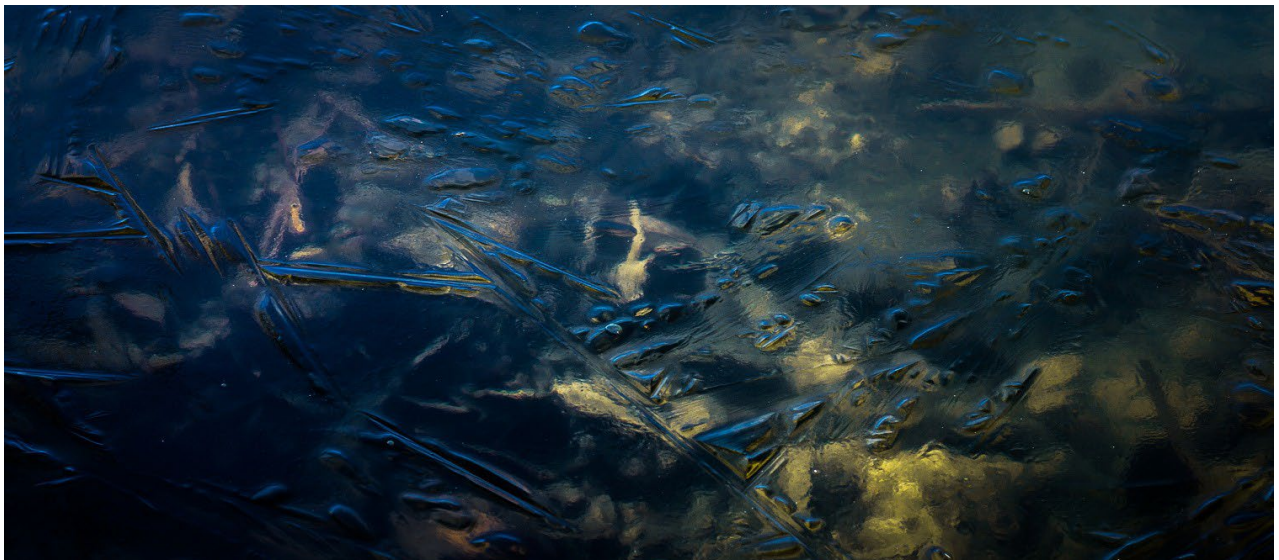


2024 ALUCA Turks Life Insurance Scholarship 1st runner-up

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‘VIOLENCE OR POVERTY’[1] – WHEN SAFETY IS NOT A CHOICE UNDER THE LIFE INSURANCE REGULATORY FRAMEWORK



The regulatory framework around life insurance does not adequately guard against financial abuse. Currently, the framework can unintentionally leave victim survivors of domestic and family violence (DFV) trapped in dangerous situations and is open to exploitation by perpetrators who exert coercive control and financial abuse.

Senator O’Neill, chair of the Parliamentary Joint Committee on Corporations and Financial Services which is inquiring into the financial services regulatory framework in relation to financial abuse (the Inquiry), has said:

‘Financial abuse is a form of family and domestic violence. The insidious nature of financial abuse means that it often goes undetected, leaving those who experience it unsupported and the issue itself shielded from public view’.[2]

Financial abuse can involve sabotaging a victim financially by incurring debts in their name, misappropriating and preventing access to funds or preventing a victim from working.[3] Of those seeking support for DFV, 90% have also experienced financial abuse. [4]

As Flequity Ventures notes in its submission to the Inquiry:

- There are parallels between financial abuse, fraud and scams.
- The direct costs to victims of financial abuse have been estimated at \$5.7 billion a year,[5] over twice the \$2.74 billion lost to scams in 2023.
- Women are disproportionately impacted by DFV and financial abuse, while victims of scams are mainly men investing in get-rich-quick schemes.
- Unlike the \$86.5 million package included in the last Budget and private sector partnerships and technological investment to tackle scams, there is no systemic action to prevent financial abuse, disrupt perpetrators, and provide greater support for victims.
- Financial institutions also tend to treat victims differently. Scam and fraud victims are referred to specialist financial crime teams who investigate, block and attempt to recover lost funds and secure their accounts.
- On the other hand, victims of financial abuse are referred to hardship teams who provide support to set up safe accounts, disentangle and start again - but generally have to repay debts even when they have been coerced. [6]

The traps in life insurance

For life insurers, the life insurance regulatory framework can unwittingly trap customers in a number of disturbing situations. For example, issues can arise with jointly owned policies (two holders of one policy) or cross ownership (where two holders own policies over each other's lives).

