**The Illusion of Protection: Why Reform is needed to ensure the Elderly are Free from Abuse**

6000LAW Law Reform

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**Submission in response to the inquiry into elder abuse**

This submission examines the role financial institutions play in the identification and management of elder financial abuse. It is concluded that the current regulatory framework operates ineffectively and does not provide adequate protection. This submission advocates a preventative approach and recommends that the development of training protocols, reporting procedures and a national awareness campaign is necessary.

Table Of Contents

1.0 Introduction 3

2.0 Scope of Submission 4

3.0 Definitional Limitations 5

4.0 Current Regulatory Framework 7

4.1 Code of Banking Practice 7

4.2 Office of the Public Advocate and Enduring Power of Attorney 8

4.3 Privacy Law 9

4.4 Confidentiality 10

4.5 Banker-Customer Relationship 11

4.6 Defamation 13

4.7 Current Liability 14

5.0 Recommendations 15

Legislative Reform 15

5.1 Mandatory Reporting Scheme 15

Policy Reform 18

5.2 National Training Program 18

5.3 Community Awareness Program 20

6.0 Conclusion 22

7.0 References 23

# 1.0 Introduction

1.1 This submission is made by four Griffith University students in their final year of study participating in a Law Reform subject. It responds to the terms of reference in the Australian Law Reform Commission Inquiry into protecting the rights of older Australians from abuse. The submission focuses on the role that financial institutions can play in preventing financial elder abuse at first instance.

1.2 We recognise that the current regulatory framework operates ineffectively and leaves banks without sufficient incentive or protection to report financial elder abuse. While recourse is available to victims, it is ineffective in light of the complexity of elder financial abuse and the general reluctance of victims to pursue legal action against their abusers.

1.3 Due to these factors, we have adopted a preventative approach to reform. We advocate for a reform package that combines the development of both legislative and policy reform. The need for a multi-faceted approach is emphasised in order to provide the utmost protection for the elderly people.

**1.4 Recommended Reforms:**

* Mandatory Reporting Scheme
* National Training Procedures
* National Education and Awareness Program.

# 2.0 Scope of Submission

2.1 This submission focuses on the expectations that should be placed on financial institutions to ensure their customer’s transactions are free from abuse. Financial institutions have the ability to act as a first line of defence by identifying the abuse at the outset. Preliminary identification of financial abuse allows for intervention before the elder person’s assets have dissipated.[[1]](#footnote-1)

2.2 Banks have the capacity to identify a number of behaviours that indicate financial abuse such as unusual volumes of banking activity, inconsistent banking practices, sudden increases in debt, or withdrawals by a third party that do not have an apparent benefit to the elderly person.[[2]](#footnote-2) Most cases of financial abuse involve the abuse of bank accounts, which can only occur with the cooperation of financial institutions.[[3]](#footnote-3)

2.3 This submission outlines the current legal framework surrounding financial elder abuse, especially in regards to the potential liability of financial institutions. Following an analysis of the current liability framework, a combination of legislative and policy reforms are recommended.

2.4 In doing so, we have frequently referred to the reports identified in the Attorney General’s Terms of Reference, however we have also had recourse to a diverse range of other materials.

# 3.0 Definitional Limitations

3.1 The prevalence of elder abuse can appear varied based on the interpretation given to the terms ‘elder’ and ‘abuse.’[[4]](#footnote-4) Most research qualifies individuals either 60 or 65 years and over as elderly, though individual differences exist in terms of aging and subsequent vulnerability.[[5]](#footnote-5) The most common definition is a person over 60-65 years of age.[[6]](#footnote-6)

3.2 The World Health Organisation (WHO) defines ‘elder abuse’ as an act, or lack of appropriate action, by a person in whom an older person has placed an expectation of trust that causes them distress.[[7]](#footnote-7) They recognise financial abuse as the illegal or improper exploitation or use of funds or resources that belong to an older person.[[8]](#footnote-8)

3.3 The WHO definition presents a challenge in separating legitimate financial elder abuse from decisions that, while unwise, are legitimate decisions that instead simply amount to poor financial management rather than a calculated and deliberate attempt to misappropriate the funds.[[9]](#footnote-9)

3.4 A number of factors such as generational, attitudinal and cultural differences affect the perception of financial abuse in a familial context.[[10]](#footnote-10) Family members may believe they are entitled to funds they are improperly using, often viewing their behaviour as advancing what they will inherit, or assuming elderly relatives do not need the money.[[11]](#footnote-11)

