

Ms Jill Irvine  
Consumer Policy Framework Inquiry  
Productivity Commission  
PO Box 80  
Belconnen ACT 2616

14 May 2007

Dear Ms Irvine

**Re: REVIEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORK**

Please find attached my submission for the purposes of the abovementioned review.

Yours Sincerely,

Michelle Howard  
Public Advocate – Queensland.

## **Submission of the Public Advocate (Queensland)**

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### **CONSUMER POLICY FRAMEWORK INQUIRY PRODUCTIVITY COMMISSION**

Productivity Commission  
PO Box 80  
Belconnen ACT 2616

#### **Introduction:**

I refer to the current Review of Australia's Consumer Policy Framework (The Review), being undertaken. The Terms of Reference specifically identify the Commission's requirement to report on ways to improve the Framework for disadvantaged and vulnerable consumers. This submission provides you with the benefit of some research conducted by my Office on vulnerable consumers with impaired capacity in the area of banking and recommends the need for this Review to examine measures to improve protections in the banking industry for this vulnerable cohort. This research has been undertaken for other purposes and should not be considered to comprehensively address the issues of interest to the Review. My resources do not permit a wider consideration at this time.

By way of background, the Office of the Public Advocate has been created under the *Guardianship and Administration Act 2000* (Qld) to provide systemic advocacy for adult Queenslanders with impaired decision-making capacity. This includes people with a mental illness/psychiatric disability, intellectual disability, an acquired brain injury, or some form of dementia. Under the *Guardianship and Administration Act 2000* (Qld) it is the role of the Public Advocate to:

- Promote and protect the rights of adults with impaired capacity for a matter
- Promote the protection of the adults from neglect, exploitation or abuse
- Encourage the development of programs to help the adults reach the greatest practicable degree of autonomy
- Promote the provision of services and facilities for the adults
- Monitor and review the delivery of services and facilities to the adults.

Adults with impaired capacity are extremely vulnerable consumers in many contexts including telecommunications, utilities and banking and finance. It is in the area of banking that my submission is focused. I note that it is an area where elderly vulnerable consumers in particular are increasingly at risk due to diminishing capacity.

#### **Figures indicating risk for older impaired customers**

The issue of banking practices and protection of finances for people with impaired capacity is an area of critical significance, particularly where financial institutions administer a significant proportion of older people's assets. Older people are particularly vulnerable in situations where they gradually lose capacity through the onset of dementia and continue to perform complex financial tasks such as banking. Where this occurs, the banking Code of Practice (the major instrument imposing self regulation on this industry) provides no obligation to try and safeguard such

individuals, thereby placing vulnerable customers at a heightened risk being financially abused.

Older people are frequently the target of financial abuse via banking. This is perhaps due to the large banking investments held by this group. In the United States, the financial assets of adults aged 65 years and over make up 70 per cent of all funds held in banking institutions. While the family home remains the major component of older Australian's assets, deposits in banking institutions represent the second largest asset class for those aged 65 and over.<sup>1</sup> Additionally, Australians have never lived so long and had so many assets in their retirement. Around 80% of people aged 65 and over are home-owners and very few have debt.<sup>2</sup> Unlike previous generations, they've been actively encouraged by government to build up their savings in order to support themselves during retirement. This fact alone makes older people a target for financial abuse and fraud.<sup>3</sup>

The vast majority of adults aged 65 and older currently receives the Age Pension, and 99% of these payments are made electronically to bank accounts. Financial institutions therefore play a critical role in the asset protection for older people, with the banking community being a supplier of financial services that offers both transaction-based and investment services.<sup>4</sup>

The risk of experiencing financial abuse is no doubt increased by the fact that most older people in Australia live independently. In 1993, 94 per cent of people 60 years and over lived in private dwellings, either with their spouse, on their own or with other relatives or friends.<sup>5</sup>

In Queensland, approximately 12% of the state's population are aged 65 or older. By the year 2051 that will grow to between 26-38 %.<sup>6</sup> This population is highly vulnerable to experiencing fraud and financial abuse, indeed elder abuse affects approximately three to five per cent of the population and it is anticipated that the numbers of people will continue to grow.<sup>7</sup> The financial cost of elder abuse to the

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<sup>1</sup> Harding, A., King, A. & Kelly, S 'Trends in Incomes and Assets of Older Australians', (Discussion Paper no. 58, National Centre for Social and Economic Modelling. University of Canberra 2002).

