

Phil Kourey
Managing Director
Cameron Ralph Pty Ltd
PO Box 307
East Melbourne VIC 8002

Dear Mr. Kourey,

Capacity Australia welcomes the opportunity to provide a submission to the Independent Review of the Code of Banking Practice. Our submission focuses on the role of the Code in ensuring appropriate protections for customers who may be at risk for financial abuse due to dementia or other forms of cognitive disability. It will address the following term of reference: *r) The desirability for the Code to provide for banks to develop standards for communicating and dealing with vulnerable customers including older persons, customers with a disability and Indigenous customers.*

Capacity Australia (capacityaustralia.org.au) is a-not-for-profit medico-legal organisation led by senior legal and medical/psychiatric academics and practitioners. We are committed to supporting the rights of people with decision-making disability. One of the ways we do this is by providing education regarding capacity (decision making ability) across medical, allied health, legal, financial and community sectors across Australia and internationally. A major element of our mission is to ensure that people with decision making disability can make the decisions (especially financial) that they are capable of making, while preventing abuse.

The 2013 Code of Banking Practice provides the following advice in relation to older customers or those with a disability *"We recognise the needs of older persons and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services".*¹ It also provides the following advice on staff training: *"We will ensure our staff (and our authorised representatives) will be trained so that they: (a) can competently and efficiently discharge their functions and provide the banking services they are authorised to provide in compliance with this Code; and (b) have an adequate knowledge of the provisions of this Code and its application to banking services."*²

While it is laudable that the 2013 code acknowledges the needs of older people and those with a disability, it does not provide sufficient commitment by banks that they

¹ Australian Bankers Association (2013). Code of Banking Practice.
http://www.bankers.asn.au/ArticleDocuments/172/ABA_CODE_MANDATE_FINAL_LR.PDF.aspx

² Australian Bankers Association (2013). Code of Banking Practice.
http://www.bankers.asn.au/ArticleDocuments/172/ABA_CODE_MANDATE_FINAL_LR.PDF.aspx

will provide appropriate protections for people with cognitive impairments and those at risk of financial abuse.

The need for banking standards which respond to vulnerable customers including people with cognitive impairment is of significant importance due to both the increasing numbers of people living with dementia or cognitive impairment and the current policy shift in Australia towards person-centred care (health) and individual funding for people with disability under the National Disability Insurance Scheme (NDIS)

It is estimated that there are now more than 353,800 Australians living with dementia and that by 2050 there will be nearly 900,000 people with dementia.³ Dementia is a neurodegenerative condition associated with an inevitable decline in decision-making ability (or “capacity”) over time. Financial capacity, or the ability to manage financial affairs, can be impacted very early in the disease process.⁴ The risk of financial abuse for people with dementia is compounded by a number of psychological, physical and environmental factors related to dependency and disability that make people with dementia even more vulnerable to financial abuse.⁵

Financial abuse of older people including those with dementia is a common and serious problem, with an estimated up to 5% of people over 65 affected in Australia.⁶ In 2011, the Alzheimer’s Society United Kingdom (UK) published its survey of people with dementia, carers, Alzheimer’s society staff and adult safeguarding authorities on their perceptions and experience of financial abuse. They found that 15% of carers reported that the person they had cared for had been subject to some kind of financial abuse.⁷

In response to increasing concerns about financial abuse, there have been calls by a number of organisations and advocates for banks to take a more active role in monitoring transactions to identify abusive practices and to provide training and education to bank staff. For example, the March 2016 NSW Law Commission Report *Elder Abuse in NSW* made the following recommendation:

“That the NSW Government fund the NSW Elder Abuse Helpline and Resource Unit to conduct information sessions with financial institutions to raise awareness of financial abuse and promote online training tools for staff such as Capacity Australia’s training program to identify financial abuse.”

³ Australian Institute of Health and Welfare (2012) *Dementia in Australia*.

⁴ Martin R, et al., 2008. Declining financial capacity in patients with mild Alzheimer’s disease: A one-year longitudinal study. *American Journal of Geriatric Psychiatry* 16, 209–219

⁵ Peisah C, et al., 2009. For the International Psychogeriatric Association Task Force on Wills and Undue Influence. The wills of older persons: risk factors for undue influence *International Psychogeriatrics* 21: 7-15.

⁶ Martin R, et al., 2008. Declining financial capacity in patients with mild Alzheimer’s disease: A one-year longitudinal study. *American Journal of Geriatric Psychiatry* 16, 209–219

⁷ Chandaria K. 2011. Short changed: Protecting people with dementia from financial abuse, Alzheimer’s Society, United Kingdom: United Kingdom.

Staff training on financial abuse and vulnerable clients has been adopted by a number of leading banks in the US and UK including Wells Fargo, Bank of American Fork, Oregon Bankers Association, Peoples United Bank, Lloyds Banking and Barclays.⁸ These initiatives have led to increased reporting of financial abuse by banks as well as improved customer satisfaction.

Until recently, there was no Australian specific training materials for banks to implement in regards to preventing financial abuse. In 2015, Capacity Australia, funded by the Dementia Collaborative Research Centre, developed a tailored online education tool based on the Australian Banking Association's Guidelines on Financial Abuse Prevention, supplemented by information related to dementia, financial capacity and supported decision making. This tool was developed in consultation with banking staff and user tested on 69 banking staff from two major banks in Australia. Use of the tool resulted in a significant increase in staff knowledge. Capacity Australia, with support from the Australian Banking Association launched this tool in February 2015. Unfortunately, 18 months later, not a single bank in Australia has implemented this training.