3.5 The Banking and Financial Services Ombudsman (BFSO) made an extensive list of possible examples of financial exploitation that occur among the elderly population, amounting to financial elder abuse.[[12]](#footnote-12) These include:

* Forging or forcing an older person’s signature or misleading them about what they are signing, including blank withdrawal forms;
* Cashing an older person’s cheque without permission or authorisation or withholding portions of the cheque funds;
* Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence;
* Using a Power of Attorney in a way contrary to the interests of the donor or for direct personal gain;
* Pressuring an older person to take out a loan or a product which is not for their benefit – for example a shared equity loan or a reverse mortgage to pay for a relative’s debts or expenses;
* Managing, without permission or legal authority, the finances of a competent older person.

# 4.0 Current Regulatory Framework

4.01 Most cases of financial abuse involve the abuse of bank accounts, which can only occur with the cooperation of financial institutions.[[13]](#footnote-13) Under the current regulatory regime, banks are not offered adequate protections and obligations relating to the reporting of financial elder abuse.[[14]](#footnote-14) Financial institutions are incentivised to turn a ‘blind eye’ as opposed to exercising cautious concern due to the difficulties associated with reporting financial elder abuse.[[15]](#footnote-15)

4.02 Financial institutions have a choice between alerting customers of potential abuse and creating potential liability for themselves, or instead opting not to get involved in family controversies.[[16]](#footnote-16) Banks have a tendency to adopt a more conservative line in decision-making, however, not acting to inform clients of suspected abuse could potentially create liability for an action in negligence.[[17]](#footnote-17)

4.03 Elder abuse raises unique obstacles to prevention, particularly for policing, judicial and health systems given the hidden nature of the abuse.[[18]](#footnote-18) In addition, a combination of a need for evidence and the impact of family attitudes have resulted in low levels of prosecution against offenders.[[19]](#footnote-19) Below we have detailed the important elements of the current regime in order to illustrate the current gap in the law.

## 4.1 Code of Banking Practice

4.1.1 The Code of Banking Practice is a voluntary instrument that governs what constitutes good banking practice.[[20]](#footnote-20) Most Australian banks have adopted the Code, though some have done so on a conditional basis.[[21]](#footnote-21) No provisions of the Code impose specific positive obligations on financial institutions to identify or report instances of abuse.[[22]](#footnote-22)

4.1.2 The Code of Banking Practice could potentially imply a duty to report suspected abuse.[[23]](#footnote-23) Paragraph 6 within the Code dictates that elderly and disabled customers require the banks to take reasonable measures to enhance access to transition services. While there is an arguable point that this implies the need for banks to report suspected abuse, this is not the preferred interpretation as the paragraph was intended to address the difficulties of physically accessing technology such as ATMs, telephone and Internet banking.[[24]](#footnote-24)

4.1.3 The Code has further general provisions that could be construed as covering financial elder abuse. These include the duty to act fairly and reasonably, comply with the law, exercise due care and skill in the offering or giving of credit, and that the bank refrain from accepting a person as a co-debtor where it is clear they do not stand to benefit.[[25]](#footnote-25)

4.1.4 The result of these provisions in relation to financial elder abuse may achieve the following:

* A duty to investigate an apparently valid mandate where a withdrawal is made by an elderly customer who is accompanied by, and directly influenced by, a carer or family member;
* A bank may not be exercising the requisite level of care if it lends to an elderly customer in circumstances involving abuse and limited capacity to repay the loan;
* A bank may have to refrain from accepting an elderly person as a co-borrower where the elderly person’s child receives the direct and only benefit.[[26]](#footnote-26)

4.1.5 The Code fails to impose specific positive obligations.[[27]](#footnote-27) However, it does serve to reinforce the existing legal obligations of banks, and arguments have been raised that they could foreseeably undergo an expansion to cover financial elder abuse.[[28]](#footnote-28)