Relevantly, The Coalition of Australian Life Insurers (**CALI**) and the Financial Rights Legal Centre provided examples in their submissions to the Inquiry:

- In contrast to banks who can de-bank customers using financial products to perpetrate abuse, life insurers have very limited rights to cancel policies, change ownership or alter terms even where financial abuse occurs.[7]
- Jointly held policies cannot be cancelled or altered without the consent of both policyholders. To change ownership to a single holder, both holders must sign a memorandum of transfer (**MOT**) under s200 of the *Life Insurance Act 1995* (Cth). Also, only the policy owner can cancel a policy and nominate or change beneficiaries

It may, of course, be unsafe for a victim to ask their abuser to agree to changes or sign a MOT. While a Court can order one party to assign ownership of the policy under ss79 or 90SM of the *Family Law Act 1975* (Cth), this can be expensive, time consuming [8] and stressful (and there is no guarantee the order will in fact be complied with).

- Conversely, where a perpetrator can operate the account from which premiums are paid, they may cancel direct debits to lapse a victim's cover; in some cases without the victim's consent or knowledge; adding to already precarious financial situations where they recently escaped a DFV situation.

Given the magnitude of the difference in losses suffered by scam and financial abuse victims, there is merit in providing the latter with at least the same support as the former.

- In other cases, abusers may refuse to sign a MOT or to pay premiums. The victim might only be able to afford the premium to cover their own life [9], causing them to choose between paying to insure their abuser's life (and not necessarily being a beneficiary) or losing their own cover along with it. A replacement policy may be on less favourable terms and the victim may have a less favourable underwriting assessment due to the abuse suffered.

It is difficult to comprehend the impact on victims from losing the invaluable financial support provided by disablement insurance due to these subversive tactics; and the dire impact of financial roadblocks cannot be underestimated.

Economic security is a primary factor in determining whether a victim can escape from a dangerous situation and research by the Australian Council of Trade Unions shows that the average cost of escaping DFV is \$18,000 and it takes about 141 hours for the victim to disentangle themselves from the relationship.[10] These figures loom large in an economic and cost-of-living crisis and these challenges can mean the difference between a victim living in safety or returning to violence.[11]

- Life insurers also face roadblocks where they attempt to issue a separate policy to a DFV victim. Firstly, the anti-hawking regime (*Corporations Regulation 7.8.21A(1)(j)*) only contains limited exemptions for offering replacement products to the original policy holder. If the victim is not the original policy holder, life insurers can only offer a replacement if the victim requests it; but they may not know this option exists.[12]

Also, as the replacement policy is a new financial product issued to a new retail client, the disclosure exemption dispensing with need for a Product Disclosure Statement (**PDS**) won't apply given the victim was not the previous policy holder. Life insurers must then either create a PDS for a product which has been closed or offer a new policy altogether, potentially subject to underwriting and less favourable terms (post APRA's individual disability income insurance sustainability measures). [13]

- The situation can also be fraught where the policy owner is an abuser and insures their victim's life. Under the current regime this is legal as no insurable interest is required under s18(2) of the *Insurance Contracts Act 1984* (Cth)(ICA).[14]

Perpetrators are known to terrorise their victims with the threat that they will kill them and claim a death benefit on their life. While at common law a person who is criminally culpable for a death cannot receive a benefit [15], this is cold comfort to victims. Also, the insurer's ability to cancel a policy based on such a threat is more questionable.

As such threats are not only criminal and suggest an intent to commit fraud, they may arguably constitute a breach of duty of good faith by the insured, justifying cancellation of the policy - see *AIA Australia Ltd v Richards* where the Federal Court noted that:

'At common law an insurer has the right to cancel a contract prospectively upon the basis of a breach of contract of such a serious nature as the commission of a fraud against the insurer: [16]'

Although case law considers the arguably similar scenario of conspiracy to defraud,[17] it would take a courageous life insurer to attempt it under the current regulatory climate.

Even in cases of murder, there are high burdens of proof for criminal culpability [18] and at times the abuse can be a less direct contributor that goes without detection.

Examples of AFCA death benefit determinations, which see victims' benefits paid to their abusers, while victims are deprived of their abusers' benefits,[19] demonstrate how unawareness of helpful precedents such as *Mayson & Wellard* [20] can perhaps unintentionally fail victims.

- A number of regulations such as ss1017B, D and of the *Corporations Act 2001* (Cth) require life insurers to send policyholders communications, such as annual statements, variation, cancellation and benefit payment notices and significant event notices.

The Australian Securities and Investments Commission (**ASIC**) has helpfully provided relief from the requirement to provide a transaction confirmation under s1017F to the policy owner (*ASIC (Cash Settlement Fact Sheet and Confirming Transactions) Instrument 2022/809*), where an insurer reasonably believes the provision of the confirmation would pose an 'unacceptable risk' of a person experiencing family violence, provided certain other conditions are met.[21]

However, this relief is limited and the prospect of fines currently up to \$782.5M for breaching these sections make the decision not to provide the confirmation fraught for an insurer.