Given the lack of action by banks within Australia to adopt measures to address financial abuse, it is imperative that the Code of Banking Practice include guidelines for how banks will provide appropriate and ethical service to customers who have a decision-making disability such as dementia or intellectual disability. The Code of Banking Practice is considered to be contractually binding and forms an important part of the broader national consumer protection framework and the financial services regulatory system.

It is the recommendation of Capacity Australia that the Banking Code of Practice include a specific statement mandating that banks develop appropriate training programs to equip their staff to identify and respond appropriately to signs of financial abuse. It is our view that in order to effectively mitigate the risk of financial abuse, the Banking Code of Practice needs to be more prescriptive than the 2013 statement that "reasonable measures" be taken to enhance the access of people with a disability to banking services.

This is especially so in the current policy climate where Australia has ratified the United Nations Convention on the Rights of Persons with Disabilities, and is moving towards implementation. Article 12 of the Convention provides for people with disabilities (including dementia and other cognitive disability) to have legal capacity equal to others, and expects signature nations to provide people with disability with the support required to exercise capacity – ie: supported decision-making. It particularly refers to people with disability being provided support to ensure the equal right to "*own or inherit property, to control their own financial affairs and to have*

⁸ AARP, 2016. Innovative Examples of Banking Safe Practices. Retrieved from: <http://www.aarp.org/content/dam/aarp/ppi/2016-02/innovative-case-examples-of-banking-safe-ppi.pdf>

equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”⁹

In a recent Australian Law Reform Commission Report on Equality, Capacity and Disability in Commonwealth Laws¹⁰, the ALRC recommended supported decision-making principles be taken up by financial institutions, stating that:

“The Australian Bankers’ Association should encourage banks to recognise supported decision-making. To this end, the ABA should issue guidelines, reflecting the National Decision-Making Principles and recognising that:

- (a) customers should be presumed to have the ability to make decisions about access to banking services;*
- (b) customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;*
- (c) customers are entitled to support in making and communicating decisions; and*
- (d) banks should recognise supporters and respond to their requests, consistent with other legal duties.”¹¹*

Given the increasing number of people with disability who will be managing either all or part of their NDIS funding (some with support), banks will need to explore how to implement policies which provide people with disability independence in banking. Capacity Australia understands that there is a competing need for banks to be aware of situations of abuse and financial exploitation, while not being overly paternalistic or denying people with disability their right to manage their own finances. Capacity Australia notes that submissions to the ALRC review stated that some banks have not allowed persons with disability to access or operate a bank account independently, and that banks are reluctant to recognise supported decision-making.¹²

A recent international report, *Alternatives to Guardianship in Financial Affairs*,¹³ canvassed ways in which Article 12 obligations might be realised in the financial sphere. Among other research, the review of alternatives to guardianship in banking included interviews with employees of major European banks and people with disabilities, their family, carers and advocates. It concluded that banks do not understand how to integrate into their work obligations to ensure that people with

⁹ Convention on the Rights of Persons with Disabilities, Article 12(5), Retrieved from:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12>

¹⁰ Australian Law Reform Commission, 2014. *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124)

¹¹ ALRC, 2014. *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124), p186.

¹² ALRC, 2014. *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124), p185-187

¹³ Tolub, Y., 2013. *Alternatives to Guardianship in Financial Affairs*, Bizchut The Israel Human Rights Centre for People with Disabilities, Jerusalem. This report was written with international audiences in mind incorporating input from European and other countries and can be viewed at <http://bizchut.org.il/en/492>.

disabilities have appropriate access to banking facilities, and that change must happen through the banking industry's regulator.¹⁴ Given that loss of independence, autonomy and personhood were view as "*severe forms of harm for any person (which) often have a greater impact than financial loss*",¹⁵ the report offers seven alternatives to guardianship which could be promoted and utilised by banks to ensure that people with disability have the maximum freedom to conduct financial affairs while risk to banks is minimised.¹⁶ Many of these alternatives may already be in use by banks but not generally for people with disability.

Capacity Australia recommends that the Australian Banking Code of Practice include a more definitive mandate for banks to develop appropriate policies and procedures regarding recognition of the right of people with disability to operate bank accounts and deal with their finances, including with support. The Code should also be explicit in requiring banks to ensure that their staff undertake training programs to assist in understanding relevant issues and responding flexibility and appropriately.

Thank you for the opportunity to comment on this review. On behalf of Capacity Australia, I would be pleased to provide any further information regarding our educational tool that would be useful to the reviewers.

Regards,



on behalf of:

Professor Carmelle Peisah
President Capacity Australia
and
Jenna Macnab
Director Capacity Australia

¹⁴ Tolub, Y., 2013 *Alternatives to Guardianship in Financial Affairs*, Bizchut The Israel Human Rights Centre for People with Disabilities, Jerusalem, p28.

¹⁵ Tolub, Y., 2013 *Alternatives to Guardianship in Financial Affairs*, Bizchut The Israel Human Rights Centre for People with Disabilities, Jerusalem, p6.

¹⁶ Tolub, Y., 2013 *Alternatives to Guardianship in Financial Affairs*, Bizchut The Israel Human Rights Centre for People with Disabilities, Jerusalem, p28-42.

