Elder Abuse and SMSFs

Elder abuse within SMSFs is a focus of a new ALRC discussion paper

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An Australian Law Reform Commission (ALRC) discussion paper has highlighted concerns about the risk of elder abuse within Self-Managed Super Funds (SMSFs) and has sought feedback about steps that could be taken to lessen its likelihood.

The ALRC's Elder Abuse discussion paper was released in December last year.[1] At the time of writing this column, the ALRC was scheduled to report its findings to the Federal Attorney-General George Brandis QC in May of this year.

In the discussion paper, the ALRC notes that "[f]inancial abuse is one of the most common types of elder abuse."[2]

The discussion paper continues: "Superannuation funds may also be the target of elder financial abuse, particularly less regulated self-managed funds. For example, an individual trustee of a self-managed fund who loses decision-making ability may be vulnerable to abuse."[3]

The legal framework for SMSFs was established in 1999 and, as the discussion paper notes: "The risk of vulnerability to financial abuse in relation to a SMSF arises in part because the regulatory framework for SMSFs was designed on the premise of self-protection."[4]

While this independent 'self-protection' may have been seen as an attractive attribute of SMSFs, an ageing population means that an increasing number of older SMSF directors are likely to be vulnerable to financial elder abuse.

The ALRC concluded in the discussion paper: "A regulatory framework that relies on self-protection may be problematic, as a larger number of SMSFs come under the control of older people who may have diminishing decision-making ability. The risk associated with trustee capacity was also noted by the Financial Services Institute of Australasia (FINSIA): "the issues of population ageing and cognitive decline are a 'silent tsunami' for self-managed super funds (SMSFs), exposing investors in this sector to financial abuse, including fraud and inappropriate investment advice."[5]

Whereas SMSFs rely on 'self-protection' all other (managed) super funds are subject to oversight by an independent regulator—the Australian Prudential Regulation Authority (APRA).

In the words of the discussion paper, the age profile of SMSF members shows that there is an 'emerging risk' of financial elder abuse in relation to SMSFs.

Currently, 8.8% of SMSFs have members aged over seventy-five years of age—the most vulnerable cohort for elder abuse, according to the ALRC. Fifty-five per cent of SMSF members are aged between fifty-five and seventy-four years of age.

As the ALRC notes—"in the coming decades, a greater number of older and more vulnerable individuals will have a SMSF."[6]

The ALRC also notes that "Alzheimer's Australia has submitted that approximately 20% of people over sixty-five years may develop dementia. Accordingly, what happens when a SMSF trustee loses decision-making ability is of critical concern in managing the risk of elder abuse."[7]

To provide further context, Alzheimer's Australia latest research also shows that:

- There are more than 353 800 Australians living with dementia,
- This number is expected to increase to 400 000 in less than five years, and
- Without a medical breakthrough, the number of people with dementia is expected to be almost 900 000 by 2050.[8]

In light of the concerns about the potential for financial elder abuse in relation to SMSFs, the ALRC discussion paper asked the following questions:

"Should the *Superannuation Industry (Supervision) Act* 1993 (Cth) be amended to:

A. require that all self-managed superannuation funds have a corporate trustee;

B. prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;

C. impose additional compliance obligations on trustees and directors when they are not a member of the fund; and

D. give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?"

It also asked: "Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?"[9]

While it is the case that for some people, age may never become a barrier to their ability to competently discharge all the responsibilities involved in running a SMSF, others will, over time, lose capacity to do so and may find themselves vulnerable to financial elder abuse.

It is also possible that even in instances where financial elder abuse is thankfully not an issue, older trustees may begin to struggle with the extensive legal, taxation, compliance and administrative responsibilities involved in setting up, running, paying benefits from and winding up a SMSF.

While many SMSF trustees engage professionals to assist them in running their fund, the ultimate financial and legal responsibility for the fund lies with the Trustee(s) of the fund—not the professionals they may choose to engage to carry out various duties.

People looking for more information on the impacts of ageing on the ability of some trustees to manage a SMSF may be interested in visiting ASIC's MoneySmart website which has information about memory loss, dementia and SMSFs.

The website says that: "As trustee of your SMSF, you should plan for the possibility that some form of impairment could stop you from being able to properly manage your fund. It's better to make a contingency plan while you're capable of making good decisions than waiting until your health deteriorates. If you're not able to run your fund you could:

- Transfer your SMSF assets to a managed super fund

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