## 4.2 Office of the Public Advocate and Enduring Power of Attorney

4.2.1 There is an increased vulnerability for the elderly when they are subject to an Enduring Power of Attorney or Administration Order. The Office of the Public Advocate (OPA) plays a role in responding to this risk.[[29]](#footnote-29) An Enduring Power of Attorney (financial) allows a Donor to appoint another person to have the power to make financial and legal decisions on their behalf, and unless revoked, continues after the Donor has lost the capacity to make these decisions independently.[[30]](#footnote-30) While useful instruments, they do not provide a guarantee against abuse and are highly susceptible to misuse through a lack of formal monitoring and reporting structure.[[31]](#footnote-31)

4.2.2 There are also informal relationships of trust that are a potential source of financial abuse for older members of communities, which actually outnumber those receiving formal assistance.[[32]](#footnote-32)

4.2.3 The OPA has the power to investigate and intervene in cases of exploitation, neglect and abuse of people who have a disability. The OPA can respond to financial elder abuse through investigations or raising it at tribunals.[[33]](#footnote-33) Donors can also apply to have conduct investigated or audited after which recommendations or alterations can be made.[[34]](#footnote-34)

4.2.4 There is a barrier to reporting suspected abuse due to concerns regarding the upholding of privacy and confidentiality obligations on the part of financial institutions.[[35]](#footnote-35) The capacity of the OPA to investigate does not sufficiently compel or encourage reporting, though there is an argument that there is a public duty to disclose the abuse.[[36]](#footnote-36)

## 4.3 Privacy Law

4.31 Privacy law becomes relevant where a financial institution seeks to disclose the personal information of a customer to a third party, such as to report suspected abuse. The *Privacy Act 1988* (Cth) regulates the handling of ‘personal information,’ which is defined as,

“Information or an opinion … whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.”[[37]](#footnote-37)

The Act also regulates how credit providers disclose personal information contained in ‘reports.’[[38]](#footnote-38)

4.3.2 The National Privacy Principles potentially apply where financial institutions seek to disclose personal information about customers to a third party where they suspect financial abuse.[[39]](#footnote-39) Any perceived vulnerability or abuse identified in the ‘opinion’ of the financial institution or its staff about an elderly customer would be ‘personal information’ when disclosing that information to a third party.[[40]](#footnote-40)

4.3.3 National Privacy Principle 2 relates to ‘use and disclosure’ and dictates that an organisation must not use or disclose personal information for a purpose other than the primary purpose of collection, unless an exception applies.[[41]](#footnote-41) The possible exceptions are that the disclosure is a permitted related purpose, prior customer consent is obtained, it is due to the reporting of suspected unlawful activity, it is required or authorised by law, or if the disclosure is to an enforcement body and relates to criminal activity.[[42]](#footnote-42) The consequences of a breach include the Privacy Commissioner declaring that a privacy complainant is entitled to compensation.[[43]](#footnote-43)

4.3.4 While in some cases an exception can apply, this can only be determined on a case-by-case basis.[[44]](#footnote-44) Under the current Australian privacy framework, financial institutions have a positive obligation not to breach privacy laws but do not have any clear protection from liability for disclosing a customer’s personal information to third parties when reporting suspected cases of abuse.[[45]](#footnote-45)

## 4.4 Confidentiality

4.4.1 In addition to the voluntary obligations a bank may owe under the Code of Banking Practice, banks owe obligations of confidentiality to their customers. Confidentiality is also reinforced under consumer protection laws within the *Australian Securities and Investments Commission Act 2001* (Cth) (“ASIC Act”).[[46]](#footnote-46)

Implied Contractual Duty

4.4.2 The relationship between a bank and its customer is contractual.[[47]](#footnote-47) However, imparted into this relationship is a common law duty of confidence. It is founded on the expectation that banks will keep their customer’s personal and financial information secret.[[48]](#footnote-48) Concerns have been raised that by reporting suspected financial elder abuse, a bank opens itself to liability regarding breach of confidentiality.

4.4.3 Only four exceptions are available as a defence to a possible breach of confidence. These include:

1. Disclosure compulsory under law;
2. Public duty to disclose;
3. The bank’s interests require disclosure; or
4. The disclosure is made with express or implied consent from the customer.[[49]](#footnote-49)

4.4.4 It is likely that banks would be able to rely on a defence under at least one of the above, particularly exceptions two, three and four.[[50]](#footnote-50) However, the possibility of liability under the bank’s contractual duty to its customer does not aid in incentivising reporting.[[51]](#footnote-51)