Sadly, DFV victims still bear the risks of their abuser being notified of their location or having an opportunity to interfere with cash settlements when a benefit is paid under a joint policy.

These roadblocks can enable perpetrators to retain insurance over their victims' lives and exert coercive control over them even after they overcome the monumental challenges of physically escaping.

As Zaneta Mascarenhas, Federal Member for Swan and member of the Inquiry, writes:

'By eroding a woman's financial independence, it restricts her choices, limits her freedom, and traps victims in debt or poverty for years. This financial disempowerment is often the very reason many women find it difficult to leave abusive relationships.'[22]

Perpetrators also can, and do, profit from their abuse by taking advantage of the current regimes regulating life insurers and superannuation trustees.

In a recent example, a superannuation fund was required to pay the account balance of a deceased member to her alleged abuser after she committed suicide following years of relentless emotional, sexual, physical and financial abuse at her husband's hands.

While the member had nominated her mother as her beneficiary, under the current regime her abuser was the only eligible superannuation dependent [23] under regulations requiring interdependency, assessed against factors including cohabitation and financial support.[24]

For life insurers, such unfortunate circumstances see insured death benefits flowing to perpetrators via the superannuation release.

This illustrates the real and cruel irony of life insurers/fund trustees having to pay abusers who contribute to the death of their victims. Clearly, measures need to be considered by the industry and government to avoid these outcomes.

Devastating statistics bear out the magnitude of DFV in general. A 2022 WA ombudsman report shows that DFV related suicides accounted for 56% of suicides in women,[25] and DFV is the leading contributor to death and disablement for women aged 18 - 44.[26] The crisis is unrelenting, with one woman dying on average every week in 2024 Australia; [27] and one child every fortnight.[28]

As providers of death and disablement cover, the life insurance industry has an obvious vested interest in being part of the solution.

Areas for improvement & implementation

Some life insurers lead the way with DFV policies, with specialist teams to assess claims, not selling jointly held policies and clear pathways for specialist external referrals.[29] The rest of the industry should consider following suit and it is exciting to see the Inquiry considering legislative change and CALI drafting a best practice guidance note for the industry.

The time is ripe for legislative change, which life insurers can help lobby for, such as:

- Classifying financial abuse as a crime as recommended by Flequity Ventures, [30] so similar support can be offered as for scams.
- Amending the law, including s63 of the ICA, so that joint and cross-owned policies can be cancelled or assigned to the victim or innocent beneficiaries such as children in cases of FDV.

This would require careful consideration to avoid perpetrators exploiting any amendments and recognising that there are valid reasons for cross ownership.

For example, a victim may hold insurance over a perpetrator's life in situations where the perpetrator pays child support. In this way, the children are provided for if the perpetrator can no longer pay child support due to disablement.

- Amending s16 of the ICA and discrimination legislation so that perpetrators can only take out policies covering a victim where there are children to support if the victim passes away and also providing for any death benefit to be paid to an independent trustee for the children.

- Amending the superannuation legislation so that superannuation trustees can release account balances to victims on grounds of DFV and, therefore, aid in their escape.
- Amending ss9 and 9A of the *Life Insurance Act 1995* (Cth) so that DFV is an event constituting life insurance business; to make it very clear that life insurers can innovate to offer solutions such as benefits covering relocation costs due to DFV.

While the industry waits in the hope that the legislative roadblocks will clear, there is plenty we can do to help victims, including:

Following industry leaders with robust DFV policies to support victims by:

- Making sure the safety of customers is paramount with safe and secure access to any online portals and checking contact, address and payment details are up to date before any payments are made (so abusers are not alerted).
- Training all frontline staff in screening and responding to DFV with referral pathways to specialist champions and external supports.
- Targeted wellbeing programs with support including rehabilitation assistance, social work supports and financial advice.
- Enabling easy, covert and non-traceable disclosure of DFV situations 'once and for all' online, allowing communication via online chat and SMS.
- Promoting and enabling easy access to financial hardship assistance.

Designing policies with DFV in mind, such as:

- Including exclusions for any beneficiary who deliberately causes or contributes to death or disablement, such as in cases of DFV; allowing for payment to innocent beneficiaries in the superannuation context, which would also help address elder abuse.
- Including terms providing for separation of joint policies in cases of DFV, such as requiring consent to separation, change of beneficiaries and transfer at the outset.

Influencing the broader community

- By requiring third party services providers, suppliers, ambassadors and sponsored parties to comply with DFV accountability terms. Life insurers can leverage partnerships with the banking, financial advice and health industries in particular, which can play a pivotal role in assisting victims.

Crucially, looking beyond supporting victims, and holding perpetrators to account by considering the following proposals:

- Where abuse is detected, and safe and practical to do so, sending letters requesting that this cease. Where banking customers used payment descriptions to send abusive messages, more than 90% of customers discontinued abuse following a warning letter.[31]
- Where the victim consents and it is safe, reporting the perpetrator to relevant authorities.
- Providing perpetrator customers with access to evidence backed behavioural change programs to help them stop their abuse.

