

**BANKS AT THE FOREFRONT: A LEGAL  
FRAMEWORK FOR THE IDENTIFICATION  
AND REPORTING OF ELDER FINANCIAL  
ABUSE**

11,979 words

This dissertation is submitted in partial fulfilment of the requirements of the degree of  
Bachelor of Laws (Honours) of Curtin University

2017

**Juheina Ahmed**  
(LLB, Curtin University)

I, Juheina Ahmed, declare that the material contained in this Honours dissertation, except where properly acknowledged and attributed, is the product of my own work carried out during the Honours year and has not previously been submitted for a degree or an award at any tertiary education institution.

Signature: .....

Date: .....

## Acknowledgements

*This thesis is dedicated to my beautiful late grandmother: for always believing I was capable of so much more than I thought. I owe it all to you.*

*I would like to express my sincere thanks to Dr Eileen Webb, my thesis supervisor, for her valuable comments and suggestions on the overall development of this thesis.*

*A special thank you to Dr Narelle Morris and Leigh Smith at Curtin Law School for their invaluable time, effort and guidance throughout the writing of this thesis.*

*I would like to express my gratitude to Consumer Credit Legal Service Inc. for inspiring me by providing me an opportunity to draft submissions for the Australian Law Reform Commission's inquiry into elder abuse.*

*Finally, a special thank you is extended to my family: my parents and brothers for their unwavering love and support throughout the writing of this thesis and my life in general.*

## Table of Contents

<b>Abstract</b> .....	iv
<b>List of Acronyms</b> .....	vi
<b>Introduction</b> .....	1
<b>Chapter 1 – A Contextual Background</b> .....	3
1.1 Elder Financial Abuse .....	3
1.1.1 Definition .....	3
1.1.2 Examples of Financial Abuse .....	3
1.1.3 Meaning of Mandatory Reporting .....	4
1.1.4 The Role of Banks .....	5
1.1.5 Current Industry Guidelines .....	6
1.1.6 Australian Law Reform Commission’s Final Report .....	6
1.2 Literature Overview .....	9
1.3 Methodology .....	13
<b>Chapter 2 – Existing Responses to Elder Financial Abuse by Banks</b> .....	16
2.1 Current Reporting Framework .....	16
2.2 Bank Industry Guideline .....	17
2.3 Australian Bankers’ Association and the Industry Guideline .....	18
2.4 The Code of Banking Practice .....	20
2.5 Key Recommendations for a More Proactive Response by Banks .....	22
<b>Chapter 3 – Identifying Difficulties to a More Proactive Response</b> .....	24
3.1 Problems with definitions and lack of data .....	24
3.2 Underreporting of financial abuse .....	27
3.3 Reluctance to mandatory reporting of financial abuse .....	28
3.4 Current Inadequate Banking Response .....	30
<b>CHAPTER 4 – International Responses to Elder Financial Abuse</b> .....	34
4.1 Mandatory Reporting in the United States .....	34
4.2 Reporting and investigation process .....	35
4.3 Canada .....	38
4.4 Effectiveness of reporting .....	39
<b>Chapter 5 – Balancing Rights with the Protection of Elderly Australians</b> .....	43
5.1 Autonomy of elderly people .....	43
5.2 Privacy implications of reporting .....	46

5.3 Immunity from proceedings.....	48
<b>Conclusion</b> .....	<b>51</b>
<b>Bibliography</b> .....	<b>53</b>

## Abstract

Elder abuse is a growing and serious issue in Australian communities, particularly with the rise of the ageing population. Elder abuse of any kind has extensive consequences for the elderly, their families and the wider community.<sup>1</sup> In the past few decades, and particularly in the last five years, policymakers have progressively developed policy instruments and strategies to generally protect the elderly population.<sup>2</sup> However, it was not until the late 1980s, when Australia seriously started considering the issue of older people being victims of crime, abuse and exploitation.<sup>3</sup>

This dissertation argues that Australian banks and financial institutions have an obvious, yet underutilised, role in the early identification of elder financial abuse. As such, the current bank reporting framework for elder financial abuse is voluntary and imposes limited obligations for banks to respond to financial abuse. The frontline role of bank tellers or staff cannot be underestimated in detecting unusual or suspicious transactions indicating potential elder financial abuse. And yet, it is fair to say that despite their unique position, banks have been and continue to be reluctant to intervene in cases of suspected elder financial abuse because of concerns regarding *inter alia* privacy obligations, legal liability, and the absence of a consistent reporting framework.

In suggesting that banks adopt a proactive response to financial abuse, this dissertation examines the current bank reporting frameworks for elder financial abuse and underscores need to implement a mandatory reporting framework in Australia. It then considers how the issue of elder financial abuse is addressed internationally in the United States and

---

<sup>1</sup> Duncan Boldy et al, 'Addressing Elder Abuse: West Australian Case Study' (2005) 24 *Australasian Journal on Ageing* 3, 3.

<sup>2</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' 36 (2014) *Sydney Law Review* 99, 120; National Seniors Australia, Submission 154 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 24 February 2017, 5.

<sup>3</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 4; P.F. Dunn, 'Elder Abuse' as an Innovation to Australia: A Critical Overview In J. Kosberg and J. Garcia, (Eds), *Elder Abuse: International and Cross-Cultural perspectives*, (New York: Haworth Press, 1995) 13-31.

Canada, by examining various frameworks already in place in relation to the training, and reporting obligations on banks. Lastly, in order to propose an effective mandatory reporting framework as a response to elder financial abuse, this thesis argues that a balance must be achieved and maintained between autonomy and rights of elderly people and the need to protect vulnerable elderly Australians from financial exploitation.

## **List of Acronyms**

ABA	Australian Bankers' Association
AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
APS	Adult Protective Services
EAPU	Elder Abuse Prevention Unit
FOS	Financial Ombudsman Service

## Introduction

Elder financial abuse has recently been named ‘the crime of the twenty-first century’.<sup>1</sup> A recent report by the Australian Institute of Family Studies found that elder financial abuse is the most common form of abuse experienced by elderly people.<sup>2</sup> There is a lack of consolidated national data because elder abuse goes largely underreported.<sup>3</sup> This is because elderly victims are often reluctant to report their perpetrators, which data shows; typically tend to be family members and those who are in a relationship of trust with the victims.<sup>4</sup> While it is acknowledged that prevention of elder abuse is a public responsibility, professionals such as those in the banking industry encounter elder financial abuse in their day-to-day practice and have a frontline role in responding to, and reporting financial abuse.<sup>5</sup>

Banks can no longer afford to be silent on this issue and there need to be protocols for the timely identification and reporting of suspected financial abuse. The aim of this thesis is to reveal the inconsistencies in relation to what constitutes elder abuse; the lack of national statistics on the prevalence of this issue; and the absence of any policy framework or reporting body for the prevention of elder abuse.<sup>6</sup> This thesis looks towards law reform in the implementation of a mandatory reporting framework. It highlights that current voluntary bank industry guideline, education and voluntary initiatives by banks provide

---

<sup>1</sup> See Kristen M. Lewis, ‘The Crime of the 21st Century: Financial Abuse of Elders’ (2014) 28 *PROBATE & PROP* 10, 11; Benjamin Pomerance, ‘Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse’ (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 461

<sup>2</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 3 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>3</sup> *Ibid.*

<sup>4</sup> P Kinnear and A Graycar, *Abuse of older people: crime or family dynamics? Trends and Issues in Crime and Criminal Justice* (1999) 113 Australian Institute of Criminology 1; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 1 <[http://www.law.uwa.edu.au/data/assets/pdf\\_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf](http://www.law.uwa.edu.au/data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf)>.

<sup>5</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, 1 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>6</sup> Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 29.

inadequate protection against financial exploitation.<sup>7</sup> Finally, this thesis acknowledges that although the concerns expressed against mandatory reporting are valid,<sup>8</sup> these can be addressed with minor changes in the law and can no longer justify a lack of reporting framework of any kind.<sup>9</sup>

Chapter 1 provides a contextual background on the issue of elder financial abuse and the role of banks in identifying and preventing financial abuse. Chapter 2 examines how banks respond to financial abuse and the existing reporting framework as a preface to Chapter 3, which highlights the difficulties that have hampered a proactive banking response. Specifically, Chapter 3.4 examines the inadequacy of the banking guideline that does not provide a reporting mechanism for banks to report suspected financial abuse. Chapter 4 considers the reporting frameworks implemented in USA and Canada to affirm the need for a similar proactive response in Australia. The aim is not to emulate those frameworks but to consider their key features and their respective effectiveness. Chapter 5 draws from international experience to address concerns expressed against mandatory reporting in Australia.<sup>10</sup> Chapter 5.1 posits arguments in favour of mandatory reporting and calls for the implementation of any framework to carefully balance competing interests in relation to autonomy of elderly people against the need to protect vulnerable elderly Australians from financial abuse.

Finally it is submitted that in order to avoid ineffective piecemeal legislative reforms to this problem, this thesis offers a different perspective in examining bank responses to elder financial abuse, one that calls for the implementation of a mandatory reporting framework in Australia.

---

<sup>7</sup> Office of the Public Advocate (SA), ‘Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People’ (2011), 12.

<sup>8</sup> See Chapter 3.3 for concerns expressed against mandatory reporting.

<sup>9</sup> Sandra L Hughes, ‘Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly’ (2003) *American Bar Association*, 9.

<sup>10</sup> K Wilber, and S Reynolds, ‘Introducing a framework for defining financial abuse of the elderly’ (1996) 8(2) *Journal of Elder Abuse and Neglect* 61–80

# Chapter 1 – A Contextual Background

## 1.1 Elder Financial Abuse

### 1.1.1 Definition

According to the World Health Organisation, elder financial abuse is ‘[t]he illegal or improper exploitation or use of funds or other resources of the older person’.<sup>1</sup> Under this definition, perpetrators of elder financial abuse can include institutions and individuals who are not in a relationship of trust with the victim as well as those that are.<sup>2</sup> This is the most commonly used definition in the literature and provides an international benchmark in this area.<sup>3</sup>

It is acknowledged at the outset that there are various difficulties associated with defining terms such as ‘elder’ and ‘elder financial abuse’, which will be explored further in the literature overview section. All references to ‘elderly people’; and ‘elder financial abuse’ in this thesis also include abuse of ‘vulnerable adults’ so as not to preclude them from this research.<sup>4</sup> The amount of literature devoted to these definitions alone deserves a topic in its own right and will not form the focus of this thesis.<sup>5</sup>

### 1.1.2 Examples of Financial Abuse

Financial exploitation comes in many forms and can include but is not limited to:

- a. improper use of power of attorney arrangements;<sup>6</sup>

---

<sup>1</sup> WHO/INPEA, *Missing voices: views of older persons on elder abuse* (2002) World Health Organisation, Geneva, 127.

<sup>2</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders’ Assets Study* (2009) Melbourne Monash University, 9.

<sup>3</sup> Duncan Boldy et al, 'Addressing Elder Abuse: West Australian Case Study' (2005) 24 *Australasian Journal on Ageing* 3, 3

<sup>4</sup> Term such as ‘elderly people’ and ‘vulnerable adults’ will be used interchangeably. Although the literature in this thesis is on elder abuse, it should be noted that the banking sector has referred to ‘elder financial abuse’ as ‘financial abuse of vulnerable adults’. See Australian Bankers’ Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013).

<sup>5</sup> D J Rabiner, D Brown and J O’Keeffe, 'Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them' (2004) 16(1) *Journal of Elder Abuse and Neglect* 65, 81.

<sup>6</sup> Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 361.

- b. fraud;
- c. forgery;
- d. forced property transfers; and
- e. denying the elderly person access to his or her own funds or home<sup>7</sup>

Despite elder abuse gaining increasing attention, there are various examples of how older Australians are being financially exploited. The Age Discrimination Commissioner, Dr Kay Patterson AO, reported in 2017 the following instances from consultations she was undertaking:<sup>8</sup>

At one community legal centre I was told about a son moving in to help his father renovate. The son sold the house, delivered his emaciated father to his sister in just the clothes in which he stood, and drove off with the money.

Bank tellers and employees often witness suspicious transactions and therefore have the ability to take action in preventing or reporting instances of financial abuse. Further consultations by Dr Kay Patterson AO provided the following example:

The bank teller who was concerned when a regular customer came in with her son, asking to withdraw \$50,000. When the manager asked if she really wanted to withdraw the money, she said her son had told her she wouldn't see the grandchildren again if she didn't.<sup>9</sup>

### 1.1.3 Meaning of Mandatory Reporting

Mandatory reporting refers to the introduction of elder abuse legislation that mandates reporting of suspected cases of elder abuse.<sup>10</sup> Mandatory reporting involves the establishment of a reporting body that provides an “Adult Protection” type service. The central role of this reporting body is to conduct investigations of the reports it

---

<sup>7</sup> Lois A. Ritter, Shirley Manly Lampkin, *Community Mental Health* (Jones and Bartlett Learning, 2012), 382.

<sup>8</sup> Rosalind F Croucher AM, ‘Supporting Older People in Exercising and Protecting Their Rights—Insights from the ALRC’s Disability and Elder Abuse Inquiries’ (Speech delivered at the ADA National Conference, 27 March 2017) < <https://www.alrc.gov.au/news-media/speech-presentation-article/supporting-older-people>>.

