Section 10A

- they live together;<sup>16</sup> and
- one or each of them provides the other with financial support; and
- one or each of them provides the other with domestic support and personal care.

#### Binding and non-binding death benefit nominations

A person can nominate beneficiaries by making a 'binding' or 'non-binding' nomination to their fund.

A binding nomination must be actioned by the super fund so long as it is considered valid under the rules laid out above, but it is quite complex for members to put in place. Binding nominations require two adult witness signatures and typically involve submitting a hard copy form, which is inaccessible to many members – these nominations have to be renewed up to every three years. Alternatively, members can make a 'non-binding' nomination which is easier to do, as it typically involves filling in a simple online form. The fund can take non-binding nominations into consideration, but ultimately retains the discretion to distribute the benefit as it sees fit in accordance with the law.

Many members do not have a death benefit nomination in place. Even for those that do, it is not unusual that the nomination is invalid under the law, or is overturned by their super fund or AFCA.

#### Fund and AFCA decisions about death benefit distributions

A fund can override a member's nomination if it does not comply with its own governing rules, the Superannuation Industry (Supervision) Act (SIS Act), and associated regulations. In the case of non-binding and invalid binding death nominations, AFCA is also typically able to override a trustee's decision about the allocation of death benefits if it decides the trustee's decision was not fair and reasonable in all of the circumstances.

When distributing death benefits, super funds are regularly required to review whether a relationship between a victim-survivor and a perpetrator of financial abuse or DFV meets the definition of a spousal relationship, or an interdependency relationship. When hearing death benefit complaints, AFCA must do the same. AFCA does not have a specific approach<sup>17</sup> to considering financial abuse or DFV when handling superannuation death benefits. Instead, it considers:

- The super fund's rules,
- The purpose of super death benefits (to provide for those people who were financially reliant on the deceased and who would have expected continuing financial support from the member)

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<sup>16</sup> If two people have a close personal relationship and the reason they do not meet the other elements of the test is because either or both of them suffer from a physical intellectual or psychiatric disability, they are still considered to be in an interdependency relationship.

<sup>17</sup> AFCA often sets out its approach in Approach documents.

<https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>

- Who relied on financial support,
- The member's wishes.<sup>18</sup>

AFCA's role is ultimately to review the fairness and reasonableness of a trustee's decision on death benefits. However, under its super jurisdiction, AFCA also can't make a decision that is contrary to law or the fund's governing rules.

## Issues with super death benefit distribution

The super death benefit system does not accommodate the needs and experiences of people who have experienced financial abuse.

The SIS Act and Regulations do not permit super funds to adequately consider financial abuse circumstances when determining beneficiaries and the split of benefits when a member passes away. This is due largely to:

- Rigid definitions of financial dependence. For example, a victim-survivor may not meet the standard of financial dependence due to a temporary separation, while inversely, a perpetrator of financial abuse may meet the standard simply because they lived with the deceased or met the definition of a spouse.
- A lack of legal clarity of how the presence of financial abuse impacts the nature and characteristics of financial dependence, should therefore be weighed when a trustee is making decisions about the distribution of super,
- A requirement for valid binding death benefit nominations to be honoured even where there is a change in relationship circumstances, for example, where a couple is separated due to domestic and family violence.
- Evidence thresholds for demonstrating financial dependence and spousal relationships that are difficult for many victim-survivors of financial abuse to meet, but given the circumstances are often straightforward for perpetrators to meet.<sup>19</sup>

These settings have yielded wildly inconsistent, and typically adverse, outcomes for victim-survivors. For example, in *Ievers v Superannuation Complaints Tribunal (SCT)*,<sup>20</sup> the Federal Court found that irrespective of evidence of DFV and indications of a relationship breakdown, an alleged perpetrator of intimate partner violence was entitled to the super and life insurance of a woman who took her own life, because the relationship met the requirements set out in the SIS Act. In this case, the victim's mother argued that:

“a person who is physically violent towards another, who exercises control over another and is abusive towards another while living with that person may not be living in a genuine domestic basis in a relationship as a couple or in an interdependency relationship

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<sup>18</sup> AFCA, *Approach to superannuation death benefit complaints*, <https://www.afca.org.au/media/614/download>

<sup>19</sup> Death benefit claimants can make statutory declarations about the nature of the relationship with the deceased, but this is weighed against evidence like rental leases and an absence of shared expenses.

