

6 March 2017

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 – Discussion Paper

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide a submission on the Australian Law Reform Commission's (**ALRC**) *Elder Abuse Discussion 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 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.

The banking industry is committed to working with stakeholders to develop workable and effective strategies and policy solutions to address elder abuse. For the purposes of this submission, the ABA will focus on the financial abuse form of 'elder abuse' and will address the following proposals:

- Proposal 2-1 A National Plan to address elder abuse should be developed.
- Proposal 2-2 A national prevalence study of elder abuse should be commissioned.
- Proposal 3-1 State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause.
- Proposal 3-5 Those reporting abuse in good faith should not be liable.
- Proposal 5-1 A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.
- Proposal 5-4 Enduring documents should be witnessed by two independent witnesses.
- Proposal 5-10 Nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers should be introduced.



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- Proposal 7-1 The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers.
- Proposal 7-2 The Code of Banking Practice should increase the witnessing requirements for arrangements.

Further, the scope of the ALRC review should not be limited to elder abuse. Many of the recommendations are also relevant to customers who have a disability that includes diminished capacity. These customers are also reliant on substitute decision-makers (for example, guardianship orders) and the recommended proposals could be leveraged to also protect these vulnerable consumers.

Proposals

National Plan

Proposal 2-1 A National Plan to address elder abuse should be developed

The ABA supports the development of a National Plan to address elder abuse and to strive for better outcomes for older Australians. A nationally consistent approach, which includes the financial sector, will assist banks, and other institutions to understand and meet the various laws, deal with the expectations of their customers and their agents across jurisdictions, improve collaboration between relevant agencies and provide greater certainty for customers.

Furthermore, the ABA agrees with the ALRC's observation that "financial literacy is itself a safeguard from abuse,"¹ and believes a national awareness campaign, with a focus on improved information and education, will be vital to reducing the risks of abuse as well as the consequences. As part of the ABA's Financial Abuse Initiative,² consumer fact sheets have been developed to help raise awareness of financial abuse and provide customers with some tips about how they can protect themselves.

Given Australia's ageing population, there is a likelihood that we will see a rise in the number of cases of elder abuse, and a longer-term strategic response will continue to provide a framework for action and reform.

Proposal 2-2 A national prevalence study of elder abuse should be commissioned

The ABA supports the commissioning of a national prevalence study of elder abuse.

The ABA agrees that "while there is a sense that elder abuse is widespread, just how widespread is unclear."³ Our response to the *Elder Abuse Issues Paper* noted that the extent of the problem of financial abuse in the community is unknown. Banking industry data indicates a very low number of complaints relating to abuse of older people, and even lower relating to possible financial abuse. A more informed understanding of the prevalence of elder abuse will assist the banking industry with its policy development and may also inform the Parliament in terms of policy formulation (and potential statutory change). The effectiveness of the National Plan will be contingent on establishing an appropriate evidence base. This evidence base will assist in defining the appropriate policy changes and strategies required to address elder abuse and will ensure banks are able to better service their customers' needs.

¹ ALRC *Elder Abuse Discussion Paper*, p 129

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

³ ALRC *Elder Abuse Discussion Paper*, p 55



Powers of Investigation

Proposal 3–1 State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:

- (a) has care and support needs;
- (b) is, or is at risk of, being abused or neglected; and
- (c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion.

The ABA supports the proposal to grant public advocates or public guardians the power to investigate elder abuse. ABA members have indicated the difficulty in identifying, responding and reporting elder abuse to a relevant authority including:

- Identifying circumstances of abuse where only a suspicion of abuse is held
- Obligation to protect the confidentiality and privacy of customers
- Identifying the relevant body who is empowered to step in and protect the customer's interests in circumstances where the customer doesn't have their own support network to assist them, and
- Steps the bank is able to take to protect the customer's financial and personal interests in the interim.