<sup>9</sup> Kay Patterson, ‘When sons and daughters abuse our most vulnerable’, *The Australian*, 6 February 2017.

<sup>10</sup> Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006), 4.

receives from mandated reporters.<sup>11</sup> The reporting body can liaise with the victim, the mandated reporter that made the report, it can also institute civil or criminal proceedings against the perpetrator; and generally assist the victim of elder abuse. The reporting model of elder abuse in the US is based on child protection model and requirements of reporting vary from state to state. It can include several professions as mandated reporters particularly health professionals, human services and law enforcement. Other states have included bank employees and financial professionals as mandated reporters of elder abuse. There are also some states in the US that require everyone to report elder abuse.<sup>12</sup> Mandatory reporting and in the US is discussed in Chapter 4 in further detail.

#### 1.1.4 The Role of Banks

Australian banks have a central role in the early identification and prevention of elder financial abuse. For instance, as shown in the above example, a bank teller presiding over bank withdrawals can witness a series of unusual or uncharacteristic transactions indicating potential financial abuse.<sup>13</sup> An American Bar Association study which has been approved in Australia, observes that banks are in a position to monitor:<sup>14</sup>

- a. evidence of coercion between customers and third parties;
- b. an uncommon volume of banking activity;
- c. unusual transactions inconsistent with the customer's banking habit;
- d. sudden increases in incurred debt where the customer is unaware; and
- e. withdrawal of large funds by a fiduciary or third party with no apparent benefit to the customer.<sup>15</sup>

---

<sup>11</sup> J Lemke and S Moskowitz, 'Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation' (2005) 7(1) *Marquette Elder's Advisor* 1, 11.

<sup>12</sup> Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006), 4

<sup>13</sup> *Ibid.*

<sup>14</sup> Sandra Hughes, 'Identity Theft, Bank Secrecy, and Anti-Money Laundering Compliance: Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly' (2004) 58 *Consumer Finance Law Quarterly Report* 293, 294; Jane Black, 'The Not-so-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population' 82(7) *St. John's Law Review* 289, 305.

<sup>15</sup> BITS Financial Services Roundtable, *Protecting the Elderly and Vulnerable from Financial Exploitation* (2010) 11-13  
<<http://fsroundtable.org/wpcontent/uploads/2015/05/BITSProtectingVulnerableAdults0410.pdf>>.

In cases involving financial abuse, customers often state that bank employees should have identified or been suspicious that financial abuse was occurring at an early stage and taken appropriate measures to prevent loss.<sup>16</sup> The study above shows that banks are in a position to monitor and detect suspicious transactions or draw attention to alarming behavior in their day-to-day practice.<sup>17</sup> However, despite their frontline role, banks are reluctant to intervene in cases of suspected financial abuse because of concerns regarding, *inter alia*, privacy obligations, and potential legal liability, as discussed later in Chapter 3.

### 1.1.5 Current Industry Guidelines

As it stands, the current framework that regulates general financial abuse in the banking sector is Australian Bankers' Association's industry guideline, *Protecting vulnerable customers from potential financial abuse*. The guideline sets out that if bank staff suspect a customer might be or about to be, the victim of financial abuse, they can take a number of steps including notifying the branch manager.<sup>18</sup> The difficulty is that this industry guideline is voluntary and therefore enforces no binding obligations on banks.<sup>19</sup> A 'guideline', by its very name, does not give due regard both to the known prevalence of this issue and the important role banks should play in preventing financial abuse.

### 1.1.6 Australian Law Reform Commission's Final Report

The lack of effective response in the prevention of financial abuse has been previously called into question. In June 2016 the Australian Law Reform Commission (ALRC) launched an inquiry into, 'Protecting the Rights of Older Australians from Abuse'. From the outset, the ALRC focused attention on the frontline role of banks and their unique position to identify and report any suspected financial abuse.

---

<sup>16</sup> See also Financial Ombudsman Service, *Bulletin 56: Financial Abuse of the Vulnerable Older Person* (2007) 2 <[https://www.fos.org.au/custom/files/docs/fos\\_banking\\_finance\\_bulletin\\_56.pdf](https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf)>.

<sup>17</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre, 19.

<sup>18</sup> Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013), 4.

<sup>19</sup> Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (February 2017), 130.

The ALRC's discussion paper in December 2016 proposed reforms to regulate the banking sector in relation to elder financial abuse by calling for a more proactive response by banks to the issue.<sup>20</sup> This included the proposal to make amendments to the Code of Banking Practice to include, for instance, 'training for staff, use of software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to relevant authorities'.<sup>21</sup>

The ALRC tabled its Final Report on 14 June 2017. Amongst its recommendations was:

The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, Protecting Vulnerable Customers from Potential Financial Abuse.

The 'reasonable steps' outlined by the ALRC in its final report included inserting various initiatives in the industry guideline, including:<sup>22</sup>

- a. training staff to detect and appropriately respond to abuse;
- b. using software and other means to identify suspicious transactions;
- c. reporting abuse to the relevant authorities, when appropriate;
- d. guaranteeing mortgages and other loans; and
- e. measures to check that 'Authority to Operate' forms are not obtained fraudulently and that customers understand the risks of these arrangements.

Although the ALRC recommended these changes to the industry guideline, it did not go so far as to recommend reporting of financial abuse by banks in its report. It is argued that reporting of financial abuse must fall under the 'reasonable steps' banks should take in cases of suspected financial abuse. One reason for the ALRC not venturing into reporting territory, particularly mandatory reporting is perhaps because the proposal outlined in the discussion paper was very temperate.<sup>23</sup> As a corollary, submissions to the inquiry

---

<sup>20</sup> Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (December 2016), 129.

<sup>21</sup> *Ibid.*

<sup>22</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 298-299.

<sup>23</sup> See Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (December 2016), 129.

generally did not comment on mandatory reporting whilst some stakeholders only went far enough to either support or object to mandatory reporting.<sup>24</sup>

The Final Report also did not discuss the need for increased reporting of financial abuse and transparency by banks in much detail.<sup>25</sup> It can be said that the ALRC missed the perfect opportunity to determine stakeholders' position on mandatory reporting by not expressly including it as a proposal in the discussion paper. As discussed in Chapter 1, instead, the ALRC took a somewhat weaker position in stating that reporting abuse in some circumstances may be an 'appropriate step' to take and those circumstances need to be outlined in the bank industry guideline.<sup>26</sup> It did not recommend the cases of financial abuse in which banks should take that 'appropriate step' nor did it highlight what reporting of financial abuse by banks, if any, should capture.<sup>27</sup>

It was accepted by the ALRC that although there were a number of submissions in support of mandatory reporting, many authors chose not to outline the implementation of any reporting framework which require banks to report financial abuse.<sup>28</sup> The issue of what type of reporting may be appropriate is, obviously a difficult one. A number of number of state service providers and agencies have voiced support for mandatory reporting.<sup>29</sup> However, there is almost no discussion of any proposed provisions of the mandatory reporting by its supporters or what it should consist.<sup>30</sup> The reason for this could be due to the objection towards mandatory reporting voiced by key players in this area, such as the

---

<sup>24</sup> Various stakeholders stated that they chose not to comment on their position on mandatory reporting or whether this is the appropriate step for Australia to take, as it was not part of the discussion paper.

<sup>25</sup> Although it is justifiable that banks have to protect customer confidentiality; banks can generally provide comment on the forms of financial abuse they may encounter.

<sup>26</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 308.

<sup>27</sup> *Ibid*

<sup>28</sup> Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (December 2016), 130.

<sup>29</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society; Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 42-44.

<sup>30</sup> Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (December 2016), 130.

Australian Bankers' Association (ABA).<sup>31</sup> Financial abuse in Australia is rarely looked at in terms of introducing a mandatory reporting framework for banks although mandatory reporting continues to draw interest in some quarters.<sup>32</sup>

## 1.2 Literature Overview

This section will consider how elder financial abuse has been defined by various states and territories and the impact this has had on measuring the prevalence of elder financial abuse.<sup>33</sup> It will do so by discussing various state law reports and publications on elder abuse. Next, it will highlight the lack of consolidated national data on this problem and determine the prospects of a mandatory reporting framework being implemented.

The issue of elder financial abuse in Australia and its detrimental impact on the community did not gain attention until the early 2000s when various state surveys on elder abuse were conducted.<sup>34</sup> A WA survey in 2003, for instance, found that two-thirds of the cases in elder abuse survey were related to financial abuse and it is the most common form of elder abuse.<sup>35</sup> Although there is general consensus in the literature on the seriousness of this issue, progress has been slow in terms of the frontline role of banks in it.<sup>36</sup>

---

<sup>31</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre, 37.

<sup>32</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate, 27.

<sup>33</sup> <sup>33</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 3 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>34</sup> See Susan Kurrle, Gerard Naughtin, 'An Overview of Elder Abuse and Neglect in Australia' (2008) 20(2) *Journal of Elder Abuse & Neglect* 108, 110; See also B Faye and M Sellick, *Advocare's Speak Out Survey "S.O.S" on Elder Abuse* (2003) Perth, Advocare; Boldy et al, *Elder Abuse in Western Australia* (2002) Perth, Centre for Research into Aged Care Services, Curtin University of Technology; B Schiamberg and D Gans, 'Elder abuse by adult children: an applied ecological framework for understanding contextual risk factors and the intergenerational character of quality for life' (2000) *International Journal of Aging And Human Development* 50, 329-359; J. B. Sklar, 'Elder and dependent adult fraud: A sampler of actual cases to profile the offenders and the crimes they perpetrate' (2000) *Journal of Elder Abuse and Neglect* 12, 19-32; D Setterlund, *The strategic plan for the prevention of elder abuse in Queensland* (2001) The Prevention Of Elder Abuse Taskforce (PEAT Force).

<sup>35</sup> B Faye and M Sellick, *Advocare's Speak Out Survey "S.O.S" on Elder Abuse* (2003) Perth, Advocare; <sup>35</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 3 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>36</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 10, 24; S Kurrle, P Sadler, & I Cameron, 'Elder abuse – an Australian case series' (1991) *Medical Journal of Australia* 155,

The literature is polarized on whether banks should engage in mandatory reporting of financial abuse.<sup>37</sup> Therefore, Australia is currently unlikely to implement any mandatory reporting framework.<sup>38</sup> The current recommended approach lies somewhere in the middle with co-operative voluntary initiatives between the banking and government sectors. It should be noted, however, that these do no good without a reporting mechanism for banks to report any suspected financial abuse and reporting body to investigate the reports.<sup>39</sup>

Leading up to the ALRC inquiry into elder abuse, mandatory reporting has received increased support in various government or parliamentary reports across the country.<sup>40</sup> However, while mandatory reporting may be proposed, there is little discussion of what the framework should look like or how it could be implemented. Banks, of course, have generally not supported mandatory reporting, the reasons for which will be discussed in Chapter 2.<sup>41</sup>

It is accepted that elder abuse is a complex and multifaceted issue, one that is complicated by lack of an agreed definition, challenges in collecting accurate statistics and balancing competing interests of vulnerable people with their right to self-determination.

---

150–153; N Biviano, ‘Abuse of the non-institutionalised aged: Dilemmas of policy and practice’ (1996) 4 *Australian Social Work* 41, 46.

<sup>37</sup> P.F. Dunn, ‘Elder Abuse’ as an Innovation to Australia: A Critical Overview In J. Kosberg and J. Garcia, (Eds), *Elder Abuse: International and Cross-Cultural perspectives*, (New York: Haworth Press, 1995); Kyle Louise, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 4; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007).

<sup>38</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, ‘Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector’ (2008) Report, Loddon Campaspe Community Legal Centre, 4.

<sup>39</sup> Kyle Louise, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 4, 13.

<sup>40</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate; Office of the Public Advocate (SA), ‘Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People’ (2011), 42-44.

<sup>41</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, ‘Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector’ (2008) Report, Loddon Campaspe Community Legal Centre, 15.

The WHO's definition has been criticized for being too broad and 'unhelpful' in characterizing this problem. This includes, for example, the difficulties with the definition of what constitutes 'improper exploitation or use of funds'.<sup>42</sup> There are also conflicting views surrounding the age limits that define an 'elder'. Some sources stating that it relates to persons aged over 65,<sup>43</sup> while other sources suggest persons above the age of 80 and limit it to only those with mental or cognitive impairments.<sup>44</sup>

Various state service providers, including Elder Abuse Helplines,<sup>45</sup> have adopted different definitions of 'elder financial abuse'.<sup>46</sup> Due to these difficulties, elder financial abuse lacks clarity and is not easily characterised.<sup>47</sup> Some definitions have been criticized for only considering perpetrators within the context of a relationship of trust, which frequently involves family members such as adult children, grandchildren and spouses.<sup>48</sup> This has its own drawbacks as it excludes financial abuse outside such a relationship, and may have the effect of limiting the protection provided to the elderly person depending on how their perpetrator is classified.<sup>49</sup>

---

<sup>42</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 9; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 1.