<sup>20</sup> *Ievers v Superannuation Complaints Tribunal* [2016] FCA 936.



providing support and care of a type and quality normally provided in a close personal relationship.” (para 59)

In this case the Court found that the alleged abusive conduct simply proved that a relationship existed under the law, and therefore the alleged perpetrator was entitled to her super.

However, a later Federal Court decision found that:

“The perpetration of family violence is entirely antithetical to the element of mutuality which may generally be accepted as an element, at least to some degree, in a genuine relationship as a couple. It follows that family violence will always be highly relevant as one of the circumstances to be considered in determining whether, on review of all of the circumstances of the relationship, the statutory test is met.”<sup>21</sup>

An AFCA determination made after this finding did not take this into consideration.<sup>22</sup>

Below are other examples of adverse or inconsistent outcomes for victim-survivors that stem from the current policy settings.

**Victim of family violence had super death benefit paid to her alleged perpetrator instead of her adult children**<sup>23</sup>

A woman passed away and her \$353,000 death benefit was paid to her five daughters by her super fund. A man claiming to be the woman’s spouse complained about this distribution to AFCA, seeking the benefit instead. Some of the adult daughters provided evidence that the mother’s spousal relationship with the complainant was over, and that their mother was a victim of intimate partner violence at the hands of the complainant. They provided statutory declarations and a police report, and they argued that the complainant did not attend their mother’s funeral. One of the daughters said that the complainant bribed her to sign a statutory declaration that he was living with her mother up until she died. However, citing *Levers v SCT* and SIS Act, AFCA determined that the complainant was the sole financial dependent of the woman who died despite evidence they were not living together in a genuine domestic partnership. AFCA overturned the super fund’s decision, awarding the full death benefit to an alleged perpetrator of intimate partner violence.

<sup>21</sup> *Mayson & Wellard* [2021] FamCAFC 1115.

<sup>22</sup> AFCA determination 701195, <https://service02.afca.org.au/CaseFiles/FOSSIC/701195.pdf>

<sup>23</sup> *ibid.*

**Victim-survivor not named as beneficiary because she could not provide evidence of financial dependence or spousal relationship<sup>24</sup>**

A victim-survivor of intimate partner violence who was in a 29-year relationship with a deceased member was not named as a beneficiary by AFCA because she could not provide 'factual evidence of financial dependence' or demonstrate she was a de facto spouse under the law. In making this decision, AFCA cited that the deceased and the complainant were living separately, which the victim-survivor said was a temporary arrangement due to physical abuse. The victim-survivor was unable to show evidence of financial dependence because she said the deceased controlled their finances in full.

**Victim-survivor was a de facto spouse and financially dependent, but not named as beneficiary due to small benefit amount and needs of other beneficiaries<sup>25</sup>**

A victim-survivor sought to claim a portion of a deceased member's death benefits alongside the deceased's minor children. AFCA determined that on the balance of probabilities, a victim-survivor was in a spousal relationship with the deceased at the date of his death. It determined the victim-survivor was partially financially dependent on the deceased. However, it also determined that 'a distribution [of super] that recognises the priority of the ... minor children, is fair and reasonable in its operation in respect of the [the victim-survivor], who has a lesser financial need'. It said 'her claim of partial financial dependency should be balanced against the needs of the minor children', meaning the victim-survivor was left without support for living expenses.

**Victim-survivor not named as a beneficiary despite claims of financial dependence and evidence of financial abuse<sup>26</sup>**

A victim-survivor was in an abusive relationship with a member who later passed away. She made a claim as a beneficiary. The victim-survivor stated she took out loans to keep his company afloat and eventually had to file for bankruptcy. AFCA found these circumstances did not constitute financial dependence and that while the victim-survivor 'continued to provide emotional support' to the deceased, the relationship was more akin to caring for a former partner, and the victim-survivor could not reasonably have held an expectation that she and the deceased would reunite due to the abuse. Therefore, the victim-survivor was not considered a financial dependent and was not named as a beneficiary.