Illustrative case study

In one recent matter a bank identified that the adult son of an elderly customer had spent \$900,000 from his mother's account on renovations and \$220,000 gambling. The son was acting on her accounts as an Attorney under an enduring power of attorney (**EPOA**). The bank contacted the Office of the Public Advocate, who advised that unless there was some evidence that the customer had diminished or impaired capacity, they were unable to consider the matter.

The bank was not able to comment on the mother's capacity, as she had not attended the branch for over 12 months.

As referred to in our response to the *Elder Abuse: Issues Paper*, the banking industry would welcome the establishment of clear reporting guidelines for banks to follow if a bank chooses to report what it believes to be suspected financial abuse or being at risk of financial abuse.⁴ This is an important outcome and would have benefits for both bank staff, in knowing to which entity a suspected financial abuse case should be reported, and customers, in protecting their interests.

While the industry supports the establishment of clear reporting guidelines, it does not support coupling this with a mandatory reporting requirement. A mandatory reporting approach could also give rise to claims in circumstances where financial abuse was occurring but was not detected and/or reported by the bank. There should be no consequences for banks not reporting elder abuse.

Proposal 3–5 Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

- (a) liable, civilly, criminally or under an administrative process;
- (b) found to have departed from standards of professional conduct;

⁴ ABA submission to the ALRC *Elder Abuse Issues Paper*, p 3



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- (c) **dismissed or threatened in the course of their employment; or**
- (d) **discriminated against with respect to employment or membership in a profession or trade union.**

The ABA supports the proposal to provide immunity to banks and its officers (acting in that capacity) reporting elder abuse to the public advocate or public guardian. This overcomes the challenge banks would have in reporting suspected financial abuse, including potential privacy, anti-discrimination, confidentiality breaches and defamation claims.

Enduring Powers of Attorney and Enduring Guardianship

Proposal 5–1 A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

The ABA supports the development of a national online register to allow banks (and other financial institutions, organisations, companies and service providers) to establish the authenticity and currency of these enduring documents.

Currently, there is no national register to which banks can verify the authenticity of powers presented. A major difficulty is ascertaining whether the relevant EPOA is in the correct form at the time it was executed (especially if the form is superseded or if the EPOA was executed in a different state or territory).

In addition, banks have experienced incidents where transactions have been delayed due to the need to verify an instrument and this has caused adverse consequences for the individual, the bank or both (such as, a delay in settling a property transaction causing additional costs or a delay in completing a market transaction subject to adverse movements in prices). Lack of a national register exposes people to the risk of financial abuse as well as the risk of unfavourable outcomes with regards to their transactions.

The ABA would welcome further detail in the ALRC’s Final Report about how this would work, and what the expectations/obligations would be on banks to check the register in a range of situations.

In order for the register to be useful in practice, careful consideration should be given to making it robust. Simply lodging documents with a register shows that the enduring document is valid at that point in time and does not address the issue of currency. The register will need to be regularly updated to account for subsequent changes or the revocation of a power. This would provide certainty for consumers and banks.

If such due diligence is not carried out, a national register could potentially serve to facilitate elder abuse by legitimising fraudulent enduring documents.

Question 5–1 Who should be permitted to search the national online register without restriction?

Bank staff should be permitted to search the national online register without restriction.

Banking products and services are an essential part of everyday life. With an increased use of formal arrangements being presented by third parties for banking transactions, unrestricted access to the register will ensure banks (and other relevant financial institutions) are able to establish the authenticity and currency of the instrument, and better service their customers’ needs with a greater likelihood of protecting their customers’ interests/assets.

Question 5-2 Should public advocates and public guardians have the power to conduct random checks of enduring attorneys’ management of principals’ financial affairs?

Public advocates and public guardians should have the power to conduct random checks, however, the ABA notes that often an attorney will be appointed but will not be active, for example, the EPOA is put in place in anticipation of potential future use. This inactivity will need to be considered as part of the random checks.



