

18 August 2016

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
By email elder_abuse@alrc.gov.au

Dear Ms Wynn

Elder abuse – Issues Paper

The Australian Bankers' Association (**ABA**) welcomes the 'Protecting the Rights of Older Australians from Abuse' inquiry in which the Australian Law Reform Commission (**ALRC**) has been asked to consider existing Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse. The ABA appreciates the opportunity to provide comments on the ALRC *Elder Abuse Issues Paper*.

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Introductory comments

The ABA met with the ALRC on 30 March 2016 and provided copies of previous ABA submissions considering elder abuse.¹ For the purposes of this Issues Paper, and in providing responses to question 25 and 26, the ABA will focus its submission on the financial abuse form of elder abuse.

The ABA recognises that elder abuse is a serious issue for the community with far reaching consequences for individuals and their families. We believe that elder abuse is an issue requiring a partnership response from Government, business and community.

The ABA notes that the financial exploitation of a vulnerable person is a deeply challenging area for the banking and financial services industry. However, banks play a significant role in ensuring adequate safeguards in relation to financial decision making.

With the challenges in mind, the banking industry developed the following industry guidelines on financial abuse (part of the ABA's Financial Abuse Initiative):²

- **Protecting vulnerable customers from potential financial abuse:** As a framework for banks, this industry guideline explains what financial abuse can look like, how it can impact customers and the bank's relationships with their customers, and how banks' staff can respond.
- **Responding to requests from a power of attorney or court-appointed administrator:** This industry guideline explains how these different legal arrangements work across Australia, how they are used by bank customers and

¹ Parliament of New South Wales - Inquiry into elder abuse in New South Wales and Communities, Disability Services and Domestic and Family Violence Prevention Committee - The adequacy of existing financial protections for Queensland's seniors

² <http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>



their substitute decision-makers, and provides a framework for how banks should respond to these arrangements.

This package also contains consumer fact sheets to help raise awareness of financial abuse and provide customers with some tips about how they can protect themselves.

Specific comments

Question 25: What evidence is there of elder abuse in banking and financial systems?

Financial abuse commonly involves family members and/or carers, with the abuse arising within the home or where an older person is resident in an institutional care facility and involving a violation of a relationship of trust.

The ABA does not know the extent of the problem of financial abuse in the community. Our member banks have observed very low numbers of complaints relating to older people, and even lower involving alleged financial abuse. It may be that reports made to community organisations or the police do not result in formal investigation or contact being made with a bank or financial institution, or alternatively, is addressed as an incidence of fraud of a customer, rather than a case of financial abuse of an older person.

Furthermore, the ABA has previously provided the ALRC with seven case studies illustrating experiences for banks in assisting customers that may be subject to financial abuse.

Question 26: What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

Laws and legal frameworks

The ABA has previously raised concerns with various Government inquiries about issues relating to powers of attorney, for example, the difficulties in verifying the authenticity and currency of powers of attorney, the lack of harmonisation of laws and instruments across jurisdictions, and the lack of a national register.³

Since this time, our member banks have noted an increased use of formal arrangements and the number of substitute decision making instruments being presented by third parties. This includes power of attorney appointments and appointments of financial managers by the relevant State Civil and Administrative Tribunal. The industry is concerned that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.

Therefore, the ABA suggests that the following changes should take place to ensure the interests' of the older population are better protected:

- Formal arrangements should be consistent and uniform across jurisdictions. The laws in each jurisdiction are broadly similar, however, there remain differences that our members, customers and their substituted decision-makers are required to understand.⁴ These differences cause unnecessary complexity and contribute to unnecessary business costs, including training for staff and communications for customers. Additionally, it can cause other risks where lack of awareness about the specific instrument could result in inappropriate application and/or powers being exceeded, or alternatively, expectations not being met with regards to the use of the instrument. As part of this, the ABA believes increased education for attorneys and

³ Inquiry into Older People and the Law conducted by the House of Representatives Standing Committee Legal and Constitutional Affairs.

⁴ For example, the laws across the States and Territories may have different names for different powers, and different formats, capacity testing, witnessing and execution processes (e.g. the instrument may or may not need to be registered with the appropriate State or Territory agency to take effect).



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financial managers about their duties and obligations under the appointment document, as well as relevant legislation would be beneficial for all parties.

- Formal arrangements should be recognised across jurisdictions and be transferrable without the need for new arrangements to be put in place in each relevant jurisdiction. Mutual recognition of instruments will provide ease of process for customers who move interstate and eliminate uncertainty with the use of instruments.
- Formal arrangements should be registered, including any revocation of the arrangement so that banks (and other financial institutions, organisations, companies and service providers) can more easily establish the authenticity and currency of the instrument.

Imposed reporting requirements

The ABA does not support a mandatory reporting approach. The primary concern for the banking industry is the risk of disrupting a trusted relationship and further disempowering a vulnerable customer.

It can be very difficult for bank staff to know whether or not an older person is:

- Making a voluntary and independent decision
- Being influenced by a third party
- Acting under duress, or
- Lacking capacity.

There may well be a legitimate and valid reason for the way something is happening and to report that could actually invade that relationship of trust and destroy it unnecessarily, because of a mere suspicion. A mandatory reporting approach could also give rise to claims against in circumstances where financial abuse was occurring but was not detected and/or reported by the bank.

Banks can play an important role in recognising potential financial abuse. However, as noted in the Issues Paper, legal obligations including privacy laws and anti-discrimination laws as well as obligations of confidentiality and concerns about possible actions in defamation provide challenges for banks in reporting suspected financial abuse.

Although the ABA does not support mandatory reporting, the industry would like to see the establishment of clear reporting guidelines for banks to follow if a bank chooses to report what it believes to be suspected financial abuse as well as a government body to which banks can report suspected financial abuse, and statutory immunity for banks choosing to report suspected financial abuse. The terms of any statutory immunity would need to be carefully considered as banks could be exposed to allegations that a report of suspected financial abuse was not made in good faith or reasonable.

Conclusion

The ABA recognises that Australia's changing demographics, such as the ageing population, presents a number of challenges for Australia in terms of government, business and community service delivery now and into the future.

In summary, the ABA believes this will involve a comprehensive and coordinated approach involving the following:

- Whole of Government and community response coordinating efforts across Australia.
- Advocating for the Australian Government to harmonise laws, develop a national register for formal arrangements, and develop nationally-recognised instruments.



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- Improved information and education, including a national community awareness campaign.

The ABA looks forward to the outcomes of the Issues Paper and further consultation on the Discussion Paper.

If you have any questions, please contact Lena Rizk, Policy Manager – Retail Policy on (02) 8298 0419; Lrizk@bankers.asn.au

Yours sincerely

A handwritten signature in black ink that reads "Diane Tate". The signature is written in a cursive, flowing style.

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