Equity

4.4.5 Financial institutions must also be mindful of their equitable duty stipulating that a person who receives information in confidence shall not take unfair advantage of it.[[52]](#footnote-52) In the case of financial elder abuse, this would require unauthorised use of confidential information, combined with said use being detrimental to the elderly customer.[[53]](#footnote-53)

4.4.6 While authorised use is generally restrained to the purpose for which the information was disclosed, which would exclude the purpose of reporting suspected abuse, there is some authority to suggest that public safety can be taken into account.[[54]](#footnote-54) However, it is considered more likely that the reporting of suspected abuse would constitute an unauthorised disclosure unless the bank has obtained prior consent. This creates an additional source of potential liability for banks that de-incentivises taking action against suspected abuse.[[55]](#footnote-55)

Electronic Funds Transfer Code of Conduct, ASIC Act, Banking and Financial Ombudsman Scheme

4.4.7 There is additional legislation that reinforces the obligations of banks to protect customer confidentiality.

4.4.8 The Electronic Funds Transfer (EFT) Code of Conduct requires participating institutions to protect consumer privacy.[[56]](#footnote-56) The ASIC Act prevents unconscionable conduct in relation to financial services.[[57]](#footnote-57) It also requires that banks promote the protection of consumer interests generally.[[58]](#footnote-58)

4.4.9 ASIC also offers the Banking and Financial Ombudsman (BFSO) self-regulatory scheme, which provides an independent service for banking customers to report complaints about their banks, which could foreseeably include circumstances where banks either wrongly suspected, or failed to report, financial elder abuse. This fails to provide a positive obligation for banks to reports suspected abuse.[[59]](#footnote-59)

4.4.10 The ASIC Act prevents unconscionable conduct in relation to financial services.[[60]](#footnote-60) The BFSO regulatory scheme is monitored by ASIC and provides an independent way to address the complaints of banking customers.[[61]](#footnote-61) It is at the bank’s discretion as to whether they will adopt this. The BFSO is of the opinion that it is arguably in the bank’s best interests to disclose confidential information where fraud is a real possibility.

## 4.5 Banker-Customer Relationship

4.5.1 While the relationship between a banker and a customer is inherently contractual, there is potentially a fiduciary duty that arises in some circumstances. These include lending or guarantee transactions or where the bank advises customers on the merit of particular transactions.[[62]](#footnote-62)

4.5.2 A test for fiduciary relations has been described in *Timms v Commonwealth Bank of Australia*[[63]](#footnote-63) as:

‘Whether the bank has, by its actions, engendered in the customer an expectation inconsistent with the bank’s acting in its own interests to protect its position as lender. Such an expectation may arise where the customer may fairly take it that to a significant extent his interest is consistent with that of the bank in financing the customer for a prudent business venture.’

4.5.3 More recently it was reaffirmed in *Finding v Commonwealth Bank of Australia*,[[64]](#footnote-64) that the ordinary relationship between banks and customers is not fiduciary in nature, unless the circumstances give rise to a fiduciary relationship.

4.5.4 Depending on the circumstances of the case, a bank’s duty to act on suspicious behaviour may outweigh its duty to carry out a customer’s valid mandate. The BFSO highlights that conflicts of duties may be prevalent where there is tension between a bank’s obligation to make payment on a customer’s unambiguous written order, and their duty to question an apparently valid mandate.

4.5.5 On the one hand, under its contractual duties, a bank must repay the customer on the customer’s mandate. However, on the other hand, the bank has a duty to ensure reasonable care is exercised when carrying out that mandate, such as questioning the validity of the order.

4.5.6 The BFSO made suggestions that the bank officers are not expected to be ‘detectives’ and can make the prima facie assumption that unless otherwise proven; they are dealing with honest people. However, they must not turn a blind eye where evidence indicates that there is a serious possibility of fraudulent activity. The complexity of the situation for financial institutions to identify potential fraudulent behaviour and question a suspicious yet valid mandate causes banks to act cautiously when doing so. This may result in less challenges from the banks to possible cases of abuse, thus less abuse is identified.

4.5.7 The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) stipulates that the banks are required to verify the identity of anyone operating an account, including representatives and powers of attorneys. The generalisation is that a bank must assume they are dealing with honest people, however it is common for them to require an additional signatory to ensure maximum protection is upheld.