<sup>43</sup> Russel Smith, 'Fraud & Financial Abuse of Older Persons' (1999) *Australian Institute of Criminology* 132; Victorian Government, Department of Health, *Elder Abuse Prevention and Response Guidelines 2012-2014* (June 2012).

<sup>44</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 8.

<sup>45</sup> See especially Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 13 <<http://www.law.uwa.edu.au/data/assets/pdf/file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf>>.

<sup>46</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 8; Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No 83 (February 2017) 140-141.

<sup>47</sup> Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 13

<sup>48</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 5; Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 3.

<sup>49</sup> For example financial abuse may not be considered if the perpetrator does not have a relationship of trust with the victim resulting in the victim not being protected in some cases. See G Lowndes, P Darzins,

The problem is that inconsistencies in the definition of elder financial abuse complicates the way that elder financial abuse is measured.<sup>50</sup> As the definition is not uniformly understood or applied, it is not possible to measure its prevalence in a standardized manner to determine the exact extent of this problem in Australia.<sup>51</sup> The lack of an agreed definition can act as an impediment to a more proactive governmental response that, amongst other things, creates difficulties in training bank employees to detect and respond to suspected financial abuse as it occurs.<sup>52</sup>

Apart from under-reporting of elder abuse, there are other difficulties associated with research on the prevalence of this issue.<sup>53</sup> Studies have used different methodologies for collecting data, including surveys and telephone helpline activity.<sup>54</sup> The drawback of collecting prevalence data is that the number of reported cases vary according to the method used to measure them.<sup>55</sup> Further difficulties arise in estimating prevalence from helpline data, as it involves victims to have knowledge that they have been abused, have awareness of the helpline service and ‘the desire, capacity and opportunity to report the abuse.’<sup>56</sup> Surveys also do not include ‘dependents who are mentally, cognitively or physically ill individuals, who are at increased risk of abuse.’<sup>57</sup>

---

J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 9.

<sup>50</sup> See especially G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 5.

<sup>51</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 9.

<sup>52</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 3; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 1-3.

<sup>53</sup> See G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 9.

<sup>54</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 10.

<sup>55</sup> *Ibid* 5.

<sup>56</sup> There are also further difficulties created by the use of the word ‘abuse’ and its negative connotations especially in cases where a family member is a perpetrator. See *Ibid* 10.

<sup>57</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 10.

The ABA was not supportive of mandatory reporting by banks as it may result in:<sup>58</sup>

- a. breach of privacy and confidentiality claims;
- b. anti-discrimination claims; and
- c. defamation claims against those who report abuses<sup>59</sup>

The literature is laden with such concerns as reasons to object to the implementation of a mandatory reporting framework.<sup>60</sup> Australia has not reached a stage where it addresses the above concerns in order to lead the nation in responding to what is emerging as a major policy concern for all communities.<sup>61</sup> Therefore, the current recommended approaches to financial abuse and the role of banks largely involve, co-operative voluntary initiatives between the banking industry and government sector.<sup>62</sup> This includes some form of voluntary reporting and ensuring the banking sector's cooperation through internal processes (such as reporting to the branch manager) that protect customer assets.<sup>63</sup>

### 1.3 Methodology

This thesis will examine current responses to elder financial abuse in the banking sector and its adequacy in protecting vulnerable adults. For this purpose, doctrinal legal research

---

<sup>58</sup> Australian Bankers' Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 4.

<sup>59</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate, 13; J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre; Kyle Louise, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4, 13.

<sup>60</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre, 15; Kyle Louise, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4, 13.

<sup>61</sup> Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 50.

<sup>62</sup> Kyle Louise, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4, 13.

<sup>63</sup> Kyle Louise, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4, 13 quoting G Price and C Fox, 'The Massachusetts Bank Reporting Project: An Edge against Elder Financial Exploitation' (1997) 8(4) *Journal of Elder Abuse and Neglect* 59, 59; J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre, 4.

will be undertaken through primary and secondary sources of law in Australia. This will particularly focus on analysing the written sources – law reports; government publications; various policy frameworks; and industry guidelines.<sup>64</sup> It will apply the internal method of doctrinal research which includes the study of law ‘using reason, logic and argument’ and the ‘primacy of critical reasoning based around authoritative texts.’<sup>65</sup>

This research will also engage in discourse analysis in order to critically examine language used in text.<sup>66</sup> Published reports will be helpful in providing a critical and conceptual analysis of source materials in this area. These materials and their recommendations will be useful in proposing a theoretical framework for reform that provides for the implementation of mandatory reporting by banks. This thesis will consider various types of publications including state law reports, submissions to the ALRC inquiry; its Final Report<sup>67</sup> and US journal articles.

However, a comparative methodology will not be undertaken as it involves comparing jurisdictions for similarities and differences whilst the focus of this research is much narrower and calls for a reporting framework to be developed in Australia much like its international counterparts.

Jurisdictions such as the US have been chosen to address arguments expressed against mandatory reporting as they have already encountered implemented mandatory reporting frameworks in the US. There has also been recent support to consider foreign jurisdictions for guidance as various government reports analyse US and Canadian approaches to mandatory reporting.<sup>68</sup> Training programs in USA and use of software to detect suspicious transactions have been specifically considered by Australian law reports to determine what the appropriate response should be.<sup>69</sup>

---

<sup>64</sup> Terry Hutchinson, *Researching and Writing in Law* (Lawbook, 3<sup>rd</sup> edition, 2010) 23.

<sup>65</sup> C McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 (Oct) *Law Quarterly Review* 632.

<sup>66</sup> Terry Hutchinson, *Researching and Writing in Law* (Lawbook, 3<sup>rd</sup> edition, 2010), 36.

<sup>67</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017).

<sup>68</sup> For discussion of US studies on financial abuse see Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (December 2016), 20.

<sup>69</sup> See especially See Consumer Credit Legal Service Inc., Submission 301 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 9.

As there are significant differences in definitions and measurements of data on elder abuse within the US states, any quantitative data in those jurisdictions will not be compared due to difficulties in determining the impact of mandatory reporting on any subsequent increase in reporting by banks.<sup>70</sup> This is perhaps due to ‘lack of evidence of effectiveness rather than a lack of effectiveness.’<sup>71</sup> Overall, considering foreign jurisdictions and their approaches to financial abuse will provide a real opportunity to propose well-informed law reform suggestions that involve the implementation of a consistent mandatory reporting framework in Australia.<sup>72</sup>

The expanded legal research framework will involve strong focus on law reform research.<sup>73</sup> This is the preferred methodology due to the ALRC Inquiry and other government publications proposing banks take steps to identify and report suspected financial abuse.<sup>74</sup> However, it is evident that in undertaking discussion of law reform particularly with a view of critical analysis, ‘there is always likely to be winners and losers, and in this way policy can rear its head even though the issue under consideration may be neutral.’<sup>75</sup>

---

<sup>70</sup> Apart from jurisdictional issues, difficulties include under-reporting as well as the different methods used to ‘measure’ its prevalence, which affect the accuracy of any data.

<sup>71</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders’ Assets Study* (2009) Melbourne Monash University, 5; Sandra L Hughes, ‘Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly’ (2003) *American Bar Association*, 27.

<sup>72</sup> M Pendleton, ‘Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditionally Scholarly Article’ in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 166.

<sup>73</sup> Terry Hutchinson, *Researching and Writing in Law* (Lawbook, 3<sup>rd</sup> edition, 2010) 63-65.

<sup>74</sup> Law society and state law reports calling for a more proactive response by banks to elder financial abuse is not the same as mandatory reporting. It is to be noted that there is not much literature in the way of scholarly/journal articles. See generally Office of the Public Advocate (SA), ‘Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People’ (2011), 12.

<sup>75</sup> Terry Hutchinson, *Researching and Writing in Law* (Lawbook, 3<sup>rd</sup> edition, 2010) 65.

## Chapter 2 – Existing Responses to Elder Financial Abuse by Banks

It is fair to say that despite their unique position, financial institutions are reluctant to intervene in cases of suspected elder financial abuse in the absence of a consistent reporting framework.<sup>1</sup> In proposing a mandatory reporting framework, it is important to consider the existing regulations and the extent to which they currently provide protection against elder financial abuse. This Chapter provides a brief overview of the current reporting framework. In doing so, it will highlight the framework's inadequacy as it provides virtually no means for bank employees to report suspected elder financial abuse.

### 2.1 Current Reporting Framework

There are few national banking laws or regulations that expressly provide for detection or reporting of suspected financial abuse. The current framework governs general banking transactions and conduct by financial institutions. These include the *National Consumer Credit Protection Act 2009* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth); and the *ePayments Code*,<sup>2</sup> which regulates and protects bank customers from fraud including unauthorised transactions and other potentially abusive conduct.<sup>3</sup> It also 'regulates electronic payments, including ATM, EFTPOS and credit card transactions, online payments, internet and mobile banking, and BPAY'.<sup>4</sup> However, there are no provisions in these legislations that expressly provide for financial abuse or the required response by banks.<sup>5</sup>

---

<sup>1</sup> The reluctance of the banking industry to mandatory reporting also stems from concerns about its resultant liability for reporting or not reporting suspected abuse as the case may be. This has been further analysed in Chapter 5.

<sup>2</sup> This regulates electronic payment facilities in Australia which includes mistaken payments and responsibility for unauthorised transactions. See ASIC, *ePayments Code* (9 March 2017) <<http://asic.gov.au/for-consumers/codes-of-conduct/epayments-code/>>.

<sup>3</sup> See Code Compliance Monitoring Committee, *Codes of Practice in the Financial Services Sector* (November 2011) <<http://www.ccmc.org.au/cms/wp-content/uploads/2013/11/Codes-of-Practice-FSN-article-Nov-Dec-2011.pdf>>.

<sup>4</sup> Australian Securities and Investments Commission, *ePayments Code* (March 2016) 2.

<sup>5</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report No 131 (2017) 299.

## 2.2 Bank Industry Guideline

As it stands, the current framework that regulates financial abuse in the banking sector is the ABA's industry guideline, *Protecting vulnerable customers from potential financial abuse*.<sup>6</sup> If bank staff suspect a customer might be the victim of financial abuse, they may, amongst other things:

- a. have conversations with customers about any suspected financial abuse;
- b. verify third party's authorisation including powers of attorney;
- c. in case of suspected abuse, contact supervisors, bank managers or legal counsel;
- d. consider delaying any transactions if the customer is in immediate danger of losing money; or
- e. seek advice from the Office of Public Advocate<sup>7</sup>

Although the industry guideline was 'developed with input from, and agreed to by, member banks', the ABA only encourages its members to comply with them in their internal policies and procedures.<sup>8</sup> The industry guideline is voluntary and therefore enforces no binding obligations on banks.<sup>9</sup> It also does not accurately reflect both the known prevalence of this issue as well as the important role banks can potentially play in preventing financial abuse. Firstly, the industry guideline provides no reporting framework for banks, mandatory or otherwise.<sup>10</sup> Secondly, it does not include the adoption of any internal policies or protocols *if* banks choose to report suspected financial abuse. Thirdly, it does not cover the monitoring of suspicious behavior or unusual transactions in any substantial sense. Lastly, the guideline relating to staff training in banks only consists of general fraud prevention training, which may not necessarily be similar to training for suspected financial abuse.

---

<sup>6</sup> Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013).

<sup>7</sup> *Ibid* 4.

<sup>8</sup> Australian Bankers' Association, *Promoting Understanding About Banks' Financial Programs* (May 2013) < [https://www.bankers.asn.au/images/uploads/ArticleDocuments/149/ABA-Industry\\_Guideline-Financial\\_Hardship\\_version1.pdf](https://www.bankers.asn.au/images/uploads/ArticleDocuments/149/ABA-Industry_Guideline-Financial_Hardship_version1.pdf)>.

<sup>9</sup> Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013) 1.

<sup>10</sup> *Ibid*.

The greatest drawback of the industry guideline apart from it being voluntary, is that there is no mechanism for bank employees to report suspected financial abuse.<sup>11</sup> The ALRC's Final Report recommended that binding obligations be imposed on banks such as training for staff to detect financial abuse in order to protect their 'at-risk'<sup>12</sup> customers to the extent that this is reasonable.<sup>13</sup> Although the Final Report acknowledged the value of the industry guideline, it stated that it was voluntary and therefore unenforceable.<sup>14</sup> This is perhaps why it recommended that any reform to bank obligations in the industry guidelines be instead incorporated into the *Code of Banking Practice* to make them contractually binding on all signatory banks.<sup>15</sup>

### 2.3 Australian Bankers' Association and the Industry Guideline

Unsurprisingly, strong objection to mandatory reporting has been voiced by key industry players such as the ABA. In its submission to the ALRC Inquiry, it stated that although it was not supportive of mandatory reporting, it would like to see clearer guidelines on reporting, if banks decided to report suspected financial abuse.<sup>16</sup>

The ABA's reticence to mandatory reporting is perhaps because of its view that the current industry guideline, together with its encouragement to its members to incorporate the guideline into their internal processes is an adequate response to the issue of elder financial abuse.<sup>17</sup> The ABA's view on the sufficiency and adequacy of the guideline is misguided as the guideline, in its present stage, is woefully inadequate to provide the required protection against financial abuse. The industry guideline imposes no obligations on banks to detect and respond to financial abuse witnessed and does not provide a uniform reporting framework, mandatory or otherwise.<sup>18</sup> Due to a lack of transparency, it is also

---

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response* Report No 131 (2017) 300.