Finally, looking after its own.

As employers of 17,000 people across Australia,[32] the life insurance industry, and employers in general, have a powerful opportunity to combat the issue of DFV in the workforce by:

- Offering their employees the same support as customers.
- Providing DFV leave of at least 14 days to help facilitate escape.
- Holding perpetrators on payroll to account by including express non-commission of DFV clauses in employee codes of conduct and strictly enforcing compliance with behaviour change programs to help perpetrators change their behaviour.

After all, we should stop asking why victims don't leave when they have few real choices, and instead, start asking why perpetrators choose abuse and why they don't stop.

[1] Title makes reference to: Summers, A. (2022). 'The Choice: Violence or Poverty'. University of Technology Sydney. <https://doi.org/10.26195/3s1r-4977>.

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[3] Zaneta Mascarenhas, 'Financial abuse is a touchpoint in the fight against domestic violence', Women's Agenda (Online, 23 August 2024) <https://womensagenda.com.au/latest/soapbox/financial-abuse-is-a-touchpoint-in-the-fight-against-domestic-violence/>.

[4] Kay Harrison, 'Tackling economic and financial abuse linked to domestic and family violence', UNSW Sydney Newsroom (online, 11 January 2023) <https://www.unsw.edu.au/news/2023/01/tackling-economic-and-financial-abuse-linked-to-domestic-and-fam>.

[5] The cost of financial abuse in Australia, Deloitte Access Economics for Commonwealth Bank of Australia, 2022 <https://www.commbank.com.au/articles/newsroom/2022/02/next-chapter-commitment.html>.

[6] Flequity Ventures, 'Enhancing financial safety' Submission no.88 to the Inquiry into financial services regulatory framework in relation to financial abuse June 2024.

[7] Coalition of Australian Life Insurers, Submission no.50 to the Inquiry into financial services regulatory framework in relation to financial abuse, 14 June 2024.

[8] Ibid.

- [9] Financial Rights Legal Centre Submission no.112 to the Inquiry into financial services regulatory framework in relation to financial abuse, June 2024.
- [10] Australian Council of Trade Unions, '10 days paid Family and Domestic Violence leave introduced into parliament after years of union campaigning', (Media Release, 28 July 2022).
- [11] See above n 8.
- [12] See above n 6.
- [14] Ibid.
- [13] Ibid.
- [15] *Swiss Re Life & Health Australia Ltd v Public Trustee of Queensland* (No 3) [2018] FCA 1918 and *Westpac Life Insurance Services Limited v Mahoney* (No 3) [2020] FCA 285.
- [16] *AIA Australia Ltd v Richards* (No 3) [2017] FCA 1069 (11 September 2017) at [65]; *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1; [2003] 1 AC 469 at 498-499 [61]. See also *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45; [2017] AC 1 at 10 [8].
- [17] *Vella v R*; *Siskos v R* [2015] NSWCCA 148 (19 June 2015).
- [18] Though see *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 where an accused was acquitted but nevertheless be found to have committed murder according to the civil standard.
- [19] Super Consumers Australia, Submission no.97 to the Inquiry into financial services regulatory framework in relation to financial abuse, 21 June 2024.
- [20] [2021] FamCAFC 1115.
- [21] Ibid.
- [22] As above, n 3.
- [23] Julie Adams, Submission 104 to the Inquiry into financial services regulatory framework in relation to financial abuse, 6 June 2024.
- [24] Regulation 1.04AAAA of the *Superannuation Industry (Supervision) Regulations 1994* (Cth).
- [25] Ibid.
- [26] Ayre, J., Lum On, M., Webster, K., Gourley, M., & Moon, L. (2016) 'Examination of the burden of disease of intimate partner violence against women in 2011: Final report' (ANROWS Horizons, 06/2016). Sydney: ANROWS. <https://www.anrows.org.au/publication/examination-of-the-burden-of-disease-of-intimate-partner-violence-against-women-in-2011-final-report/>
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- [29] As above n 8.
- [30] As above n 5.
- [31] Catherine Fitzpatrick, 'Banks put family violence perpetrators on notice. Stop using accounts to commit abuse or risk being 'debanked'', 4 July 2023 <https://theconversation.com/banks-put-family-violence-perpetrators-on-notice-stop-using-accounts-to-commit-abuse-or-risk-being-debanded-208575>.
- [32] ANZSIC K6310 'Life Insurance in Australia - Market Size, Industry Analysis, Trends and Forecasts (2024-2029)' IBISWorld August 2023 <https://www.ibisworld.com/au/industry/life-insurance/522/#:~:text=Employees,24%2C853.>