

LAW REFORM REPORT – ELDER ABUSE (IP 47)

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?

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I am currently studying a bachelor of law at Murdoch University, and while I had been assigned the task to present a submission on the abuse of elders, this area is incredibly important to me. Firstly, because financial abuse has the potential to permanently devastate a person.¹ Secondly, my grandparents have on occasion encountered this abuse and were not in a position to adequately protect themselves. This aspect especially fuels my frustration with the law as the role of law to protect its citizens from harm. In the present moment, the laws governing this area face considerable difficulty while the prevalence of financial abuse continues. Studies suggest that 3-7 percent of the elderly community experience financial abuse from those they trust. Studies have also shown that this form of abuse is the most common afflicted upon the elderly.² For these reasons, this area of law should not only be considered and debated upon, but action should be taken to amend the law to better protect the elderly.

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In regards to the action taken by financial institutions, I agree that banks should take more action to protect its customers. While banks do not owe a duty of care to their customers and need only adhere to the terms of the contract,³ my concern and I'm sure the community's concern is that despite no tortious relationship, customers place significant trust in the hands of their bank. Given that banks are entrusted with a person's financial livelihood, possibly a lifetime's worth for elders, obligations should be placed upon banks to take as much action as practically possible. I do not suggest that the bank's hold complete responsibility over all customers. For example, in many states in the USA legislation imposes mandatory reporting where the act involves a person that is vulnerable, disabled, endangered or impaired.⁴ Another concern of the members of parliament was that mandatory reporting would be too intrusive on the lives of the elderly.⁵ For that reason, financial institutions should be instructed to report only what is known to them, what they have witnessed or possibly investigated after attaining permission from the person concerned.

¹ Thomas L. Hafemeister, 'Financial Abuse of the Elderly in Domestic Setting' in Wallace RB (eds), *Elder Mistreatment: Abuse, neglect, and Exploitation in an Aging America* (National Academics Press (US)).

² House of Representatives Committee, Parliament of Australia, *Chapter 2 Fraud and financial abuse*, [2.14]-[2.15].

³ *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80.

⁴ House of Representatives Committee, Parliament of Australia, *Chapter 2 Fraud and financial abuse*, [2.82]-[2.83].

⁵ *Ibid*, [2.84].

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Paragraph 109 highlights the constraints on financial institutions, including confidentiality and the duty to carry out the customer's mandate. While these are legitimate constraints, I believe it possible for Australian banks to replicate the US approach and impose mandates that financial institutions report concerns of abuse. For the moment, I am concerned that some law curtails the bank's effort to protect its customers. For example, there is no immunity provisions in Australia that would protect a bank should they report an instance of financial abuse in good faith and in the best interest of the customer. Another issue would be defining what needs to be reported.⁶

Financial abuse does not always fall within formal parametres. A national survey has found that very little assistance provided to elders involved formality.⁷ This raises concerns that elderly people are more likely to be taken advantage of within their home. This presents incredible difficulties for institutions and the government agencies to identify and respond to abuse.

Recommendations

Legislation should be amended to:

- Require financial institutions to provide mandatory training for staff about financial abuse, particularly in regards to the elder community.⁸
- Place an obligation on banks to ensure that where a party intends to enter into a joint account with an elderly and vulnerable person or place them as a guarantor, that the bank take positive action to ensure that each party is completely aware of the obligations and possible ramifications. It may also be prudent to provide a cooling off period or a preliminary waiting period to ensure the elder party has not been pressured into entering the contract.
- Require financial institutions to report suspected financial abuse. Protocols should be established in each institution to ensure a proper response is taken. Furthermore, staff should be trained to both identify and report the abuse of vulnerable customers.
- Require banks to include terms in contracts that inform the customer that the institutions reserve the right to report financial abuse to the relevant authorities should it occur.
- Clearly define and clarify the breadth of financial abuse and what it constitutes to better allow institutions to better identify and respond.
- Conduct more investigation and research in this area. Questionnaires could be attached to relevant Centrelink and financial forms.

Other recommendations:

- Require financial institutions to monitor nominee arrangements where there is a real imbalance of power in the relationship and the vulnerable party consents.
- Include elderly people as a special class of persons in which harsher penalties are imposed on those that seek to or succeed at abusing an elderly person. It would also prove prudent to educate the public that elder abuse will incur these significant penalties.

⁶ Ibid [2.85]

⁷ Mike Clare, Barbara Black and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia* (Crime Research Centre: The University of Western Australia, April 2011), 49.

⁸ Australian Law Reform Commission, above n 1, 29.