



17 November 2017

The Hon. Nick Goiran
Chair, Select Committee into Elder Abuse
Legislative Council
Parliament House
Perth WA 6000

Dear Mr Goiran,

Inquiry into Elder Abuse

The Australian Bankers' Association (**ABA**) appreciates the opportunity to make a submission to the Legislative Council of Western Australia's inquiry into elder abuse. The banking industry is committed to working with government and stakeholders to develop workable and effective strategies and policy solutions to help older Australians protect themselves from financial abuse.

With the active participation of 24 member banks in Australia, 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 accessible banking industry.

Introductory comments

According to the Intergenerational Report, Australia faces the challenges of a growing and ageing population that is expected to reach nearly 40 million by 2055 with nearly a quarter of that over the age of 65.¹ In addition to Australia's ageing population, there is a likelihood that Australia will see a rise in the number of cases 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. Elder abuse is an issue requiring a partnership response from Government, business and community.

For the purposes of this inquiry, the ABA will focus our submission on the form of elder financial abuse, with a particular focus on how banks help prevent financial abuse as well as highlighting some of the challenges faced by banks and recommendations for the Committee to consider.

The banking industry provided significant input to the Australian Law Reform Commission's (**ALRC**) inquiry into Elder Abuse. We are reviewing current guidelines and practices with regard to the recommendations for the banking industry contained within Chapter 9 the final ALRC report, *Elder Abuse – A National Legal Response*² ('**ALRC Report**').

We encourage Governments across all Australian jurisdictions to progress implementation of the recommendations in the ALRC report, including the harmonisation of laws and legal instruments, the development of a national register for formal arrangements and legal protection for 'good faith' reporting of suspected abuse.

¹ 2015 Intergenerational Report. Australian Government. <http://www.challengeofchange.gov.au/>

² <https://www.alrc.gov.au/publications/elder-abuse-report>



Financial abuse and the role of banks

From a banking perspective financial abuse is complex and difficult to ascertain. Every customer's situation is unique and banks have an obligation to respect their customers' wishes, protect their customers' privacy and not unnecessarily intrude into their customers' lives. The bank-customer relationship is a contractual relationship in which the bank is not permitted to transact on the customers' account without the customer's mandate. The bank must assume that a customer can transact until the point at which the law, and a member of the medical profession, say this is not the case.

In the main, financial abuse occurs due to a breach of trust most often from a family member or person who is supposed to be caring for an individual and their welfare. We also recognise that the majority of trusting relationships do not result in elder abuse. In cases of suspected financial abuse, it is important that bank employees are both vigilant and cautious. It can be a very difficult judgement call for people to make. Banks need to be careful to ensure that any measures do not disadvantage older people through the diminution of trust in third parties acting in good faith and in the best interests of the older person.

What we have done

Banks play a significant role in ensuring adequate safeguards in relation to financial decision making and have clear arrangements in place to help customers manage their finances securely.

Banks encourage the use of formal substituted decision making arrangements and supported decision making arrangements. While these arrangements provide the bank with clear instructions, and ensure banks are able to better service their customers' needs, it can be difficult for a bank to establish if a third party exerts "undue influence", without asserting some form of subjective judgement. The Committee should also be aware that currently each state has a different legal instrument, there is inconsistency in the arrangements and the arrangements are not recognised across jurisdictions. This can be confusing for consumers and cumbersome for banks

The banking industry has developed the following industry guidelines on financial abuse (part of the ABA's Financial Abuse Initiative)³:

- **Protecting vulnerable customers from potential financial abuse:** As a framework to 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 bank 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 their substitute decision-makers, and provides a framework for how banks should respond to these arrangements.

Note, these Industry Guidelines are being reviewed and individual banks are considering their current policies and practices concerning how banks provide products and services to older and vulnerable Australians.