## 4.6 Defamation

4.6.1 The issue of defamation as a basis for legal action against financial institutions arises where a false allegation of abuse is publicised or communicated to a third party.[[65]](#footnote-65) The test for establishing a publication is an objective one and looks to whether the publication would have been likely to cause a reasonable person to have thought less of the plaintiff.

4.6.2 Financial institutions can be found liable for defamation if they make an incorrect allegation of abuse, which subsequently causes damage to the accused person’s reputation. When making allegations of abuse, banks must be cautious, so as to avoid giving rise to an action in defamation. There are, however, a number of defences that are available for banks should they face a defamation charge.

4.6.3 A defence of honest opinion is available where the defendant is able to demonstrate one of the following three circumstances:

* That the material published was an expression of opinion rather than a statement of fact, that it is related to public interest, and the opinion is based on proper material;
* That the matter was an expression of opinion by an employee or agent of the defendant rather than a statement of fact, it was a matter of public interest and the opinion is based on proper material;
* The matter was an expression of opinion of a person (commentator) other than the defendant rather than a statement of fact, it was a matter of public interest and the opinion is based on proper material.[[66]](#footnote-66)

4.6.4 Therefore the defence of honest opinion would be available to financial institutions in cases where the matter was an expression of opinion by an employee or agent of the bank. Further, the employee expressed their opinion on the materials provided and found that the client was acting fraudulently.

4.6.5 A defence of qualified privilege may be available where it was necessary to make defamatory statements in order to properly discharge the financial institution’s legal, social or moral obligations.[[67]](#footnote-67) This defence is the most pertinent to the banker-customer relationship.[[68]](#footnote-68)

4.6.6 The defence of qualified privilege is a strong defence for financial institutions, provided the information has only been communicated to another directly for business purposes. Where a bank officer suspects fraudulent activity, it is their duty to report such findings. Where procedures are followed and the person/s to whom the information was communicated to had a duty to receive such information, there is a strong defence.

4.6.7 To ensure protection against liability for defamation, financial institutions should endeavour to take care when reporting suspected financial abuse. This should not stop financial institutions from reporting such abuse; however they should ensure that any information reported about possible abuse/fraudulent behaviour is substantially true and based on valid material.

## 4.7 Current Liability

4.7.1 This submission has examined a variety of instruments in operation, which require financial institutions to ensure that their customers make financial decisions free from fraud. These include the Code of Banking Practice, the ASIC Act and the common law duties that govern contractual relationships between banks and their customers. However, none of these instruments place positive obligations on the financial institutions to identify possible instances of elder financial abuse, nor do they make the banks accountable if they fail to report the transaction.

4.7.2 Whilst a duty to ensure clients are free from financial abuse could be implied in the Code of Banking Practice, the Code is a merely a voluntary instrument. Further, those banks that have adopted the Code are hesitant to report suspected instances of abuse for fear of legal action being commenced against the bank for breaches of privacy or defamation. The *Privacy Act[[69]](#footnote-69)* does allow for disclosure in instances required by law, for example criminal activity. However, it does not specifically state that disclosure is permitted where there is suspected instances of financial abuse of an elderly person.

4.7.3 Financial institutions can be held liable where they have failed to ensure their customer’s banking activities are free from abuse. However, given the complex nature of elder financial abuse, most victims are hesitant to report abuse and do not wish to pursue legal action against their abusers for a number of reasons. This includes the fact many victims do not know they are being abused, and in instances where they do, they are not aware of the support available to them and lack the desire, capacity and opportunity to report the abuse.[[70]](#footnote-70)

4.7.4 It is concluded that whilst a regulatory framework is in place, there is no legislation or policies developed at a national level, which impose positive obligations on financial institutions to report and manage financial abuse. Given the complex nature of elder financial abuse and the general reluctance for victims to pursue legal action against their abusers, legislative and policy reform is required to ensure that victims are protected at the outset from abuse. Therefore a preventative approach to reform is recommended, in particular the development of national training protocols, a procedure for reporting abuse and the roll out of a national awareness campaign.

# 5.0 Recommendations

## Legislative Reform

### 5.1 Mandatory Reporting Scheme

5.11 In order to address the shortcomings of the current regulatory framework in Australia, regard must be had to both voluntary and mandatory reporting schemes developed internationally.

5.12 The United States and Canada are both international jurisdictions that have implemented long-standing and pre-existing expatriate schemes. In the United States, forty-two states require mandatory reporting, while the remaining states have voluntary reporting laws.[[71]](#footnote-71) It is recommended that for an effective implementation in Australia, a balance between these two systems must be struck.