<sup>14</sup> Ibid 299.

<sup>15</sup> Ibid 300-301.

<sup>16</sup> See Australian Bankers' Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 3.

<sup>17</sup> Ibid 5.

<sup>18</sup> Consumer Credit Legal Service Inc., Submission 301 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 8.

difficult to determine which banks have incorporated it into their internal process and if the required response is consistent nationally.<sup>19</sup> Unlike the Code of Banking Practice that covers most of the retail banking market,<sup>20</sup> this guideline does not provide an adequate framework for banks to respond to any suspected financial abuse.<sup>21</sup>

Further, there is a lack of accounts or case studies on financial abuse encountered by bank employees in their day-to-day practice as well as their respective responses, if any.<sup>22</sup> It is reasonable to suggest that as financial abuse is the most common form of elder abuse perpetrated in Australia, banks must frequently encounter such suspicious transactions indicating potential financial abuse.<sup>23</sup> These transactions can particularly include abuse of power of attorney arrangements.<sup>24</sup> Accordingly, there is a need for greater clarity and transparency to assess the industry's current responses to incidents of financial abuse and how those responses can be improved.<sup>25</sup> Without this insight, it will be difficult to develop a workable reporting framework that banks can comply with.

A greater understanding of financial abuse encountered by banks will enable lawmakers to consider the most effective approaches in reducing the prevalence of elder financial abuse. It is clear that the banking industry needs to provide strong support and work

---

<sup>19</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, 35-36 <<https://aifs.gov.au/sites/default/files/rr35-elder-abuse.pdf>>.

<sup>20</sup> Code Compliance Monitoring Committee, Code Subscribers <<http://www.ccmc.org.au/code-of-banking-practice-2/code-subscribers/>>.

<sup>21</sup> Ibid; National Seniors Australia, Submission 154 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 24 February 2016 Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 12.

<sup>22</sup> Although it is justifiable that banks have to protect customer confidentiality; banks can generally provide comment on the forms of financial abuse they may encounter.

<sup>23</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 3 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>24</sup> Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 361; See also Donna J. Rabiner, David Brown, Dr Janet O'Keeffe, 'Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them' (2004) 16(1) *Journal of Elder Abuse & Neglect* 65, 78.

<sup>25</sup> Although it is justifiable that banks have to protect customer confidentiality; banks can generally provide comment on the forms of financial abuse they may encounter.

closely with the government sector in order to play a proactive role in responding to financial abuse.<sup>26</sup>

## 2.4 The Code of Banking Practice

The Code of Banking Practice (the Code) is the banking industry's code of conduct but does not contain provisions specifically targeting elder abuse. The Code may cover financial abuse relating to any 'customers with special needs', however, this is much broader than the industry guideline and does not target elder abuse.<sup>27</sup> However, elder financial abuse may be captured by provisions in the Code relating to guarantors in loan applications but they operate in a general sense and do not target financial abuse.

The Code is voluntary and sets out the required standards of good banking practice with regards to banks dealing with their customers.<sup>28</sup> Yet, not all banks are signatories to the Code.<sup>29</sup> Currently, 95% of the banking industry has signed up to it which includes twenty five member banks and each of the 'big four banks'.<sup>30</sup> Once signed up, the Code becomes contractually binding on all signatory banks.<sup>31</sup> However, as many in the industry are not signed on, this creates inconsistencies in the response of banks and can lead to troubling gaps in the coverage.<sup>32</sup> In other words, if vulnerable people are victims of financial abuse, they may not have any redress and banks may have no obligation if they are not signed up to the Code.<sup>33</sup>

---

<sup>26</sup> Kyle Louis, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4, 13 quoting G Price and C Fox, 'The Massachusetts Bank Reporting Project: An Edge against Elder Financial Exploitation' (1997) 8(4) *Journal of Elder Abuse and Neglect* 59, 59

<sup>27</sup> Australian Banker's Association, *Code of Banking Practice* (at 1 February 2014).

<sup>28</sup> *Ibid.*

<sup>29</sup> Code Compliance Monitoring Committee, Code Subscribers <<http://www.ccmc.org.au/code-of-banking-practice-2/code-subscribers/>>.

<sup>30</sup> Code Compliance Monitoring Committee, Code Subscribers <<http://www.ccmc.org.au/code-of-banking-practice-2/code-subscribers/>>.

<sup>31</sup> Australian Bankers' Association, *Code of Banking Practice—FAQs* (2013), 1.

<sup>32</sup> Eileen Webb, 'The problems with asking bank to police financial abuse', *The Conversation*, 15 June 2017 <<https://theconversation.com/the-problems-with-asking-banks-to-police-financial-abuse-79187>>.

<sup>33</sup> *Ibid.*

Disputes with banks can be referred to the Financial Ombudsman Service (FOS) which investigates allegations involving breach of the Code.<sup>34</sup> FOS provides free external dispute resolution service for bank customers and will have regard to banking industry practices outlined in the Code in resolving banking complaints.<sup>35</sup> However, much like the Code, FOS is unable to provide a resolution if the bank is not a member.<sup>36</sup> This means that in certain cases, perhaps involving lending by banks where elderly people act as guarantor, it may be too late before customers find out they are not protected under the Code or cannot refer the matter to external dispute resolution if their bank is not a member of FOS.<sup>37</sup>

In an independent review of the Code in 2017, the Code was described as sitting within a complex tapestry of banking regulations<sup>38</sup> whilst imposing no binding obligations to detect and report suspected financial abuse.<sup>39</sup> It was highlighted in the ALRC's Final Report, that the 'reasonable steps' banks must take in reducing financial abuse should be outlined in the industry guideline and should be contractually binding much like the Code.<sup>40</sup> This is important in ensuring all banks meet the necessary standard and are much more transparent in how and when they deal with financial abuse.<sup>41</sup> Therefore, if the requirements for banks to train their staff to detect and report financial abuse were set out in the industry guideline to be binding on banks 'they would be legally enforceable and

---

<sup>34</sup> FOS, *How FOS Resolves Disputes and Our Terms of Service* (2013)

<[https://www.fos.org.au/custom/files/docs/fact\\_sheet\\_our\\_dispute\\_process\\_and\\_terms\\_of\\_referencepdf.pdf](https://www.fos.org.au/custom/files/docs/fact_sheet_our_dispute_process_and_terms_of_referencepdf.pdf)>.

<sup>35</sup> The Financial Ombudsman Service is the EDR scheme is binding on banks that are signatories to it. See Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013).

<sup>36</sup> Members of FOS can also include credit providers and any other business that provides financial products or services. See generally FOS, *How FOS Resolves Disputes and Our Terms of Service* (2013) <[https://www.fos.org.au/custom/files/docs/fact\\_sheet\\_our\\_dispute\\_process\\_and\\_terms\\_of\\_referencepdf.pdf](https://www.fos.org.au/custom/files/docs/fact_sheet_our_dispute_process_and_terms_of_referencepdf.pdf)>.

<sup>37</sup> Participating financial service providers can also be members of the Credit and Investments Ombudsman which also provides free external dispute resolution for member financial service providers.

<sup>38</sup> There was also criticism of the Code being complex and inaccessible in an environment where stakeholders are seeking black-letter action. See generally Phil Houry, *Report of the Independent Review of the Code of Banking Practice* (2017) 10, 28.

<sup>39</sup> Australian Banker's Association, *Code of Banking Practice* (at 1 February 2014).

<sup>40</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report No 131 (2017) 299.

<sup>41</sup> Eileen Webb, 'The problems with asking bank to police financial abuse', *The Conversation*, 15 June 2017 <<https://theconversation.com/the-problems-with-asking-banks-to-police-financial-abuse-79187>>.

therefore likely to be more effective in preventing elder abuse'<sup>42</sup> This is likely to be more effective than the current operation of the voluntary industry guidelines that no impose no positive obligations on banks to report.<sup>43</sup>

## 2.5 Key Recommendations for a More Proactive Response by Banks

Currently in Australia, while mandatory reporting seems far away from being implemented, parliamentary inquiries and government reports have called for voluntary initiatives when it comes to reporting of financial abuse. ABA's support for voluntary reporting is a positive step towards reducing the risk of financial abuse perpetrated through the banking sector.<sup>44</sup> However, there is a need for a reporting framework of some kind that ensures banks report suspected financial abuse and take all steps to protect their customers from abuse.

In calling for a more proactive response by banks, there have been a number of key recommendations made by state government reports which can have an impact in reducing incidents of financial abuse. A report by the Office of the Public Advocate in South Australia recommended:<sup>45</sup>

- a. Outlining clear definitions of elder financial abuse
- b. Developing voluntary initiatives with banks to recognise financial abuse
- c. A system of voluntary reporting of abuse, but a mandatory response system which is triggered by a report or notification of abuse;
- d. The establishment of a reporting body that banks can raise concerns with; and
- e. Develop a database to register people who are thought to prey on vulnerable adults<sup>46</sup>

---

<sup>42</sup> Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No 83 (February 2017), 130.

<sup>43</sup> Australian Bankers' Association, *Code of Banking Practice—FAQs* (2013) 1.

<sup>44</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report No 131 (2017) 307.

<sup>45</sup> Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 13-14.

<sup>46</sup> *Ibid* 93.

Senior Rights Victoria recommended that the Code be amended to require banks to train their staff members to identify suspected financial abuse and to understand the protocols to deal with it.<sup>47</sup> In the US, research has shown that mere training without reporting obligations of employees is likely to fall short of the appropriate response.<sup>48</sup> This is because whilst training of staff is useful in detecting signs of suspected financial abuse, it needs to go further in terms of making a complaint and that complaint being investigated by an established reporting body.<sup>49</sup> Without this, banks will not be really playing a proactive role in actually reducing the rate of financial abuse and will be seen as mere observers when they should be exercising a far more important role.<sup>50</sup> However, as the upcoming Chapter will demonstrate, there are various difficulties that have hampered the banking response to elder financial abuse – particularly the reporting of financial abuse.

---

<sup>47</sup> See Kyle Louise, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 4; Seniors Rights Victoria, Submission to the Victorian Law Reform Commission, *Guardianship Consultation Paper 10*, 3 June 2011; J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, ‘Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector’ (2008) Report, Loddon Campaspe Community Legal Centre.

<sup>48</sup> Taylor Lemick, ‘Society’s Response To the “Invisible” Abuse Of Elders: Understanding And Addressing The Financial Abuse Of Society’s Most Vulnerable Citizens’ (2015) 23 *The Elder Law Journal* 151, 160.

<sup>49</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate, 13.

<sup>50</sup> However, it is acknowledged that banks are limited in only being able to report financial abuse if there is a reporting body established for this purpose

## Chapter 3 – Identifying Difficulties to a More Proactive Response

A study by Advocare Inc., an Elder Abuse Helpline in Western Australia, stated that:

There are no reliable national statistics to confirm the size of the problem. There is no mandatory reporting. No policy framework for investigating complaints. Not even an agreed definition of what constitutes elder abuse.<sup>1</sup>

There are a number of difficulties associated with banks taking on, or being forced to take on a more proactive response to elder financial abuse. These include a lack of consistent definition on what constitutes financial abuse; limitation of data collection; underreporting of financial abuse by victims and concerns outlined by the banking industry relating to resultant liability for reporting.<sup>2</sup> This Chapter will now examine those in order. The analysis of these suggests that the difficulties can be largely overcome with more systematic research into this issue and by using consistent classification systems that allow for a uniform definition.<sup>3</sup> Community education and voluntary initiatives to highlight this widespread problem should not be underestimated in reducing the prevalence of elder financial abuse in the community.<sup>4</sup>

### 3.1 Problems with definitions and lack of data

One problem with a lack of proactive response to this problem is that there is no clear, well-defined concept of elder financial abuse.<sup>5</sup> Elder financial abuse is also known as “financial exploitation,” “financial mistreatment,” and can also fall within the category of

---

<sup>1</sup> Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 29 quoting AgedCareCrisis.com, *Elder abuse* (28 May 2015) <<https://www.agedcarecrisis.com/care-issues/elder-abuse>>.

<sup>2</sup> Ibid.

<sup>3</sup> Donna J. Rabiner, David Brown, Dr Janet O’Keeffe, ‘Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them’ (2004) 16(1) *Journal of Elder Abuse & Neglect* 65, 74.

<sup>4</sup> Julian Gardner, Uncovering elder abuse: powers of attorney, administration orders and other issues for banks, paper presented at the Banking and Financial Services Ombudsman Annual Conference, 25 November 2005.

<sup>5</sup> In the banking sector elder financial abuse has been referred to as ‘financial abuse of vulnerable adults’ but the focus of this thesis is elder financial abuse. See generally Australian Bankers’ Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013).