- **Consumer fact sheets:** Outlines the steps customers can take to better protect themselves, their money and their property and what customers need to know in order to set up power of attorney arrangements to manage their banking needs and what they can expect from banks.
- **Bank training:** Banks have large training programs for their staff covering compliance with financial services and banking laws, corporations laws, privacy laws, discrimination laws, etc. Banks also have in place specific training programs generally to help their staff work with their customers and look to embed our industry guidelines with their internal processes and staff training programs.
- **Bank product and service solutions:** Banks can put in place products that can help the customer manage their interests without exposing them to unacceptable financial risks. For example, co-signatory accounts and two-to sign. Bank customers are able to structure their banking and financial affairs so that a trusted third party has access to their bank account. For

³ <http://www.bankers.asn.au/consumers/financial-abuse-prevention>



example, a customer can set up their bank accounts in a number of ways to enable a third party to assist them with their banking transactions. We discourage the use of informal arrangements such as the sharing of pin numbers as this does put the customer at risk.

- **Strong advocacy program:** The ABA maintains a strong advocacy program in relation to financial abuse issues and the rights of vulnerable customers e.g. submissions to inquiries and raising the issue with key ministers.

The Committee should also note the Financial Ombudsman Service's Approach to Financial Elder Abuse⁴, released in October 2017.

Recommendations

The ability of the banking industry to play a more significant role in reducing incidences of financial abuse is limited by inconsistencies in practice between the different jurisdictions and the limited powers of adult safeguarding agencies to investigate potential instances of financial abuse.

The ABA recommends that the Legislative Committee closely consider the following recommendations of the ALRC Report. Implementation of these recommendations will require the support of the Australian Government and all State and Territory Governments.

[A National Plan to Combat Elder Abuse \(ALRC recommendation 3-1\)](#)

The ABA endorses the need for a national plan to address the potential abuse of older and vulnerable Australians. This should include a national awareness campaign, with a focus on improved financial literacy and education about the benefits and use of legal instruments for all Australians.

[Legal protection for 'good faith' reporting of suspected abuse to an adult safeguarding agency with investigative powers \(ALRC recommendations 14-2 and 14-7\)](#)

The ABA believes these are critical recommendations. The lack of a safe guarding entity with appropriate powers to investigate suspected financial abuse is acting as a barrier to banks reporting. Bank staff are not qualified to make assessments about a customer's competency and are also limited by legal and confidentiality obligations. Banks can decide to delay or stop a transaction, however, there is no appropriate entity where the bank can then report the suspected financial abuse for further investigation. This is of particular concern when the suspected abuser has a Power of Attorney or similar legal instrument.

Furthermore, the industry believes that people who in 'good faith' report suspected financial abuse to a safe guarding entity should be given immunity from certain legal obligations that might otherwise prevent them from reporting abuse. This overcomes the challenge banks have in reporting suspected financial abuse, including potential privacy, anti-discrimination, confidentiality breaches and defamation claims.

A collection of case studies demonstrating the need for a clear reporting framework and legal protections for 'good faith' reporting are included in Appendix 1.

[Nationally consistent laws and legal instruments and a national online register of documents and court appointments \(ALRC recommendation 5-3\)](#)

The ABA believes that formal arrangements should be consistent and uniform across jurisdictions. The laws in each jurisdiction are broadly similar, however, there remain differences that our member banks, customers and their substituted decision-makers are required to understand.⁵ These differences cause unnecessary complexity and contribute to unnecessary business costs, including training for staff and communications for customers.

⁴ <http://www.fos.org.au/publications/our-approach/the-fos-approach-to-financial-elder-abuse/>

⁵ 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).



Strong banks – strong Australia

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. The 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.

For example, customers 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).

Closing Comments

In summary, the ABA believes it will take coordinated action from governments, businesses and community representatives to address financial abuse within our community.

If you have any questions or would like further information please contact Amanda Pullinger, Policy Director on (02) 8298 0411 or by email apullinger@bankers.asn.au.

The ABA looks forward to the outcomes of the inquiry into elder abuse in Western Australia.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Anna Bligh', is written over the typed name and title. The signature is fluid and cursive, with a long, sweeping tail that loops back under the name.