5.13 California’s mandatory reporting has highlighted the role banks play in elder financial abuse. Legislation has been developed to outline the obligations of reporting suspected abuse.[[72]](#footnote-72) The *Financial Abuse Reporting Act* § requires employees of banks and credit unions to report any suspected financial elder abuse to adult protective services. In certain circumstances the Act mandates a report to law enforcement.[[73]](#footnote-73)

5.14 In the case of mandatory reporting, the correct identification of the abuse is paramount. The legislative framework requires front line banking associates to undertake compulsory training programs.[[74]](#footnote-74) This training helps associates effectively recognise abuse and most importantly creates familiarity with reporting processes.[[75]](#footnote-75)

5.1.5 The legislative framework within California defines what is deemed to be ‘suspect’ elder abuse for identification purposes. The Act states that when a bank employee encounters,

“…Behaviour or a transaction/s that would lead a person with similar training to form a reasonable belief that an elder is a victim of financial abuse then they are held liable to report such behaviour and the corresponding transactions.” [[76]](#footnote-76)

Employees are required to report the behaviour as soon as practicable via telephone reporting.[[77]](#footnote-77) Following the phone call, a written report must be provided to adult protective services or law enforcement agencies within two working days.[[78]](#footnote-78)

5.1.6 The mandatory reporting schemes stipulate that failure to report suspected abuse will result in the financial institution being held liable. This remains controversial due to severe consequences for the employee.[[79]](#footnote-79) If found liable, the banking employee’s practising rights could be restricted as well as disciplinary action being taken.[[80]](#footnote-80)

5.1.8 Canada has implemented a different scheme to respond to elder financial abuse, known as Saskatchewan system.[[81]](#footnote-81) The model provides financial institution with the authority to contact the elder before processing a transaction provided the customer has signed the appropriate documentation.[[82]](#footnote-82) The financial institution and its employees are then capable of monitoring accounts and transactions and have the obligation to contact the elder should any transactions raise concern.[[83]](#footnote-83) The system also provides authority for the financial institution to report suspect transactions to the appropriate authorities.[[84]](#footnote-84)

5.1.10 To implement a mandatory reporting scheme in Australia, the establishment of a separate body would be required similar to the Adult Protective Services body in California.[[85]](#footnote-85) This paper does not support such a creation, due to the funds required to establish the organisation and provide investigative resources. This submission suggests such funding would be better focused on training and community awareness.

5.1.11 In order for an Australian reporting system to be successful, a balance must be reached between the voluntary and mandatory reporting schemes. There are currently government agencies that could be vested with additional powers to manage the influx of reporting of abuse.

5.1.12 This submission suggests that a threshold test would be the most appropriate solution in creating a quasi-mandatory scheme. This would involve imposing obligations on financial institutions to report transactions over a certain amount rather than in every suspected instance.

5.1.13 A dollar figure would not adequately account for the differences in individual wealth of the elderly person, therefore a threshold based upon a percentage of an individual’s net worth provides a solution. It is that the threshold for triggering a mandatory report be placed at 20% of the net worth of an elderly customer. Transactions that fall under the trigger threshold need only be reported if the financial institution and its trained employees suspect elder abuse. The financial institutions would be required to report these transaction/s to the external body to ensure adequate and impartial investigations.

5.1.14 When a report has been made, the suspect transaction has often already been processed and the funds allowed to pass through the accounts. Elders are often reluctant to take further action after the fact for a variety of reasons. This highlights the need for financial institutions to hold or pend transactions until the outcome of the reporting process has been finalised.

5.1.15 Following the implementation of a mandatory scheme in Australia, it is recommended an additional power to pend suspect transactions be afforded to financial institutions. This power would allow the bank to suspend transactions until a determination of suspected abuse is reached via the reporting process. This would eliminate the need for civil proceedings to recover funds that have been taken by way of abuse, effectively removing the responsibility of the victim to take action. The effectiveness of such a scheme relies on the premise that given financial institution employees are often the first to encounter these transactions they are in the best position to identify and manage the abuse.