The super death benefit system is well and truly stacked against victim-survivors of financial abuse and DFV. In a context where there is an urgent need to improve outcomes for

<sup>24</sup> <https://service02.afca.org.au/CaseFiles/FOSSIC/909611.pdf>

<sup>25</sup> AFCA determination 764467, <https://service02.afca.org.au/CaseFiles/FOSSIC/764467.pdf>

<sup>26</sup> AFCA determination 849882, <https://service02.afca.org.au/CaseFiles/FOSSIC/849882.pdf>

victim-survivors, change is needed. Financial abuse and DFV must be deterred, and the assets of victims must be protected from perverse outcomes.

Legal clarification is required to ensure that a person who has contributed to someone's death by perpetrating DFV must not be able to financially benefit from that death. DFV and financial abuse circumstances must be fairly considered when making decisions about death benefit distribution, particularly when determining whether financial dependency exists. It is also important that trustees and AFCA carefully consider how DFV and financial abuse circumstances impact a victim-survivor's ability to provide evidence of or meet the threshold for beneficiary eligibility. The following interventions will make the death benefit distribution system fairer for victim-survivors of financial abuse.

**Recommendation 2:** Amend Section 10 and 10A of the SIS Act to allow super funds to consider financial abuse circumstances when determining claimed beneficiaries' eligibility, including where a binding nomination is in place.

**Recommendation 3:** Update AFCA's approach document on super death benefit complaints to outline how it determines whether a super fund's decision on death benefit distribution was 'fair and reasonable in all the circumstances' in the presence of financial abuse.

**Recommendation 4:** Ensure that super death benefit claim evidence requirements for victim-survivors are in line with best practice and accommodate consumer vulnerability.

**Recommendation 5:** Waive the financial dependence cohabitation requirement in Section 10A of the SIS Act in cases of DFV, as is the case when physical, intellectual, or psychiatric disability is present.

**Recommendation 6:** Undertake a broad-based and independent review of the super death benefit distribution system to fully examine its adequacy and whether it is fit-for-purpose.

## Super and elder abuse

While many of the concerns outlined above apply in instances of elder abuse, additional concerns have been raised by the Australian Law Reform Commission (ALRC) in relation to superannuation:<sup>27</sup>

- The complexity of the super system is a significant barrier for older people managing their superannuation funds effectively, particularly when it comes to administering self-managed super funds (SMSFs).
- Older people may lack awareness and understanding of their rights and options regarding superannuation, making them vulnerable to exploitation and financial abuse. Cognitive decline contributes to this vulnerability.
- There is evidence that abuse perpetrators can misuse powers of attorney and exploit

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<sup>27</sup>ALRC 2017, *Elder Abuse— A National Legal Response*, [https://www.alrc.gov.au/wp-content/uploads/2019/08/elder\\_abuse\\_131\\_final\\_report\\_31\\_may\\_2017.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/elder_abuse_131_final_report_31_may_2017.pdf)

- their authority to access or control an older person's superannuation for personal gain.
- The scale of financial abuse in older populations is likely significantly underreported.

The ALRC recommended a review of death benefit nominations arrangements, with a focus on ensuring SMSF governance arrangements do not facilitate elder abuse. This has not yet been undertaken, despite a clear need.

Aside from addressing the findings from the ALRC review, the Federal government should consider the need for minimum service standards to specifically outline best practice responses to elder abuse. Minimum service standards have been used in other financial service sectors (e.g. the Banking Code of Practice)<sup>28</sup> to help protect older Australians from financial abuse. The super sector lacks similar industry leadership, creating a significant gap in consumer protections. Given the failure of self-regulation we see a clear need for the Federal Government to drive the implementation of minimum member service standards.

**Recommendation 7:** Minimum member service standards in super should outline best practice approaches to disrupting elder abuse.

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<sup>28</sup> Banking Code of Practice, s.54(c)  
<https://www.ausbanking.org.au/wp-content/uploads/2021/10/2021-5-Oct-Banking-Code-WEB.pdf>