The Hon. Anna Bligh AC
Chief Executive Officer



Appendix 1: Financial abuse case studies

The following case studies demonstrate the need for:

- The establishment of a clear reporting framework and independent adult safeguarding agencies that can investigate cases of suspected financial abuse of older and vulnerable customers, and
- The need for legal protections for people who in ‘good faith’ report suspected financial abuse to adult safeguarding agencies.

Case study # 1 – Reporting the misuse of a power of attorney

An elderly customer living in a nursing home appointed a family friend as their Attorney.

Following multiple withdrawals on the customer’s account, the bank contacted the customer to confirm he was happy for the Attorney to access his accounts. The customer confirmed he knew about the transactions and was happy with the current arrangement. The bank reviewed the power of attorney (POA), which appeared to have been executed correctly. The bank enhanced monitoring of the account while permitting the Attorney to act in accordance with the POA.

The bank reiterated its concerns to the customer a number of times and recommended he seek legal advice or report the matter to the police if the Attorney was not acting in his interests. During this period, the Attorney continued to withdraw funds and attempted to apply for lending in the customer’s name.

The customer finally reported the matter to police via a friend on the grounds of potential fraud and then revoked the POA. The bank subsequently noted the change of circumstances and assisted the police with their enquiries.

The challenge for the bank in this scenario was to encourage the customer to seek further advice and/or report their concerns to police. Despite the bank’s concern, it complied with the Attorney’s instructions, based on the customer’s confirmation that the transactions were in order.

Case study # 2 - Potential financial abuse; unable to obtain agency support to investigate independently

Ms J has been a customer of a bank branch for many years. Ms J is a member of an established immigrant community in the area. Bank staff became concerned when she made a number of large withdrawals over a six week period. The branch manager met with Ms J to discuss his concerns. Ms J advised that her religious advisor had insisted that she needed to make cash donations directly to him, and that he would say special prayers for her. Ms J did not receive receipts for any of these donations. Ms J is a spinster with no children and her church plays a significant role in her life.

The branch manager told Ms J that this practice was concerning and she became distressed when she realised she had withdrawn over \$120,000. She could not recall making several of the withdrawals or breaking her term deposit to do so.

The bank contacted:

- The police, who advised they could not investigate the matter unless they received a complaint from Ms J, notwithstanding that she may have diminished capacity and may not be aware of potential financial abuse.
- The Office of the Public Advocate, who were unable to assist unless the bank lodged an Application for Administration with the state Administrative Tribunal. Such an application requires detailed knowledge of the proposed represented person, including medical reports, living arrangements, carer’s details. It was not appropriate for the bank to lodge the application.

Ultimately, the bank contacted a senior representative of the Church, who was listed as the contact point for complaints. This resulted in an internal investigation being undertaken. The bank was advised



that, notwithstanding Ms J's allegations, there was no evidence of inappropriate conduct. The senior representative advised he would continue to liaise with Ms J.

The bank advised Ms J that it would not support further pre-payments from her term deposit account and she accepted that outcome.

This case highlights the challenges of assisting a customer where they may not have capacity to realise they may have been financially abused. It also highlights the risk banks are exposed to in respect of meeting their privacy and other legal obligations. In this instance, it should have been possible to refer the matter to a statutory body to intervene and review.

Case study # 3 – Potential misuse of an enduring power of attorney; unable to obtain agency support to investigate

The bank identified that the adult son of an elderly customer had spent \$900,000 from his mother's account on renovations and \$220,000 on 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 and bank staff are not equipped to make such medical judgements.

In this instance, it should have been possible to refer the matter to a statutory body to intervene and review.

Case study # 4 – Concern for customer's welfare; challenges in obtaining agency support

The bank suspected that Ms Q's son had forged his 94 year old mother's signature on cheques totalling \$10,000. He repeatedly attended the branch and was particularly aggressive and intimidating to bank staff.