“financial abuse of vulnerable adults,” as referred to the banking sector. These terms have a common theme of illegal or improper use of the elderly person’s funds or assets which has been broadly defined by the WHO.<sup>6</sup> Whilst some definitions require a prerequisite of financial abuse occurring within a relationship of trust between the alleged victim and perpetrator, other definitions consider financial exploitation regardless of the relationship.<sup>7</sup> This means that they can include strangers as perpetrators. Criminal activity such as theft and fraud can also be included within this definition.<sup>8</sup>

Even if the clear focus of the definition is on the misuse of the elderly person’s funds or property as part of ‘elder financial abuse’,<sup>9</sup> the WHO definition is quite broad in that it does not actually cover the discussion on financial abuse and its complexity. Alternatively, a narrow definition only considers situations where there is a relationship of trust between the parties.<sup>10</sup> This has its own drawbacks as it may lead to only the most serious forms of abuse being identified while disregarding the subjective view of the victim in relation to the abuse suffered.<sup>11</sup>

Although there are similarities in the different definitions, a lack of a clear definition reflects on how seriously elder financial abuse is perceived in the community.<sup>12</sup> This can act as an impediment to a more proactive governmental response that, amongst other things, creates difficulties in training bank employees to detect and respond to suspected financial abuse as it occurs.<sup>13</sup> Further, different classifications of financial abuse have a

---

<sup>6</sup> This definition was briefly discussed in Chapter 1.

<sup>7</sup> See generally D Boldy et al., ‘Addressing elder abuse: Western Australian case study’ (2005) 24(1) *Australasian Journal on Ageing*, 3–8 <<http://www.wiley.com/bw/journal.asp?ref=1440-6381>>; H Comijs et al., ‘Elder abuse in the community: Prevalence and consequences’ (1998) 46(7) *Journal of the American Geriatrics Society* 885–888; C.L Dessin, ‘Financial abuse of the elderly’ (2000) 36 *Idaho Law Review* 203.

<sup>8</sup> Tijana Mihaljcic, Georgia Lowndes (2013) ‘Individual and Community Attitudes toward Financial Elder Abuse’ (2013) 25(2) *Journal of Elder Abuse & Neglect* 183, 183.

<sup>9</sup> D Cripps et al, ‘Abuse of older people: issues for lawyers’ (2002) 1 *Elder Law Review* 14.

<sup>10</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 3.

<sup>11</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders’ Assets Study* (2009) Melbourne Monash University, 9.

<sup>12</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, ‘Elder Abuse: Understanding Issues, Frameworks and Responses’ (Research Report 35, Australian Institute of Family Studies, 2016) 4.

<sup>13</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 3; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of*

flow on effect on the accuracy of prevalence data collection.<sup>14</sup> A Report by the found that ‘the absence of a precise agreed definition is considered problematic for a range of reasons, not the least of which is the difficulty in measuring elder abuse’.<sup>15</sup>

It is difficult to respond to financial abuse and develop responses to it, if the prevalence data is inaccurate and does not reflect the size of this problem.<sup>16</sup> There is a lack of consolidated national data and the quantitative data collected in this area is not uniform. It relies heavily on surveys and calls made to Abuse Helplines and referral services.<sup>17</sup> In 2015, data collected from the Elder Abuse Prevention Unit (EAPU) showed that financial abuse accounted for 40% of all reports. A recent report by the Australian Institute of Family Studies found that elder financial abuse seems to be the most common form of abuse experienced by elderly people.<sup>18</sup>

The lack of prevalence data on this issue, in part due to inconsistent definitions identified above.<sup>19</sup> According to a 2007 Report by the House of Representatives Standing Committee on Legal and Constitutional Affairs, perhaps this is the main reason why there has been a hampered development of appropriate responses to financial abuse in the banking sector.<sup>20</sup>

---

*the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 1-3.

<sup>14</sup> See Donna J. Rabiner, David Brown, Dr Janet O’Keeffe, ‘Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them’ (2004) 16(1) *Journal of Elder Abuse & Neglect* 65, 76; Tijana Mihaljcic, Georgia Lowndes (2013) ‘Individual and Community Attitudes Toward Financial Elder Abuse’ (2013) 25(2) *Journal of Elder Abuse & Neglect* 183.

<sup>15</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, ‘Elder Abuse: Understanding Issues, Frameworks and Responses’ (Research Report 35, Australian Institute of Family Studies, 2016) 4.

<sup>16</sup> Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011), 29; Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ 36 (2014) *Sydney Law Review* 99, 100-101.

<sup>17</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 3 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Tijana Mihaljcic, Georgia Lowndes (2013) ‘Individual and Community Attitudes toward Financial Elder Abuse’ (2013) 25(2) *Journal of Elder Abuse & Neglect* 183, 183.

<sup>20</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 2.18.

The ABA has stated that there is a low incidence of financial abuse in the community and that their ‘member banks indicate that they have very low numbers of complaints about this issue’.<sup>21</sup> However, it is argued that the actual extent of financial abuse is unknown and ‘that a lack of consistent reporting mechanisms across financial institutions may in fact be one of the reasons for low reporting rather than an actual low incidence of such abuse.’<sup>22</sup>

Until such time as Australia conducts a national study, or collates comprehensive data using a consistent approach to definitions and collection of data across the states and territories, the best estimates available indicate that somewhere between 2% and 10% of Australians over 65 years have experienced, or are experiencing, a form of elder abuse.<sup>23</sup>

### 3.2 Underreporting of financial abuse

As elder financial abuse goes largely unreported or underreported, the data only accounts for reported financial abuse in Australia which is not an accurate representation of this issue in the community.<sup>24</sup> Underreporting can occur because elderly victims are often reluctant to report their perpetrators, which data shows; typically tend to be family members and the victim may feel loyalty towards them.<sup>25</sup> It can also occur because the elderly victim may be ashamed or embarrassed;<sup>26</sup> may fear the perpetrator facing harsh

---

<sup>21</sup> Ian Gilbert, ABA, *Proof Transcript of Evidence*, 17 August 2007; see Ibid 2.98.

<sup>22</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007).

<sup>23</sup> University of South Australia, *Prevalence of Elder Abuse in South Australia Final Report: Current Data Collection Practices of Key Agencies* (2017), 20.

<sup>24</sup> Duncan Boldy et al, 'Addressing Elder Abuse: West Australian Case Study' (2005) 24 *Australasian Journal on Ageing* 3; see also R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, 5  
<<https://aifs.gov.au/publications/elder-abuse>>.

<sup>25</sup> P Kinnear and A Graycar, *Abuse of older people: crime or family dynamics? Trends and Issues in Crime and Criminal Justice* (1999) 113 *Australian Institute of Criminology* 1; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 1  
<[http://www.law.uwa.edu.au/data/assets/pdf\\_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf](http://www.law.uwa.edu.au/data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf)>.

<sup>26</sup> The word ‘abuse’ also consists of negative connotations people may not want to acknowledge that they have been victims of abuse. Also what may be abuse in one culture may be a norm in another. See A Moon, *Perceptions of elder abuse among various cultural groups: Similarities and differences. Generations* (2002), 75-80.

consequences if a report is made;<sup>27</sup> where the elderly person relies on the victim for their care needs;<sup>28</sup> or if he or she lacks the capacity,<sup>29</sup> or knowledge to report.<sup>30</sup>

Underreporting of elder abuse is therefore closely connected with unreliable statistics on this issue which creates evidentiary problems,<sup>31</sup> when assessing the responses to abuse by the banking sector and even going as far to impact on whether there is a need for *any* response; contrary to data that suggests it is the most common form of abuse.<sup>32</sup>

### 3.3 Reluctance to mandatory reporting of financial abuse

It is not only the banking industry that has reservations about mandatory reporting.<sup>33</sup> Many elderly people see mandatory reporting as somewhat invasive and do not feel that there is a need for it in Australia.<sup>34</sup> Surveys conducted in the early 2000s show that reluctance of elderly people to mandatory reporting stems from concerns about their autonomy and their right to self-determination.<sup>35</sup> In formal consultations with elderly people on mandatory reporting in New South Wales, elderly people voiced objections to the implementation of

---

<sup>27</sup> This is because the victim and the perpetrator often have a relationship of trust which can include close family members or friends.

<sup>28</sup> P Kinneer and A Graycar, *Abuse of older people: crime or family dynamics? Trends and Issues in Crime and Criminal Justice* (1999) 113 Australian Institute of Criminology 1; Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 1 <[http://www.law.uwa.edu.au/data/assets/pdf\\_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf](http://www.law.uwa.edu.au/data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf)>.

<sup>29</sup> This can include mental or cognitive impairment suffered by the elder person.

<sup>30</sup> D J Rabiner, D Brown and J O'Keeffe, 'Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them' (2004) 16(1) *Journal of Elder Abuse and Neglect* 65, 72-73

<sup>31</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 41.

<sup>32</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 3 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>33</sup> Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006) 3-4.

<sup>34</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 2.85-2.90.

<sup>35</sup> See especially K Wilber, and S Reynolds, 'Introducing a framework for defining financial abuse of the elderly' (1996) 8(2) *Journal of Elder Abuse and Neglect* 61; see also B Faye and M Sellick, *Advocare's Speak Out Survey "S.O.S" on Elder Abuse* (2003) Perth, Advocare; Boldy et al, *Elder Abuse in Western Australia* (2002) Perth, Centre for Research into Aged Care Services, Curtin University of Technology; B Schiamberg and D Gans, 'Elder abuse by adult children: an applied ecological framework for understanding contextual risk factors and the intergenerational character of quality for life' (2000) 50 *International Journal of Aging And Human Development* 50, 329.

mandatory reporting as they considered it an invasion of their privacy and felt that mandatory reporting of financial abuse is based on stereotypes that elderly people are frail and incompetent to look after their affairs.<sup>36</sup>

Mandatory reporting can be seen as ‘paternalistic’<sup>37</sup> and an infringement of human rights.<sup>38</sup> Although these concerns have been alleviated somewhat due to mandatory reporting done in other sectors,<sup>39</sup> they need to be addressed before a reporting framework of any kind can be implemented. Therefore, there is a need to carefully balance autonomy and rights of elderly people against protection of individuals who are vulnerable and do not have capacity to act in their best interests.<sup>40</sup> This will be further discussed in Chapter 5.

Concerns relating to mandatory reporting based on ageist assumptions was raised by the Aged and Community Services Australia which stated:

It is important that paternalistic and stereotypical views of older people as being frail, dependent and cognitively impaired do not hijack the agenda, treating elder abuse in the same way as child abuse... Mandatory reporting can lead to older people not seeking help for fear of a report being made whether they want it to be or not.<sup>41</sup>

One of the other shortcomings to an appropriate response to elder abuse involves questions about what reporting will capture and how effective it will be. The concerns voiced against mandatory reporting by banks stem from lack of information on what mandatory reporting

---

<sup>36</sup> NSW Ageing and Disability Department, *Mandatory Reporting of Abuse of Older People* (1997), Sydney.

<sup>37</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 308.

<sup>38</sup> Elder Abuse Prevention Unit, *Position statement on mandatory reporting of elder abuse* (2006) Queensland: EAPU, 4.

<sup>39</sup> For example this refers to mandatory reporting of child abuse or family violence by health professionals. Also the literature suggests that mandatory reporting elder abuse is based on mandatory reporting of child abuse in the US. See Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006) 4.

<sup>40</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 2.78-2.80.

<sup>41</sup> Aged and Community Services Australia, Submission No 102 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017; Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 416.

will entail and the extent to which the state and reporting bodies will be capable of intervening in the lives of elderly people.<sup>42</sup> It should be noted that the discourse on reporting has often been hampered by the kind of abuse that can and should be reported.<sup>43</sup> Accordingly, there is a need for more research into mandatory reporting, and if implemented, for the framework to define what needs to be reported what does not.<sup>44</sup>

The concerns raised above have not only impacted on discourse related to reporting of financial abuse but also the extent to which financial institutions need to be responsible for any suspicious abuse they encounter. The objections to mandatory reporting are not without merit and therefore need to be appropriately addressed before bank reporting protocols can be implemented. Chapter 5 will further discuss the need to adopt a rights based approach whilst ensuring protection of vulnerable older Australians.

### 3.4 Current Inadequate Banking Response

There is little published about how banks deal with cases of financial abuse they encounter. Therefore the internal response of banks to such cases is not known including the methods used to detect financial abuse.<sup>45</sup> Apart from reporting of any kind, banks should be engaging in good industry practice to ensure a more proactive response to financial abuse.<sup>46</sup> This includes banks doing everything possible to protect their customer's interests.<sup>47</sup> However, banks have come under criticism for being lax in taking preventive action even where bank employees may have reasonable suspicions of

---

<sup>42</sup> Western Australian Government, *Submission No. 74* to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 7; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 2.85.

<sup>43</sup> *Ibid* 2.79.

<sup>44</sup> This is also important to avoid reporting for fun or arbitrary reporting without any reasonable suspicions of financial abuse.

<sup>45</sup> Although it is justifiable that banks have to protect customer confidentiality; banks can generally provide comment on the forms of financial abuse they may encounter.

<sup>46</sup> James Frost, 'Bank staff on alert for signs of elder abuse' *The Australian Financial Review*, 30 October 2017 <<http://www.afr.com/business/banking-and-finance/financial-services/bank-staff-on-alert-for-signs-of-elder-abuse-20171030-gzb316>>.