<sup>2</sup> Peter Mc Donald, *Changing home ownership rates in Australia: issues of measurement and interpretation*, (2003), Australian Housing and Research Institute <<http://www.ahuri.edu.au/> at 5 January 2003.

<sup>3</sup> ABC Radio National, *Financial Abuse of the Elderly*, Background Briefing, Radio National 22 January 2006 < <http://www.abc.au/rn/talks/bbing/stories/s1539285.htm> , at 1

<sup>4</sup> Associate Professor Jill Wilson, Dr Cheryl Tilse, Dr Deborah Setterlund, Professor Linda Rosenman, 'Population Aging and the Implications for Financial Markets' (2004) *Journal of Banking and Financial Services*, Vol. 119, pp14-16.

<sup>5</sup> 'Abuse of Older People: Crime or Family Dynamics?' *Australian Institute of Criminology – trends and issues in criminal justice*, May 1999.p.2.

<sup>6</sup> Commissioner for Complaints, (Annual Report 1 July 2005 – 30 June 2006), p 1.

<sup>7</sup> The Strategic Plan for the Prevention of Elder Abuse in Qld, Qld Government, Department of Families., p. 4. See also: Mc Callum, J. and Suet- Lam – Mui (1996) 'Costing Abuse of Older People: Towards Cost Effective Responses' *Confronting*

community and governments is under researched in Australia. The most comprehensive study available shows that in New South Wales, elder abuse increased costs of services provided to people affected by elder abuse by \$311 per person per week. This adds around \$300 million per year to service costs for older people.<sup>8</sup> The Elder Abuse Prevention Unit (Qld) has recorded a loss of up to \$90-million in Queensland over a two and a half year period.<sup>9</sup> Indeed, financial abuse is regarded as the fastest growing form of elder abuse in Australia.<sup>10</sup>

### **Substitute decision making - Formal and informal mechanisms regarding banking**

As people age the risk of cognitive impairments and other severe disabilities is increased and this then is likely to impact on their capacity to administer their own financial affairs. Other people are then likely to be appointed either formally (eg by way of an Enduring Power of Attorney or the appointment of an Administrator) or informally (eg appointed as a signatory on an account, given signed withdrawal slips, access to ATM cards of credit cards, providing assistance in the investment of assets) to manage those adult's assets. Indeed recent prevalence research suggests that 25% of adult Australians play a role in assisting people over the age of 65 to manage their assets.<sup>11</sup>

The informal network – family, friends and neighbours – is overwhelmingly the principle source of assistance to older people living in the community, whilst the formal care network, organised mainly through the Home and Community Care (HACC) program, plays a significantly smaller and usually supplementary role.<sup>12</sup> Studies show that victims of elder abuse are primarily women with a disability and that increased disability leads to a greater likelihood of abuse. The majority of abusers are relatives of older people.<sup>13</sup>

Where a person has been given access to another person's accounts or investments, there is always the potential for mismanagement. Attention needs to be given to what protections can be put in place for those people who may be more at risk of transactional financial mismanagement whilst ensuring also that unnecessary barriers are not placed in the way of effective and proper third-party management of the person's assets.<sup>14</sup>

### **Under-reporting of financial abuse**

Where the person responsible for the financial abuse has a role of carer or comes within the support network, it is understandable that the older person may not

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*Abuse: the Way Forward, Conference Papers and Proceedings*, the NSW Advisory Committee on Abuse of Older People in their Homes, Wesley Centre, 2-3 May 1996, Sydney).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, p 3.

<sup>10</sup> ABC Radio National (above n.3)

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, p. 6.

<sup>14</sup> Ibid.

consider the behaviour as a crime or something serious enough to warrant public intervention.<sup>15</sup>

Additionally, reporting of abuse is often very difficult for those who have extreme physical or mental impairments. Those who are socially isolated, may have no opportunity to report abuse or no one whom they can tell. If the complaint is voiced to an independent person, often there is a lack of knowledge about where to access help, or what systems exist.<sup>16</sup> Some older people put themselves at risk because of their lack of financial knowledge and poor financial management by carers and relatives.<sup>17</sup>

These issues are compounded where an elderly person with impaired capacity has limited or no English skills and is totally reliant on family members for support. Older people from non-English speaking backgrounds mainly experience abuse in the form of financial abuse. This abuse is under-reported for reasons of fear, isolation, lack of knowledge, lack of access to appropriate services and /or shame.<sup>18</sup> Older people of diverse cultural, linguistic and religious backgrounds are more vulnerable as a result of their greater dependency on their family for support.<sup>19</sup>