5.1.17 This submission argued that the greatest issue with respect to financial elder abuse is the lack of positive obligations imposed on financial institutions to identify, manage and report suspected instances of abuse. It is recommended that a quasi-mandatory reporting scheme be introduced in Australia to ensure not only that banks are obligated to make such reports but they are also protected from potential liability of improper disclosure. It is further recommended that financial institutions be afforded additional powers to place transactions on hold pending investigation of the alleged abuse by an external body. Theoretically this practice would minimise the need for the victim of abuse to take legal action to recover dispersed funds.

## Policy Reform

### 5.2 National Training Program

5.2.1 A collective model of reform is recommended, including both legislative and policy reform. In the form of policy reform, the development of a national training program is required. Further, it is recommended the Australian Government introduce a national education campaign to ensure potential victims of abuse and the general population are aware and educated on the issue of elder abuse.

5.2.2 Central to the notion of reporting abuse is the preliminary identification of such abuse. This submission has recommended a mandatory reporting scheme, however for such a scheme to work effectively, banking employees require the skills to identify the abuse. Therefore it is recommended that national training protocols be developed. This will ensure that employees are prepared to identify the ‘red flags’ of abuse, thus increasing their confidence in reporting.

5.2.3 The Western Australian Government has been working with the banking and financial sector to discuss how the Government can aid recognition and subsequent response to situations of abuse.[[86]](#footnote-86) The financial institutions that cooperated indicated that introducing training of this type would be far too difficult at a state level and thus advocated the need for a consistent national approach.

5.2.4 In California, legislation has been introduced which imposes compulsory reporting obligations on banking and financial staff. They are required to report any suspected cases of financial abuse, which are subsequently investigated by adult protective services.[[87]](#footnote-87) The focus in the North American jurisdiction has been on the development of training resources for the staff of financial institutions to enable them to identify and subsequently report instances of financial elder abuse.

5.2.5 Massachusetts has had training protocols in operation for banking staff since 1996.[[88]](#footnote-88) The training program has been developed collaboratively with community organisations, government, adult protective services and the Attorney General’s office. The program has trained over 2,000 bank personnel and distributed 1,900 trainer reference manuals and 3,000 employee training manuals.[[89]](#footnote-89) The program provides financial institutions with a protocol to follow and has now become a national model.[[90]](#footnote-90) The training model has allowed for early intervention and reporting of suspected and actual abuse. A good example of the success of the program was an instance where a customer service representative was able to intervene on an occasion where a senior citizen was about to transfer $3,700 to cover the taxes on a supposed $100,000 cash prize that she received notice of over the telephone.[[91]](#footnote-91) Whilst this is merely one example, it is an instance that shows how the implementation of standardised guidelines can help the prevention of financial abuse of the elderly.

5.2.6 In the BFSO Bulletin on financial abuse, the Ombudsman analysed the main components of the North American training resources.[[92]](#footnote-92) The Ombudsman believed the training resources would be relatively easy to adapt for the Australian banking environment and forms a useful basis for the development of a training template.[[93]](#footnote-93)

5.2.7 Whilst training resources implemented in North American detailed how to identify common ‘red flags’ of financial abuse, much of the resources focused on developing a clear response protocol for acting on concerns.[[94]](#footnote-94) It is recommended that in the adaptation of the North American training protocol to an Australian banking context, a clear response protocol should be developed. This allows financial institution staff to follow a clear procedure when they suspect financial abuse has occurred or is disclosed to them. The procedure should detail who has the authority to make decisions, whom the abuse should be reported to and when.[[95]](#footnote-95) Further, a clear documentation procedure should be developed to ensure the most accurate information is recorded and capable of being referred onwards, in the instance of third party reporting.

5.2.8 The complex and hidden nature of elder financial abuse makes instances of abuse difficult to identify to the untrained eye. Financial institutions are well positioned to witness instances of abuse as most forms of financial abuse occur by misuse of bank accounts.[[96]](#footnote-96) The development and implementation of a national level training program would equip staff with the knowledge and skills to identify abuse at the outset and by that notion work as a preventative measure.