<sup>47</sup> Financial Ombudsman Service, *Determination Case number 472675*, 2 August 2017, 2 <<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/472675.pdf>>.

financial abuse.<sup>48</sup> In particular, those that relate to the abuse of power of attorney arrangements where bank tellers fail to act reasonably.<sup>49</sup>

FOS has seen a spike in customer complaints and disputes about banks. It recently called for banks to be more proactive in detecting elder abuse. FOS recently awarded \$220,000 in compensation to a bank customer for the bank's failure to make appropriate inquiries and to act reasonably. The elderly bank customer in question was a regular visitor of the bank branch and was known to the bank employees. On two separate occasions, the elderly customer fell victim to a scam and transferred large sums of money overseas. In awarding compensation payment, FOS determined that the bank should have been put on notice as the transactions were uncharacteristic and the employee should have contacted the customer's Power of Attorney to verify the transactions. There was also reason to believe that the customer appeared confused at the time of the transactions and did not fully appreciate the consequences of the bank transfer.<sup>50</sup>

According to FOS, if banks do not become more proactive in their response to abuse, it will leave them open to adverse determination and compensation payments worth hundreds and thousands of dollars.<sup>51</sup> The frontline role of banks requires them to identify signs of abuse, make appropriate inquiries into unusual transactions that raise red flags, to act reasonably and in the best interest of their customers.<sup>52</sup> Therefore, training staff to

---

<sup>48</sup> James Frost, 'Bank staff on alert for signs of elder abuse' *The Australian Financial Review*, 30 October 2017 <<http://www.afr.com/business/banking-and-finance/financial-services/bank-staff-on-alert-for-signs-of-elder-abuse-20171030-gzb316>>; Eileen Webb, 'The problems with asking bank to police financial abuse', *The Conversation*, 15 June 2017 <<https://theconversation.com/the-problems-with-asking-banks-to-police-financial-abuse-79187>>.

<sup>49</sup> Caxton Legal Centre Inc, Submission No. 112 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, 2007, 19.

<sup>50</sup> Financial Ombudsman Service, *Determination Case number 472675*, 2 August 2017 <<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/472675.pdf>>.

<sup>51</sup> James Frost, 'Bank staff on alert for signs of elder abuse' *The Australian Financial Review*, 30 October 2017 <<http://www.afr.com/business/banking-and-finance/financial-services/bank-staff-on-alert-for-signs-of-elder-abuse-20171030-gzb316>>.

<sup>52</sup> Financial Ombudsman Service, *Determination Case number 472675*, 2 August 2017 <<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/472675.pdf>>.

detect red flags indicating signs of financial abuse is integral to reducing its prevalence.

Where possible banks should:<sup>53</sup>

- a. alert customers of large or unusual transactions uncharacteristic of their banking patterns;
- b. contact the elderly customer to verify third party written authorisations allowing the third party to act on his/her behalf;
- c. provide training to detect signs of abuse and to inform the customer of potential abuse where appropriate;<sup>54</sup> or
- d. taking preventive actions to delay or refuse suspicious transactions until additional verification<sup>55</sup>

In most cases of financial abuse, legal practitioners discover or become aware of seem to involve the abuse of bank accounts. Banks need to consider a more holistic approach in supporting elderly people to feel less vulnerable and more secure in their transactions.<sup>56</sup>

In relation to the approach adopted by the banking sector and the difficulties associated with it, Mr Herd,<sup>57</sup> a legal practitioner submitted:

The banks have an invidious choice here of course. Their choice is to alert customers of the potential abuse and thereby create an almighty problem for themselves and the family... Banks tend to take the more conservative line in most things-that is, the three wise monkeys approach. Generally speaking, I am waiting at this stage for someone to sue a bank for that ... approach, in other words failing to disclose or inform on concerns about the operation of a bank account and as a consequence losing money from that bank account which is never recovered. I think banks are fair game in a litigation sense for an action for negligence arising out of that failure to act.<sup>58</sup>

---

<sup>53</sup> Financial Ombudsman Service, *Banking and Finance – Bulletin 56* (2007)

<[https://www.fos.org.au/custom/files/docs/fos\\_banking\\_finance\\_bulletin\\_56.pdf](https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf)>.

<sup>54</sup> This can also include the bank informing the Power of Attorney where appropriate.

<sup>55</sup> These steps are similar to ones outlined in the industry guideline.

<sup>56</sup> COTA, Submission No 354 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017.

<sup>57</sup> Mr Herd made submissions to the Report by House of Representatives Standing Committee on Legal and Constitutional Affairs on elder abuse and was quoted in the Report.

<sup>58</sup> Mr Brian Herd, Transcript of Evidence, 16 July 2007, 9; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 2.100.

It is essential to protect vulnerable elderly Australians from abuse – these generally tend to be people with impaired capacity, cognitive decline and those who are not living a quality of life in the community or in residential care.<sup>59</sup> A study by Queensland Law Society argued that a common law duty to report elder abuse may apply to banks where such abuse is observed or suspected by bank officers.<sup>60</sup>

Although banks can presume they are dealing with honest people unless proven otherwise, they cannot ‘turn a blind eye to known facts that indicate a serious possibility that a customer is being defrauded’.<sup>61</sup> Due to their unique position, the banks’ role ‘at the forefront’ requires a proactive response that extends beyond internal education programs, which are not necessarily effective in practice.<sup>62</sup> As there are currently no requirements for banks to train staff to identify or report financial abuse to relevant authorities,<sup>63</sup> there is a strong need for law reform to address the difficulties outlined in this Chapter. By considering precedents internationally in relation to the education of, and reporting obligations on, bank employees, Australia can develop a much informed banking response to this issue.<sup>64</sup>

---

<sup>59</sup> See House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 2.81.

<sup>60</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate, 13-14.

<sup>61</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, ‘Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector’ (2008) Report, Loddon Campaspe Community Legal Centre, 37; Kyle Louise, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 4, 12.

<sup>62</sup> Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 51-52 <[http://www.law.uwa.edu.au/data/assets/pdf\\_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf](http://www.law.uwa.edu.au/data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf)>.

<sup>63</sup> The ALRC in its Final Report outlined the steps banks should take to protect their customers including training of bank employees in order to respond appropriately to elder abuse. See Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017), 298, 302.

<sup>64</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 8 <<https://aifs.gov.au/publications/elder-abuse>>.

## CHAPTER 4 – International Responses to Elder Financial Abuse

The World Health Organisation considers the United States to have the most longstanding and fully established system of reporting elder abuse.<sup>1</sup> A fundamental feature of this system is mandatory reporting by banks in some states and the state-based adult protective services that investigate and respond to reports of elder financial abuse.<sup>2</sup> Canada has also enacted laws that provide for reporting of financial abuse, and has been recommended by the Australian Institute of Criminology as a co-operative approach to preventing financial abuse.<sup>3</sup> This Chapter considers the US and Canadian approaches to reporting of elder financial abuse and suggests that mandatory reporting frameworks can be effective in informing the Australian response to elder financial abuse.<sup>4</sup>

### 4.1 Mandatory Reporting in the United States

In the United States, forty-nine states and the District of Columbia have laws with respect to reporting elder abuse particularly financial abuse.<sup>5</sup> The various adult protection statutes are not restricted to abuse against older people, they also protect ‘what is described as ‘vulnerable’, ‘disabled’, ‘endangered’ or ‘impaired’ adults (e.g. in Alaska, a ‘vulnerable adult’ is one who is 18 years of age or older who, because of mental/physical impairment, is unable to meet their own needs without assistance).’<sup>6</sup> In states such as Massachusetts and California, an elder person is defined as being over the age of 60 and 65 years respectively. In most US states, however, ‘age is not in and of itself a specific trigger for

---

<sup>1</sup> World Health Organization. (2014). Global status report on violence prevention. Geneva: WHO <[http://www.who.int/violence\\_injury\\_prevention/violence/status\\_report/2014/en/](http://www.who.int/violence_injury_prevention/violence/status_report/2014/en/)>.

<sup>2</sup> Ibid; see also R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, 38-39 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>3</sup> Australian Institute of Criminology, Submission No 40 to House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 2006, 5.

<sup>4</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 8 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>5</sup> G Comizio, L Petrasic, and A Kowalski, ‘Compliance Risk Management: What Financial Institutions Need to Know About Reporting Elder Financial Exploitation’ (March 2014), 1 <<https://www.paulhastings.com/docs/default-source/PDFs/stay-current-compliance-risk-management-what-financial-institutions-need-to-know-about-reporting-elder-financial-exploitation.pdf>>.

<sup>6</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 2.82.

the protective legislation to apply, but rather the critical factor is whether the person is considered vulnerable or disabled'.<sup>7</sup> However, according to the Consumer Protection Financial Bureau, only half of those states mandate banks and financial service providers to report suspected financial abuse to Adult Protective Services or law enforcement, where appropriate.<sup>8</sup> Within the US state laws, there are also marked differences in terms of mandatory and 'permissive' reporting regimes. Similar to the inconsistencies in state laws and definitions of elder abuse in Australia, US state laws also differ in the following ways:<sup>9</sup>

- a. the definition of elder financial exploitation, abuse, neglect, and/or other defined terms;
- b. the group of protected individuals;
- c. which persons and/or entities are required or explicitly permitted to report; and
- d. the state of mind trigger regarding when a report is required or permitted.

As not all states have banks as mandated reporters of financial abuse, it is difficult to accurately measure the prevalence of financial abuse in terms of the total number of cases and ones that actually get reported. Studies that have reported prevalence rates should be treated with some caution as there are a number of different definitions used across states to measure financial abuse.<sup>10</sup>

## 4.2 Reporting and investigation process

In the US, there are significant differences in terms of the required components of reporting, such as when to submit a report within the scope of their employment and

---

<sup>7</sup> Ibid.

<sup>8</sup> Consumer Financial Protection Bureau, 'Recommendations and report for financial institutions on preventing and responding to elder financial exploitation' (March 2016), 22-23.

<sup>9</sup> G Comizio, L Petrasic, and A Kowalski, 'Compliance Risk Management: What Financial Institutions Need to Know About Reporting Elder Financial Exploitation' (March 2014), 1  
<<https://www.paulhastings.com/docs/default-source/PDFs/stay-current-compliance-risk-management-what-financial-institutions-need-to-know-about-reporting-elder-financial-exploitation.pdf>>.

<sup>10</sup> Donna J. Rabiner, David Brown, Dr Janet O'Keeffe, 'Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them' (2004) 16(1) *Journal of Elder Abuse & Neglect* 65, 72-73.

immunity from civil or criminal liability in cases where workers make reports.<sup>11</sup> US banks provide training to their employees, regardless of whether they are mandated reporters or not. Such training includes:

- a. detecting transactions that raise red flags;
- b. identifying warning signs of suspicious transactions indicating abuse;
- c. verifying authority documents including Power of Attorneys;
- d. detecting inconsistent signatures;
- e. large or uncharacteristic withdrawals by their customers, and
- f. monitoring of behavioural or visual signs that raise alarms.<sup>12</sup>

There have been bank programs set up in states such as Philadelphia that operate with the cooperation of the bank staff; the relevant corporate department at the bank branch; and the Adult Protective Services (APS) as the reporting body. If employees detect signs of potential abuse, they may delay transactions; separate the customer from the perpetrator, if present; to clarify the situation and where appropriate, report the matter to the bank's corporate department.<sup>13</sup>

The corporate department at the branch acts swiftly in taking measures to minimise the losses to the customer and reports the matter to the APS, where appropriate.<sup>14</sup> Reports of financial abuse are investigated at the local state level in accordance with local laws and regulations, with APS, and local law enforcement authorities having key investigative roles.<sup>15</sup> The state APS consults with the department to further investigate the matter and

---

<sup>11</sup> Ibid.

<sup>12</sup> Jessica Hall, 'Bank workers will be trained to detect elder financial abuse: Those employees are in the best position to see signs of the growing problem, say backers of SeniorSafe' *Portland Press Herald*, 11 February 2014; see also Sandra L Hughes, 'Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly' (2003) *American Bar Association* 21.

<sup>13</sup> John Ginovsky, 'Financial Abuse' (2006) 14(1) *ABA Bankers News* 1, 4.

<sup>13</sup> Linda Navarro, 'Combatting Elder Abuse Through Awareness and Training' (2016) 108(2) *ABA Banking Journal* 60; see also John Ginovsky, 'Financial Abuse' (2006) 14(1) *ABA Bankers News* 1

<sup>14</sup> John Ginovsky, 'Financial Abuse' (2006) 14(1) *ABA Bankers News* 1.