### **Risks associated with financial abuse**

Whilst it must be recognised that an elderly person with capacity has the right to make decision which is not financially prudent, this is not the case for those with impaired capacity. Capacity may be compromised due to undue influence for elderly parents who may come under a variety of pressures to divest themselves of assets to children who have a false sense of entitlement to receive their inheritance in advance. Decisions made by an elderly person in these circumstances may not be made freely and voluntarily made and thus capacity to transact in those circumstances may be questionable.

Where an older person has been subjected to financial exploitation, the potential effect can be catastrophic as elderly people in these circumstances as they are likely to have limited capacity to replace lost assets and may have no guarantees of the support from the family member or friend who is benefiting. Life expectancies and future needs (such as payment of accommodation bonds) are often not factored into the equation when making the decision to divest assets and also there is frequently a lack of understanding about the implications for pension entitlements.

The perception of financial abuse in these circumstances is often a problem where family or friends may be carefully planned and premeditated their actions but because the abuse has arisen in a family context it is rarely perceived as a crime. Anecdotally, orders for compensation are infrequent in these circumstances and criminal prosecutions are rare.

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<sup>15</sup> Ibid, p3.

<sup>16</sup> Ibid, p3.

<sup>17</sup> Ibid, p 9.

<sup>18</sup> Prepared by E. D'Urso and Associates for the New South Wales Advisory Committee on Abuse of Older People, Discussion Paper 6, *Research on Abuse of Older People from a non-English Speaking Background*, p. 6.

<sup>19</sup> Ibid.

### **Financial abuse facilitated by the banking industry**

Dr Cheryl Tylse, a senior lecturer at Queensland University specialising in asset management for the elderly, considers that financial abuse is getting worse from both family (who are interested in inheriting property ) and the market which is engaged in trying to sell financial products such as reverse equity mortgages or financial planning, or accommodation such as retirement village products.<sup>20</sup>

Additionally, there are new banking trends which are emerging which increase the risk of financial abuse for vulnerable adults. These include:

#### Reverse Mortgages:

Many older people are asset rich but income poor and banks appear to have developed an interest in the assets of older people by creating new security documentation such as reverse mortgages. These loans can place older vulnerable adults at significant risk, particularly due to the uncertainty of future needs and lifespan.

#### Use of P.I.N and corresponding responsibility of banks to monitor:

Use of person's P.I.N. raises the issue of measures that banks may take to prevent fraud and financial exploitation. For example it may be appropriate to monitor transactions of older people for irregularities in bank account use and to make inquiries with the customer where concerns are raised. It is understood that this practice is often adopted by banks in relation to credit card use, but does not appear to be the practice in relation to other banking transactions. With the increased closure of over the counter services for older people, EFTPOS transactions may be the only means of accessing funds for some people. Older people are often vulnerable to having large amounts of their funds removed in this way, particularly where they have failed to invest life savings in a more secure and inaccessible accounts.

### **What protective measures have been adopted internationally?**

It is concerning that in the context of such a vulnerable group of consumers, there are currently no protective practices or laws governing the Australian banking sector to protect against financial abuse of cognitively impaired adults.

In both the United States of America and Canada a variety of measures have been introduced in an attempt to combat this problem.

#### Canada:

Whilst not strictly a legal measure, in Canada, older persons have begun authorising their banks to monitor their accounts for unusually large transactions or unusual patterns of transactions. The bank is then authorised to raise its concerns with the account holder and to warn of the possibility of fraud. Account holders, however, retain full rights over their accounts and may elect to disregard any warnings given.<sup>21</sup> Whilst this measure serves as a protection for adults with full capacity to engage in banking transactions it does not serve to protect adults with impaired decision making capacity.

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<sup>20</sup> Ibid p.2.