Proposal 5-4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

- a) Legal practitioner;
- b) Medical practitioner;
- c) Justice of the peace;
- d) Registrar of the Local/Magistrates Court; or
- e) Police officer holding the rank of sergeant or above.

Each witness should certify that:

- a) The principal appeared to freely and voluntarily sign in their presence;
- b) The principal appeared to understand the nature of the document; and
- c) The enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

The ABA supports the enhanced witnessing requirements proposal and agrees that a more stringent list of prescribed witnesses enhances the protection around enduring documents. Importantly, the witnessing requirements should be harmonised across the states and territories.

In relation to adopting the witnessing model in Victoria, the ALRC should conduct an assessment to determine whether this model is working effectively.

Proposal 5–10 State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.

The ABA supports the introduction of nationally consistent and uniform laws across jurisdictions.

While the laws in each jurisdiction are broadly similar, there remain differences that our members, customers and their substituted decision-makers are required to understand. These differences cause unnecessary complexity and contribute to unnecessary business costs, including training for staff and communications for customers. Furthermore, 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.

Banks and superannuation

Proposal 7–1 The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

The ABA does not believe the Code of Banking Practice (**Code**) should prescribe matters related to the financial abuse of older customers (also applicable to **Proposal 7-2**). The current operation of the industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*⁵, and with the ABA encouraging members to follow the guideline and incorporate it into their internal processes and procedures, is adequate. This view is consistent with the Final Report on the review of the Code of Banking Practice conducted by independent consultant, Philip G Khoury Managing Director of CameronRalph Navigator.⁶

The financial exploitation of a vulnerable person is a deeply challenging area for the banking industry. The industry guideline provides guidance for banks and assists banks in responding to suspected cases of financial abuse on an individual case-by-case basis. A prescriptive clause in the Code will not

⁵ <http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>

⁶ <http://cobpreview.crkhoury.com.au/>



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allow for this flexibility and will impede the ability of banks to effectively and appropriately respond to individual circumstances of financial abuse.

It is important to note that the Financial Ombudsman Service refers to the industry guideline as 'best practice' when dealing with a bank dispute on financial abuse.

As an alternative, the ABA accepts that the Code should include a clause reflecting a banks' commitment to addressing elder abuse. The ABA is also committing to a review of the guideline, re-evaluating the reasonable steps guidance and working with member banks on the implementation of the guideline to their internal processes, procedures and policies. The ABA would welcome further consultation with the ALRC on the review of the guideline.

Proposal 7–2 The Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

The ABA is concerned with increasing the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts.

While banks strongly encourage the use of formal arrangements, some bank customers prefer to put in place appropriate measures to help protect themselves yet retain their financial independence, including an 'Authority to Operate'. Formal arrangements provide banks with clear instructions; minimising the risk of the customer breaching their contractual obligation and ultimately, ensuring banks are able to better service their customers' needs. The latter arrangement may leave customers vulnerable to fraud, exploitation and financial abuse, these risks are also relevant for customers using formal arrangements.

A third party signatory may be added to a customer record when a customer requests another person have access to their accounts, for both financial and non-financial transactions, on a temporary or permanent basis. Unlike a formal instrument, a third party signatory does not have the authority to open or close existing accounts on behalf of the customer. The current procedure requires the account holder to attend in person at the bank or provide certified ID. This is sufficient protection to verify the authenticity of the form.

Many customers appoint third party signatories to accounts e.g. the appointment of a secondary cardholder to a credit card account. The proposal is drafted in a manner that would apply to all consumers, not just those at risk of financial abuse. In the majority of cases where older vulnerable customers are not involved, this administrative burden is not warranted. There does not seem to be a mechanism to carve out, and apply this, to a particular category of customer (for example, those over a certain age) without discriminating and restricting the actions of many older people who remain highly competent.

Concluding remarks

The ABA looks forward to the outcomes of the Discussion Paper and consulting further on this matter.

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

Yours sincerely,

Diane Tate
Executive Director – Retail Policy
(02) 8298 0410
dtate@bankers.asn.au