The police were called on a number of occasions and a guard was appointed to the branch. He continually stated he had POA (which was not presented) and that he was entitled to access his mother's funds. He also presented letters to the branch which were clearly forged, appointing him as a signatory to her accounts.

He then presented an EPOA, which bank staff believe was obtained under duress. Ms Q was contacted and confirmed she did not wish him to access her funds. Flags were placed on Ms Q's accounts to ensure funds were not released to her son. Branch staff were concerned for both Ms Q's financial security and her physical wellbeing and escalated their concerns internally.

The bank tried to engage the Public Advocate, Public Trustee, state Administrative Tribunal and state Elder Abuse support line, however, was variously advised the matter fell outside their jurisdiction, that Ms Q would need to engage the agency directly, or that the bank would need to submit an application for guardianship.

The Office of the Adult Guardian (**OAG**) was then engaged, who advised they would only be able to act if the bank made a formal referral and they found, prior to their review, that there were reasonable grounds to rebut Ms Q's presumption of capacity. The bank completed the referral process, the OAG investigated the matter and found the issues raised were substantiated, including allegations of neglect. In parallel, the state Administrative Tribunal ultimately appointed the Public Trustee as Ms Q's Administrator.

This case highlights the challenges experienced by the bank when seeking to escalate concerns regarding potential financial abuse.



Case study # 5 – Dispute between family members; conflicting enduring powers of attorney; capacity to execute enduring power of attorney

Mr N and his wife operated a successful small business for a number of years. Mrs N passed away in 2015 and Mr N resides with his adult son (S1). At various times in 2015 Mr N appointed one of his adult daughters (D1) as a third party signatory to one of his accounts, his two adult daughters (D1 and D2) as attorneys under an EPOA and then one of his daughters as EPOA D1 in her own right. In 2016 he appointed S1 as his attorney under a further EPOA, at which time he revoked one of the earlier EPOA's, but not the other. As a result, S1 and D1 presented current EPOAs to the branch and provided conflicting account operating instructions.

D1 advised branch staff that Mr N had been diagnosed with dementia and did not have capacity to execute an EPOA in favour of S1. Absent a medical assessment, bank staff were required to assume capacity. Mr N indicated to branch staff that he did not want conflict between his children and could not provide further clarity. S1 raised allegations of serious fraud on the part of D1. D1 then presented the Bank with a detailed medical report noting that Mr N lacked capacity to manage his financial affairs and that he may have lacked capacity at the time the EPOA in favour of S1 was executed.

The bank's approach was to protect Mr N's financial position, pending clarity of instructions. In practice, this meant restraining his accounts but continuing to meet pre-existing periodical payments which were clearly for Mr N's benefit (including health insurance and car insurance) and allowing cash drawings of up to \$1,000 per week to cover Mr N's immediate expenses. This figure was based on his normal spending pattern. The bank also advised that it would allow drawings for other key expenses, upon receipt of evidence that payment would be for Mr N's benefit.

D1 and S1 were encouraged to seek legal advice, which they did. D1 and S1 took the matter to the relevant state Administrative Tribunal which determined that Mr N did not have capacity and appointed D1 as his interim financial manager. It was unlikely that Mr N had capacity to revoke the earlier EPOA and appoint S1 in 2016.

S1 has indicated to the Bank that he will be pursuing D1 regarding his fraud allegations, as he believes D1 has used Mr N's funds to her own advantage.

This case highlights the challenges of conflicting authorities and the assumption of capacity to enter into or revoke an EPOA.

Case study # 6 – Diminished capacity and family coercion

Following the death of her husband, Mrs D attended the branch on a number of occasions with her adult daughter. Over a six month period, she requested a number of partial redemptions from two term deposit accounts, withdrawing the funds from her accounts. Branch staff were concerned Mrs D was being coerced by her daughter into making the withdrawals, which were uncharacteristic. They observed Mrs D's daughter taking cash from Mrs D when funds were withdrawn.

