

The problems with asking banks to police financial abuse

Written by Eileen Webb, Associate Professor, Curtin Law School, Curtin University

The Australian Law Reform Commission wants to give banks the responsibility to protect vulnerable customers from financial abuse. But there are a number of issues with this approach. Its success depends on the good faith of the banks, and could leave some customers uncovered and the banks with no one to report abuse to.

In a [new report](#) on elder abuse, the commission recommends that the [Code of Banking Practice](#) be amended so that banks take “reasonable steps” to prevent financial abuse.

But the code is voluntary and some banks have been lax in the past, meaning some customers won't be covered. “Reasonable steps” still needs to be defined, to ensure all banks meet a standard. And we need transparency to know what financial abuse banks are dealing with, how and when.

[Around 9%](#) of older people living in the community are financially abused. It is likely the number is even higher among those with cognitive impairment or who live in institutions. Financial exploitation of older people is [increasing](#) and [mostly perpetrated](#) by those close to the victim, including family members.

The amendments to the code will include measures such as enhanced staff training to recognise elder financial abuse, an obligation to report suspected abuse, and recommendations to tackle the problem of forced guarantees for mortgages and other loans to relatives.

Can the banks protect vulnerable people?

Elder financial abuse is difficult to detect. However, banks and financial institutions are in a unique position to see it. Banks have face-to-face contact with customers, play a role in providing third-party authorisations, monitor electronic transactions and oversee lending.

But the Code of Banking Practice is voluntary, and [many in the industry are not signed on](#) . This could lead to troubling gaps in coverage. Institutions that do not sign up to the code will be under no obligation at all.

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Although some have imposed protocols to address elder financial abuse, a [recent interview with Kirsty Mackie](#), chairwoman of the Elder Abuse Committee of the Queensland Law Society, noted that training of front-line banking staff, collaboration between institutions, understanding of the bank's legal position, and preparedness to act in the customer's best interest were all lacking.

The commission also settled on a standard that requires banks to take "reasonable steps" to prevent financial abuse, despite [Legal Aid NSW recommending](#) that a higher standard be adopted. The proposed alternative was to require banks to "take all steps" to prevent financial abuse.

A standard based on what is "reasonable" is problematic as context matters; what one bank may regard as a reasonable response to suspicions of elder abuse may differ from what a court or the general public thinks.

In the [United States](#), some states impose mandatory reporting of elder financial abuse, but Australia looks [set to make reporting voluntary](#). This leads on to the issue of transparency.

We need to know under what circumstances banks will keep matters "in house", to decide if these are appropriate. Criteria for reporting suspected financial abuse need to be established, as well as a body to report to. The commission has recommended the implementation of an adult guardian to which complaints could be referred. All these issues remain unclear and will require more discussion.

A related concern is the potential ramifications for people who make reports. In Australia, whistle-blower protection remains inadequate. Indeed, the Australian Banking Association [sub mission](#) to the Australian Law Reform Commission suggested that immunity be granted to banks that report instances of elder financial abuse.

Finally, given that banks will deal internally with most instances of elder financial abuse, it is important that we ensure the bank's response balances the autonomy of older people while addressing elder financial abuse.

Where to from here?

The commission recommendation is welcome and will bolster the safeguards already in place. More discussion will be needed in the aftermath of the inquiry to ensure the recommendations are implemented and their potential realised.

The reality is that success will rest largely on the good faith of the banks. There must be willingness to build a collaborative and consistent approach to acting on elder financial abuse and to ensure rigorous internal procedures are put in place and followed. Employees who make reports of elder abuse must also have adequate protection.

This, in turn, must feed into an appropriately resourced entity where the most serious matters can be directed.

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