## 5.3 Community Awareness Program

5.3.1 The current poor identification and management of elder financial abuse stems from a lack of education and awareness of the issue.[[97]](#footnote-97) In the Inquiry Report Older people and the Law,[[98]](#footnote-98) the committee recommended the implementation of a National Education and Awareness Program similar to that of the Domestic Violence Awareness Campaign.[[99]](#footnote-99) It was suggested the program should focus on both older people vulnerable to financial abuse and potential abusers.[[100]](#footnote-100)

5.3.2 The successes of primary prevention programs are often difficult to quantify.[[101]](#footnote-101) The Australian Institute of Family Studies published a report; “Reflecting on the Current State of Primary Prevention in Australia”[[102]](#footnote-102) where particular Domestic Violence Campaigns were evaluated. Community-based education programs attempt to prepare people with the knowledge and skills they may need when they are transitioning into different types of relationships for example motherhood.[[103]](#footnote-103) The “Baby Makes 3” Program focused on promoting equal relationships during the transition to parenthood and was assessed as readily replicable and easily integrated into existing maternal child health services.[[104]](#footnote-104)

5.3.3 The Australian Government also experienced success from the implementation of the “It’s Not Our Game” community action campaign. The campaign focused on the Normanton Stingers AFL club who imposed strict player sanctions for involvement in domestic violence.[[105]](#footnote-105) The campaign was linked to a reduction in domestic violence incidents, including a 64% reduction in breaches of domestic violence orders.[[106]](#footnote-106)

5.3.4 The Canadian Government introduced an awareness campaign in 2009 focusing on educating the public on elder abuse.[[107]](#footnote-107) The advertising program; “Elder Abuse- It’s Time to Face Reality”[[108]](#footnote-108) aired on television and included print and online components.[[109]](#footnote-109) The Canadian Government examined the effectiveness of the program, resulting in a 2011 public opinion survey indicating the campaign had significantly increased awareness of elder abuse among Canadians.[[110]](#footnote-110)

5.3.5 Despite the challenges in evaluating community education and awareness programs, there is evidence to show they are effective. In 2005, Donovan and Vlais[[111]](#footnote-111) conducted a review of Australian and international social marketing and education campaigns and specified a number of important components that should be included. They advocated the need for a comprehensive theoretical foundation of the programs. Following this, the implementation of an Elder Abuse awareness program should address the theoretical reasons behind financial abuse and how it occurs in the familial context.

5.3.6 The Australian campaign, “Violence Against Women- Australia Say No” included a new domestic violence hotline in the rollout of the campaign[[112]](#footnote-112). Similarly, an abuse hotline for both victims and potential perpetrators of elder financial abuse could be developed and implemented. Another component of a successful campaign is a method of continued monitoring and evaluation to determine how well the material is accepted by the public.[[113]](#footnote-113) Strong evaluation procedures were a key element of one of the most successful domestic violence awareness campaigns conducted by the Soul City non-government organisation in South Africa.[[114]](#footnote-114)

5.3.7 The implementation of an Elder Abuse Awareness campaign in Australia should include a component focusing on the education of older adults. WHO reported that around 26% of countries worldwide have taken steps to implement such programs.[[115]](#footnote-115) Many of these include the provision of information with the purpose of assisting older adults in understanding financial issues and their legal rights.[[116]](#footnote-116) This component of the campaign focuses on individual empowerment stemming from better education and awareness.[[117]](#footnote-117)

5.3.8 Financial abuse of the elderly is complex in nature and generally hidden in familial relationships. Central to the understanding of such abuse is the requirement of education. Similar to that of the “Violence against women, Australia says no” campaign, it is recommended that the Australian Government rollout an education campaign relating to elder financial abuse. Such a campaign can educate the general public about elder abuse and also educate Older Australians so they can better understand their legal rights relating to their financial decisions. The desired result of such a campaign would be individual empowerment of those susceptible to abuse and an increased awareness among the Australian public.

# 6.0 Conclusion

6.1 This submission examined the role financial institutions play in the identification and management of financial abuse of the elderly. The current regulatory framework surrounding financial institutions was examined, and it was concluded that whilst recourse was available for victims of financial abuse, the framework did not operate effectively. This was largely due the complex nature of elder financial abuse and the general reluctance by victims to pursue legal action against their abusers, who in most instances were family members.

6.2 Therefore, a preventative approach to elder financial abuse was recommended with a focus placed on the development of a **mandatory reporting scheme,** which places positive obligations on the financial sector to identify and report abuse. To complement such a scheme, it was recommended that **uniform training protocols** be implemented at a national level along with the rollout of an **education and awareness campaign.**

6.3 Whilst three separate reforms have been suggested, a combination of all in the form of a **best practice approach model** is required to ensure the best protection of society’s vulnerable from financial abuse.

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