<sup>21</sup> Australian Law Reform Commission, *Older People and the Law: Elder Abuse and Legislation*, Spring (2002), p.1

### United States:

In the United States various financial institutions have introduced training for their staff that is specifically related to financial abuse of older people. In California, the Elder Financial Protection Network have worked with the California's Banker's Association to develop a training video to provide front-line personnel and supervisors with the right skills to see the warning signs for potential elder abuse fraud. California doesn't have a mandatory reporting statute but does support mandatory training for California financial institutions.<sup>22</sup>

The Massachusetts Banking Association along with other relevant agencies, have also developed a training package for education of their staff and other interested bodies.<sup>23</sup>

Financial institutions in particular have the ability to play an intermediary role in the intervention of elder abuse. Training packages could be developed in a similar way in Australia to assist front-line banking staff in the identification of potential acts of financial abuse against older people and provide ways in which staff could deal with these issues.<sup>24</sup>

In 1995 Oregon passed legislation protecting banks from liability when reporting suspected financial abuse of the elderly. Though the law provides immunity, it is not a mandatory reporting law.<sup>25</sup> In 1999, the Oregon Banker's Association distributed a two part training video entitled "Preventing Elder Financial Exploitation: How Banks Can Help," to all the state banks. The video, which was put together by the association with assistance from the state Department of Justice, the State Department of Human Resources, and the American Association of Retired People (AARP), trains bank employees to look out for possible symptoms of elder financial abuse. It also offers tips to seniors on how to protect themselves.<sup>26</sup>

Florida is one of the few states with a mandatory reporting law requiring the reporting of anything suspicious to a state hot-line. The teller or supervisor can report without penalty or liability. When a front-line person reports a suspected case of financial exploitation, it is redirected to the state's department of the aging, which sends out people from Adult Protection Services to investigate.<sup>27</sup>

It is suggested that protections including measures such as these be considered for Australia as well as additional protective measures for this group of customers who are vulnerable to financial abuse due to disability or aged related issues. Other possibilities are no doubt identifiable through comprehensive research and consideration.

### **Recommendations for Reform:**

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<sup>22</sup> Ibid, p.14.

<sup>23</sup> Ibid, p.22.

<sup>24</sup> Ibid.

<sup>25</sup> Kaisha Harris , 'Protecting your elder customers' (March 2005), ABA Banking Journal, March 2005, p.8

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

In 2000 the Queensland Law Society held an Elder Abuse Forum aimed at identifying issues contributing to elder abuse and recommending solutions. It brought together a range of medical, legal, community and government experts who deal constantly in their respective fields with issues related to elder abuse.<sup>28</sup> Delegates considered that the banks have a role in reporting financial abuse when detected. It is acknowledged however that this has been made more difficult with the introduction of electronic banking which has largely removed direct personal contact with this vulnerable group in the community.<sup>29</sup>

Monitoring banking transactions is one way of providing a safeguard and this can be achieved through a monitoring process by examining such things as:

- A sudden change in a bank account
- Cashing an elder's cheques without permission
- New names added to the elder's bank signature card
- Unusual withdrawals of funds using an ATM card (particularly in the case of elderly people)
- Changes in appointments of attorneys under Enduring Powers of Attorney
- Withdrawals of large amounts of money with inadequate explanation
- Unpaid bills despite available funds
- The elders report of financial exploitation
- Evidence of poor understanding of the financial transactions being undertaken
- An elderly parent is made a guarantor for an adult child

Transactions which involve such features may not be immediately discernable as fraudulent or exploitative.

It is of concern that where financial institutions may suspect an adult lacks capacity or is possibly the victim of financial abuse there are no mechanisms allowing for appropriate action to be taken<sup>30</sup>. It is here that the issues of protection, privacy and autonomy intersect and often conflict. Nevertheless where adults are increasingly vulnerable, particularly with a rapidly aging population and the ease with which banking can be done electronically, it is critical that the most vulnerable customers with impaired capacity are adequately protected from abuse.

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<sup>28</sup> QLS Inc- Education Programs – Elder Abuse Forum,  
[www.qls.com.au/education/eaf.htm](http://www.qls.com.au/education/eaf.htm) 15/02/01

<sup>29</sup> Ibid.

<sup>30</sup> It is understood the Adult Guardian in Queensland has received a small number of notifications from banking staff where there is suspected financial abuse. She reports however, that this is ad hoc and tends to be from regional locations. She suspects this relates to a greater sense of responsibility to those customers whom they know. Where such notifications have occurred the Adult Guardian has then instigated an investigation pursuant to her legislative powers.



**14 May 2007**

**Public Advocate - Queensland**

GPO Box 149

BRISANE

Qld 4000

Tel. 07 3224 7472

Fax. 07 3224 7364

Email: [public.advocate@justice.qld.gov.au](mailto:public.advocate@justice.qld.gov.au)