<sup>15</sup> Financial Crimes Enforcement Network, Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation, 22 February 2011 <<https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2011-a003>>.

if necessary, press charges against the perpetrator.<sup>16</sup> The APS may also visit the victim to conduct further investigations and provide additional services once it finds there is actual financial abuse.<sup>17</sup> It can also provide evidence in any legal proceedings of alleged abuse. Even after a report has been made by the bank, the APS liaises with the bank to keep it updated of the financial accounts of that customer and any other risk-factors.<sup>18</sup>

Under California law, it is not only a bank teller that has an obligation to report cases of suspected financial abuse. This also includes loan officers who approve loan application in cases where the elderly person acts as a guarantor for a family member and the loan officer identifies signs indicating financial abuse.<sup>19</sup>

Banks in the US can report any suspicious transaction indicating financial abuse to the Financial Crimes Enforcement Network although its reporting may not be required under the regulations.<sup>20</sup> California has passed laws,<sup>21</sup> which consider suspected financial abuse to fall under state mandatory reporting laws if the customer resides in California regardless of the physical location of the bank.<sup>22</sup> Therefore, these policies can ‘enhance consistency in reporting, expedite action and eliminate the extra step of determining whether reporting

---

<sup>16</sup> J Lemke and S Moskowitz, ‘Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation’ (2005) 7(1) *Marquette Elder's Advisor* 1, 11.

<sup>17</sup> The services provided by the APS can include health, housing and community services. See National Centre for State Courts, ‘Prosecuting Elder Abuse Cases’ (2012) 14

<<http://www.eldersandcourts.org/~media/Microsites/Files/cec/Prosecution%20Guide.ashx>>.

<sup>18</sup> See National Centre for State Courts, ‘Prosecuting Elder Abuse Cases’ (2012) 14

<<http://www.eldersandcourts.org/~media/Microsites/Files/cec/Prosecution%20Guide.ashx>>; See also J Lemke and S Moskowitz, ‘Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation’ (2005) 7(1) *Marquette Elder's Advisor* 1, 11.

<sup>19</sup> G Comizio, L Petrasic, and A Kowalski, ‘Compliance Risk Management: What Financial Institutions Need to Know About Reporting Elder Financial Exploitation’ (March 2014), 2; see also Office of the Public Advocate, Queensland, *Submission No. 76 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Older People and the Law* (2007), 3.

<sup>20</sup> G Comizio, L Petrasic, and A Kowalski, ‘Compliance Risk Management: What Financial Institutions Need to Know About Reporting Elder Financial Exploitation’ (March 2014).

<sup>21</sup> *Financial Elder Abuse Reporting Act of 2005*, 1018 USC (2005); see also Taylor Lemick, ‘Society’s Response To the “Invisible” Abuse Of Elders: Understanding And Addressing The Financial Abuse Of Society’s Most Vulnerable Citizens’ (2015) 23 *The Elder Law Journal* 151, 161-162.

<sup>22</sup> Consumer Financial Protection Bureau, ‘Recommendations and report for financial institutions on preventing and responding to elder financial exploitation’ (March 2016), 22-23; see also Taylor Lemick, ‘Society’s Response To the “Invisible” Abuse Of Elders: Understanding And Addressing The Financial Abuse Of Society’s Most Vulnerable Citizens’ (2015) 23 *The Elder Law Journal* 151, 161-162.

is mandatory in a given location and situation.<sup>23</sup> As the US protocols for reporting demonstrate, banks are at the forefront in the fight against abuse and by implementing reporting protocols, banks can ensure they take *all* steps to protect elderly people from financial exploitation.

### 4.3 Canada

Canada has enacted sophisticated frameworks that consider a multi-disciplinary response to financial abuse. These incorporate community education,<sup>24</sup> awareness-raising campaigns;<sup>25</sup> education of and training of bank employees and banks monitoring their customers' bank accounts for any suspicious activity.<sup>26</sup> Banks will only monitor their customers' bank account with their consent. If there are unusual or large transactions, the banks will notify their customers who will hold complete rights over their bank accounts and may choose to disregard their bank's warnings or escalate it further. In this way, banks are playing a proactive role in protecting customers by notifying them directly. This allows account holders to retain control over their assets and have the final say in whether to report their perpetrators.<sup>27</sup>

The *Adult Guardianship Act 1996* (British Columbia), for instance, provides wide protection to elderly people with respect to abuse occurring in a range of places and circumstances.<sup>28</sup> More importantly, all persons who suspect elder abuse or exploitation may report the abuse to a 'designated agency' which investigates the complaint. Reporters

---

<sup>23</sup> Consumer Financial Protection Bureau, 'Recommendations and report for financial institutions on preventing and responding to elder financial exploitation' (March 2016), 23.

<sup>24</sup> This includes Community Response Networks consisting of members of the public and other organisations that provide help elderly victim, provide resources and referrals. See generally Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 45-46.

<sup>25</sup> See Public Guardian and Trustee of British Columbia, *B.C.'s Adult Guardianship Laws: Supporting Self-Determination for Adults in British Columbia – Protecting Adults From Abuse, Neglect and Self Neglect*; see also Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 45-46.

<sup>26</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 8 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>27</sup> The National Clearinghouse on Family Violence, *Financial Abuse of Older Adults* <[http://publications.gc.ca/collections/Collection/H88-3-30-2001/pdfs/violence/finan\\_e.pdf](http://publications.gc.ca/collections/Collection/H88-3-30-2001/pdfs/violence/finan_e.pdf)>; see also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 2.102.

<sup>28</sup> *Adult Guardianship Act*, RSBC 1996.

of financial abuse have immunity from proceedings under the legislation which provides a safe harbor to those who make reports.<sup>29</sup> Bank employees can also report suspicious cases of financial abuse to the relevant reporting body under the *Personal Information Protection and Electronic Documents Act 2000*.<sup>30</sup>

Although the *Adult Guardianship Act 1996* (British Columbia) operates under a system of voluntary reporting, the response framework adopted by designated agencies<sup>31</sup> in British Columbia is mandatory.<sup>32</sup> This means that reporting bodies are mandated to respond and investigate allegations of abuse received. Further, people who report suspected abuse to these agencies are protected under the legislation and an action for damages cannot be sought against them or those that assist in the investigation.<sup>33</sup>

It is clear that there is a need for a reporting framework that allows banks to make reports. However, much like British Columbia, any law reform response should consider a multi-disciplinary and innovative community based approach to financial abuse. In order to avoid a patchwork of legislation, Australia should consider the adoption of adult protective legislation much like the US and Canada, to ensure a coordinated banking response to elder financial abuse.<sup>34</sup>

#### 4.4 Effectiveness of reporting

International developments in mandatory reporting frameworks in places like the US and Canada have not gone unnoticed in Australia.<sup>35</sup> However, Australian observers have questioned the effectiveness of mandatory reporting as there is lack of evidence that

---

<sup>29</sup> *Adult Guardianship Act*, RSBC 1996; see also Office of the Public Advocate (SA), ‘Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People’ (2011), 42-43.

<sup>30</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 8 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>31</sup> These designated agencies are health agencies. See *Ibid*.

<sup>32</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, Chapter 8 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>33</sup> *Adult Guardianship Act*, RSBC 1996, s 46(2).

<sup>34</sup> See especially Office of the Public Advocate (SA), ‘Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People’ (2011), 46.

<sup>35</sup> Susan Kurrle and Gerard Naughtin, ‘An Overview of Elder Abuse and Neglect in Australia’ (2008) 20(2) *Journal of Elder Abuse and Neglect* 108, 110.

suggests mandatory reporting increases reporting by banks. Dunn examined the American response to elder financial abuse and recommended learning from it but warned against following the same course.<sup>36</sup> It is important to note, however that mandatory reporting does not work in isolation and involves a coordinated and multi-disciplinary approach accompanied by:

- a. cooperation of the banking industry;
- b. community education in raising awareness on reporting of financial abuse;
- c. education of bank employees to detect and monitor abuse;<sup>37</sup> and
- d. resources to establish a reporting body that conducts investigations<sup>38</sup>

For example, Louisiana (where “any person” can make a report) has struggled to implement training and education programs for bank employees to make reports:<sup>39</sup>

Although the Louisiana Law requires mandated reporting of all reports of suspected elder abuse, I do not think all financial institutions are aware of this requirement. This lack of reporting is probably related to the lack of formal education and training on the complexities of financial abuse. Our state has never attempted a coordinated statewide education and training effort with financial institutions.<sup>40</sup>

Similarly, a study by the American Bar Association determined that mandatory reporting is likely to be effective if it is coupled with education of bank employees and a formal bank reporting project.<sup>41</sup> Reporting measures in the US have been somewhat hampered by lack of education and training of employees in some states and a lack of reporting body in

---

<sup>36</sup> P Dunn, *Elderly abuse in the home. Conference Proceedings, Crime and the Elderly* (1989) National Workshop. Adelaide: South Australian Commissioner for the Aged and Victims of Crime Association; see also *ibid*.

<sup>37</sup> Sandra Hughes, ‘Identity Theft, Bank Secrecy, and Anti-Money Laundering Compliance: Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly’ (2004) 58 *Consumer Finance Law Quarterly Report* 293, 27.

<sup>38</sup> Office of the Public Advocate (SA), ‘Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People’ (2011), 13-14.

<sup>39</sup> See Sandra L Hughes, ‘Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly’ (2003) *American Bar Association*, 28.

<sup>40</sup> Letter from Robert J. Seemann, Director, Elderly Protective Service, Louisiana Governor’s Office of Elderly Affairs, 15 February, 2002.

<sup>41</sup> Sandra Hughes, ‘Identity Theft, Bank Secrecy, and Anti-Money Laundering Compliance: Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly’ (2004) 58 *Consumer Finance Law Quarterly Report* 293.

others.<sup>42</sup> These are issues related to resources and funding and do not prove that mandatory reporting is ineffective if implemented properly. Further, as discussed in Chapter 2, the US has been affected by the same difficulties in agreed definition of elder abuse and variations in data collection that show a lack of *evidence* of effectiveness of mandatory reporting than a lack of effectiveness itself.<sup>43</sup>

In Florida, mandatory reporting has proved effective due to a multi-disciplinary approach to financial abuse and immunity to bank employees that make reports. Chris Shoemaker, past Acting Director of Florida's APS Program described the positive impact of mandatory reporting and the cooperation of the banking sector:

In Florida, we have had no opposition from the banking industry in regards to the mandatory reporting provision contained in our APS law...Through various training that has occurred at the local level, banks have been very cooperative in understanding their legislative mandate for reporting. On numerous occasions, I personally have received phone calls from banking officials who have noticed unusual activity with a client's account and have reported it to our hotline.<sup>44</sup>

This shows that cooperative initiatives with the banking sector to ensure proper training to employees is provided will go a long way in easing the pathway to mandatory reporting in Australia, if implemented. It will also ensure that banks are more proactive in their response and not merely compelled to act due to mandatory reporting laws alone. Providing immunity from legal proceedings is also an important factor in ensuring the cooperation and engagement of the banking sector. In the US, this also includes states that have voluntary reporting. In Oregon, for example, the introduction of safe harbor provisions in the voluntary reporting legislation has seen a more proactive response by banks.<sup>45</sup> Despite voluntary reporting of financial abuse, a recent report released by Oregon Office of Adult Abuse Prevention and Investigations has shown that banks are the most

---

<sup>42</sup> See generally Taylor Lemick, 'Society's Response To the "Invisible" Abuse Of Elders: Understanding And Addressing The Financial Abuse Of Society's Most Vulnerable Citizens' (2015) 23 *The Elder Law Journal* 151.

<sup>43</sup> G Lowndes, P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University, 5.

<sup>44</sup> Sandra L Hughes, 'Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly' (2003) *American Bar Association*, 27.

<sup>45</sup> Linda Navarro, 'Combatting Elder Abuse through Awareness and Training' (2016) 108(2) *ABA Banking Journal* 60; see also John Ginovsky, 'Financial Abuse' (2006) 14(1) *ABA Bankers News* 1, 4.

common reporters of financial abuse with an increase in the total number of financial reports made.<sup>46</sup> It should be noted that mandatory reporting by bank employees in addition to medical and law enforcement professionals can be effective in significantly extending the pool of reporters.<sup>47</sup>

The measures and statutes in place in the United States are not perfect by any means and if Australia ever considers introduction of mandatory reporting laws, it should not seek to mirror the US frameworks. This is because the laws are quite different on a state and federal level as well as the significant difference where some states have mandated reporting by bank employees whilst others that do not specifically state bank employees as mandatory reporters in their statutes.<sup>48</sup> The US experience, however can inform Australian law reform on bank reporting in that it shows that the effectiveness of mandatory reporting framework is reliant on a number of factors. This includes raising awareness of financial abuse and its reporting; the cooperation of the banking sector; allocation of resources with respect to bank training and education programs; and establishing a reporting body to which reports can be made.<sup>49</sup> The Canadian approach to reporting has shown that in order for any proposed framework to be effective in this area, it is important to take into account the consent of the elderly who retain their rights. This ensures that reporting is not merely for regulatory compliance but considers its customers who are at the heart of this issue.<sup>50</sup>

---

<sup>46</sup> Linda Navarro, 'Combatting Elder Abuse through Awareness and Training' (2016) 108(2) *ABA Banking Journal* 60; see also John Ginovsky, 'Financial Abuse' (2006) 14(1) *ABA Bankers News* 1, 4.

<sup>47</sup> Jennifer Beth Glick, 'Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy' (2005) 12 *VA. J. Soc. POL'Y & L.* 714, 724-725.

<sup>48</sup> Sandra L Hughes, 'Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly' (2003) *American Bar Association*, 27-29.