Mrs D's daughter was aggressive and insistent that funds be withdrawn. Branch staff spoke to Mrs D away from her daughter and explained they were concerned that the withdrawals might not be for her benefit. Bank staff offered to assist Mrs D speak with the state Elder Rights organisation for advice. Mrs D clarified that she was aware the funds were being withdrawn and did not wish to seek assistance.

Three months later the branch flagged further concerns when Mrs D became upset about her account balance and could not recall withdrawing funds. Mrs D asked if her (deceased) husband had been withdrawing funds, and had a 'conversation' with him while in the branch. Mrs D's sister also contacted the bank to advise she was concerned that her niece was improperly accessing Mrs D's account and bullying Mrs D. The bank provided Mrs D's sister with the contact details of the state Guardianship Board for advice. In addition, the bank asked Mrs D's daughter to provide the bank with medical evidence that Mrs D was able to manage her affairs. The medical advice highlighted capacity concerns and recommended withdrawals be limited to \$800 weekly, pending further review.



The bank implemented this restriction on the account and faced ongoing complaints from Mrs D's daughter, who repeatedly requested additional funds. These requests were declined. By that time, ~\$148,000 had been withdrawn.

Mrs D's sister ultimately requested a formal assessment be undertaken and the state Administrative Tribunal found that Mrs D had lost capacity to manage her affairs. Mrs D's son in law was appointed both Administrator and Guardian.

Banks are not in a position to formally assess capacity. This case highlights challenges in assisting customers as their capacity changes as well as the persistence of potential financial abusers and the quantum of transactions that can be performed.

SELECT COMMITTEE INTO ELDER ABUSE



Your ref: ELD
Our ref: A638477

17 October 2017

26 OCT 2017

Hon Anna Bligh
Chief Executive Officer
Australian Bankers' Association Inc
Level 3, 56 Pitt Street
SYDNEY NSW 2000

Dear Ms Bligh

Inquiry into Elder Abuse

On 13 September 2017 the Select Committee was established by the Legislative Council to commence an inquiry into Elder Abuse.

As part of its consultation, the Committee invites you to provide a written submission on the matters referred to in the attached terms of reference.

The closing date for submissions is **4:00pm on 17 November 2017**. Submissions received after that date are unlikely to be considered. If you are unable to present your submission by the closing date, please contact the Committee Clerk.

Submissions are confidential until the Committee releases them. You should not disclose your submission to others until the Committee authorises its public release.

It is normal practice for Legislative Council standing committees to authorise the publication of submissions at some stage during its inquiry. These submissions are then available to the public on request. Please note that your submission may be placed on the Internet by the Committee.

It is important that any request for the Committee to prohibit publication of all or part of the submission, or the identity of the author, be attached to the submission when it is lodged. State why you want it confidential. If you want part of the submission kept confidential please put that part on a separate page(s). The Committee will consider requests for confidentiality, but retains the power to publish any submission. The Legislative Council may also authorise publication.

The Committee may decide to hold hearings at a later date. If you wish to appear before the Committee, make that request when the submission is lodged.



Select Committee into Elder Abuse – Terms of Reference

On Wednesday 13 September 2017, the Legislative Council ordered that a select committee be established to inquire into elder abuse with particular reference to:

- a) determine an appropriate definition of elder abuse;
- b) identify its prevalence;
- c) identify the forms of elder abuse, including but not limited to neglect;
- d) identify the risk factors;
- e) assess and review the legislative and policy frameworks;
- f) assess and review service delivery and agency responses;
- γ g) the capacity of the Western Australia Police to identify and respond to allegations of elder abuse;
- h) identify initiatives to empower older persons to better protect themselves from risks of elder abuse as they age;
- i) consider new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse; and
- j) consider any other relevant matter.

The select committee is to report by no later than Thursday 13 September 2018.

By order of the Legislative Council on Wednesday 13 September 2017, membership of the Select Committee into Elder Abuse shall be:

- Hon Nick Goiran MLC (Chair)
- Hon Alison Xamon MLC (Deputy Chair)
- Hon Matthew Swinbourn MLC
- Hon Tjorn Sibma MLC.