<sup>49</sup> Sandra Hughes, 'Identity Theft, Bank Secrecy, and Anti-Money Laundering Compliance: Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly' (2004) 58 *Consumer Finance Law Quarterly Report* 293

<sup>50</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 19; N Biviano, 'Abuse of the non-institutionalised aged: Dilemmas of policy and practice' (1996) 4 *Australian Social Work* 41, 46.

## Chapter 5 – Balancing Rights with the Protection of Elderly Australians

The concerns expressed against mandatory reporting in Australia, including the autonomy and privacy of elderly people as well as the banking concerns about liability of reporting in Australia are not without merit. However, these concerns are not considered serious barriers that justify a lack of reporting framework, mandatory or otherwise.<sup>1</sup> As a starting point to a more proactive bank reporting response, this Chapter addresses and attempts to alleviate various concerns expressed against implementation of mandatory reporting by banks. It suggests that for a mandatory reporting to be effectively implemented in Australia, such a framework needs to carefully balance the competing interests of the independence of elders against the protection of elderly people vulnerable to abuse.<sup>2</sup>

### 5.1 Autonomy of elderly people

Mandatory reporting of elder financial abuse raises concerns about the autonomy of elderly people and the extent to which they can exercise their right of self-determination and if they so wish, refuse to provide consent to investigate or punish their perpetrator.<sup>3</sup> Vulnerable older Australians are concerned about statutes that permit state intervention – in terms of regulatory bodies investigating alleged complaints, banks monitoring their customers' accounts and making reports of alleged financial abuse. This also includes

---

<sup>1</sup> K Wilber, and S Reynolds, 'Introducing a framework for defining financial abuse of the elderly' (1996) 8(2) *Journal of Elder Abuse and Neglect* 61–80; Fealy et al, *Financial Abuse of Older People: A Review* (2012) National Centre for the Protection of Older People, University College Dublin.

<sup>2</sup> Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006) 9; see also Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate, 13; Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* at 15 July 2009; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 2.78-2.92; Kyle Louise, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4, 16.

<sup>3</sup> See especially K Wilber, and S Reynolds, 'Introducing a framework for defining financial abuse of the elderly' (1996) 8(2) *Journal of Elder Abuse and Neglect* 61; see also B Faye and M Sellick, *Advocare's Speak Out Survey "S.O.S" on Elder Abuse* (2003) Perth, Advocare; Boldy et al, *Elder Abuse in Western Australia* (2002) Perth, Centre for Research into Aged Care Services, Curtin University of Technology.

ageist assumptions about mandatory reporting that suggest older Australians do not have capacity to look after their own financial affairs.<sup>4</sup>

Reporting frameworks in the US have been criticized for promoting ageist attitudes and stereotypes particularly where mandatory reporting laws become effective after the alleged victim reaches a certain age threshold (which is often at or above the age of sixty, sixty-five or seventy).<sup>5</sup> To inform the Australian law reform response to reporting, it is important that the reporting framework is not restrictive and respects the wishes of elderly people.<sup>6</sup> Customers should have the choice of whether banks can monitor their bank accounts or where the bank suspects financial abuse, the customers should be the first ones to be informed of suspected financial abuse rather than a reporting body. Mandatory reporting does not mean reporting at all costs of all cases of suspected financial abuse. Rather, banks should use their discretion, act reasonably in reporting cases with the goal of protecting elderly people that are unable to care for themselves or continue to be financially exploited.<sup>7</sup>

The varied approaches to reporting in the US and Canada show that there is no one right answer, rather a collective response to reporting, regardless of mandatory or voluntary, accompanied with voluntary cooperative initiatives between the government and the banking sector. Mandatory reporting laws, if implemented in Australia should operate with the underlying purpose of protecting those that are unable to protect themselves. This particularly includes elderly people that do not have the decision-making capacity, are dependent on others for care, cannot manage their financial affairs, or are especially vulnerable and rely on enduring power of attorney arrangements to manage their funds.<sup>8</sup>

---

<sup>4</sup> Elder financial abuse can also capture incidents where relatives are careless or take liberties with the elderly person's money in certain circumstances without the intention to commit financial abuse.

<sup>5</sup> See Benjamin Pomerance, 'Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse' (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 475 for list of statutes consisting of various age thresholds that trigger mandatory reporting laws.

<sup>6</sup> See *Adult Guardianship Act*, RSBC 1996, s 2; Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 42.

<sup>7</sup> Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011).

<sup>8</sup> *Ibid* 475-476.

Therefore, mandatory reporting laws ensure that banks can protect the most vulnerable elderly people in the community by reporting their perpetrators.

Much like the approach in Canada, bank customers, where appropriate, should be able to consent to their bank monitoring their accounts and informing them if suspicious transactions are detected before filing a report with the relevant authority.<sup>9</sup> This is relevant in online banking and circumstances where the customer does not visit the bank branch for the teller to detect any signs of abuse. Such measures enable elderly people to have control over their financial affairs and whether they decide to ‘opt out’ of mandatory reporting laws.<sup>10</sup>

Any implementation of mandatory reporting framework in Australia should keep the US experience in mind and not include age triggers in the legislation, and seek the consent of the customer, where possible, before reporting suspected financial abuse.<sup>11</sup> The bank industry guideline already refers to ‘vulnerable adults’ instead of ‘elderly people’ alone.<sup>12</sup> Although the thesis is focused on ‘elder abuse’ rather than the ‘abuse of vulnerable people’, it is worth noting that any reporting framework implemented in Australia should not preclude vulnerable people from receiving protection under it.<sup>13</sup>

In order for mandatory reporting laws to be effective, they must afford greater respect to the autonomy of elderly people. A careful balance between competing interests of autonomy with the need to protect elderly people from financial abuse is crucial in achieving an effective mandatory reporting framework that acts as a deterrent to perpetrators of financial abuse.

---

<sup>9</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 2.102.

<sup>10</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD), 19; see also N Biviano, ‘Abuse of the non-institutionalised aged: Dilemmas of policy and practice’ (1996) 4 *Australian Social Work* 41, 46.

<sup>11</sup> Benjamin Pomerance, ‘Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse’ (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 475-477.

<sup>12</sup> See Australian Bankers’ Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013).

<sup>13</sup> *Ibid.*

## 5.2 Privacy implications of reporting

Objections to mandatory reporting arise due to concerns regarding invasion of the victim's privacy. Critics argue that victims with mental capacity can report abuse themselves or provide consent for it to be reported by professionals; requiring no need for mandatory reporting. However, victims with mental capacity may not wish to report abuse or seek assistance. They may also be reluctant to implicate a loved one because of fear of retribution or embarrassment.<sup>14</sup> It is often the case that victims, even with mental capacity do not report abuse because they are isolated, are in a dependent position, or are unaware of the existence of elder abuse helplines and other resources.<sup>15</sup>

The ABA is not supportive of mandatory reporting due to concerns about privacy implications of reporting financial abuse of customers. There were also concerns that reporting may be in breach of confidentiality laws and will open banks to liability.<sup>16</sup> In 2008, the Loddon Campaspe Community Legal Centre suggested that reporting of financial abuse may be in breach of Australian privacy laws and wrote to the Privacy Commissioner asking for comment.<sup>17</sup> The Privacy Commissioner responded in 2010 and stated the *Privacy Act 1988* (Cth), particularly the National Privacy Principles 2 provide a framework for disclosure and do not prevent banks from lawfully cooperating with law enforcement bodies.<sup>18</sup>

---

<sup>14</sup> Bella English, *It's Society's Secret Crime*, Boston Globe (2 August 1989), 17; see also Molly Dickinson Velick, Mandatory Reporting Statutes: A Necessary Yet Underutilised Response to Elder Abuse (1995) 3 *Elder Law Journal* 165, 173.

<sup>15</sup> Lawrence R. Faulkner, 'Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults' (1982) 60 *Family Law Quarterly* 69, 80. See also Molly Dickinson Velick, Mandatory Reporting Statutes: A Necessary Yet Underutilised Response to Elder Abuse (1995) 3 *Elder Law Journal* 165, 173.

<sup>16</sup> Australian Bankers' Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 4.

<sup>17</sup> J Edmonds and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre.

<sup>18</sup> Letter from Andrew Solomon to Phil Grano, 21 May 2010, 2  
<<https://www.fos.org.au/public/download.jsp?id=11909>>.

The Privacy Commissioner stated that banks can disclose personal information under the *Privacy Act 1988* for the purposes of reporting elder financial abuse.<sup>19</sup> It was further stated that banks are not required to come to conclusions or prove financial abuse of the elderly person. Rather, they are only required to have a reason to suspect that financial abuse may be occurring and report their concern to the relevant reporting body which conducts investigations to determine if there is any unlawful activity.<sup>20</sup>

Reporting of suspected financial abuse by banks does not breach privacy laws in the US.<sup>21</sup> Further, all states protect privacy of alleged elder abuse victims once a report is made. Throughout the process of reporting and any subsequent investigation, all information is kept confidential and is not a matter for public record under the respective statutes unless victim provides consent for the information to be released under certain statutes.<sup>22</sup> Although Australia and the US have marked differences in their laws, the US statutes can provide guidance to Australian lawmakers to ensure reporting frameworks protect the privacy of elderly Australians. In order for an effective reporting framework to be implemented in Australia, the following privacy concerns need to be addressed by lawmakers:

- a. Should the alleged victim be contacted before a report of suspected elder abuse is made?
- b. Is there a need for informal discussion with the alleged victim and family members (not involved in the alleged abuse)?
- c. Who should receive the report and how many entities should get involved?
- d. What can recipients at relevant reporting body do with the report received?
- e. Can the reporting body contact the victim and their family members to conduct investigation?<sup>23</sup>

---

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> In the US, reporting, generally does not violate the privacy principles of the *Gramm-Leach-Bliley Act*. See Consumer Financial Protection Bureau, 'Recommendations and report for financial institutions on preventing and responding to elder financial exploitation' (March 2016), 3.

<sup>22</sup> Audrey S. Garfield, 'Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California' (1991) 42 *Hastings Law Journal* 861, 888, 920.

<sup>23</sup> Benjamin Pomerance, 'Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse' (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 486-487.

Careful drafting of reporting frameworks ensures banks are not in breach of privacy laws to alleviate certain concerns against mandatory reporting. Protecting banks from liability for making reports is likely to encourage the cooperation of the banking sector and enable banks to be more proactive in reporting.<sup>24</sup> Lawmakers must therefore achieve a balance between ensuring that relevant authorities receive the necessary information to investigate suspected financial abuse while ensuring that collected information is kept confidential from the moment the employee detects a suspicious financial transaction and makes a report.<sup>25</sup>

### 5.3 Immunity from proceedings

In order for mandatory reporting frameworks to be effective in encouraging bank employees to report suspected abuse to relevant authorities, it is essential that protection and immunity from proceedings be provided to those that report financial abuse.<sup>26</sup> Banks are more likely to willingly report elder financial abuse if the government absolves them from liability for reporting.<sup>27</sup> As discussed above, liability can arise where customers may institute proceedings for revealing private information.<sup>28</sup> For example, customers may bring proceedings against their bank for disclosure of their information, including potential breach of confidentiality, and defamation.<sup>29</sup> Much like the reporting frameworks in the US and British Columbia in Canada, the identity of the person who makes the report as well as the report itself should be kept confidential to ensure that an action for damages cannot be sought against the bank or its employees.<sup>30</sup> It is necessary for the reporting

---

<sup>24</sup> Molly Dickinson Velick, Mandatory Reporting Statutes: A Necessary Yet Underutilised Response to Elder Abuse (1995) 3 *Elder Law Journal* 165, 175.

<sup>25</sup> *Ibid.*

<sup>26</sup> See Benjamin Pomerance, 'Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse' (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 468-469.

<sup>27</sup> Molly Dickinson Velick, Mandatory Reporting Statutes: A Necessary Yet Underutilised Response to Elder Abuse (1995) 3 *Elder Law Journal* 165, 187.

<sup>28</sup> Australian Bankers' Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 3.

<sup>29</sup> Australian Bankers' Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 4.

<sup>30</sup> *Ibid.*

framework to protect reporters of financial abuse because, as Mangione et al have pointed out:

Even the most diligent mandated reporter might look the other way in questionable situations if the law does not protect the reporter from civil and criminal liability arising out of the referral. People do not want to be exposed to a lawsuit or criminal prosecution as result of trying to help someone else [while performing their legally imposed duty].<sup>31</sup>

The degree of protection and immunity provided to reporters of financial abuse should not be absolute. Immunity from proceedings against civil and criminal liability for reporters of financial abuse should only be extended to good faith reports and individuals that make false reports or report with a *mala fide* intention, should not receive the benefit from this shield against liability.<sup>32</sup> Individuals that make false reports and damage the reputation of innocent people are also perpetrators who exploit the ‘good faith’ reporting system.<sup>33</sup> People who are victims of false reports of financial abuse should have redress against such damaging actions and therefore blanket immunity provisions that protect all reporters of financial abuse should not be implemented.<sup>34</sup> Instead, reporting of financial abuse needs to include a component of ‘reasonable belief’ that has both a subjective element of what the reporter believed and whether there were reasonable grounds for that belief.

The banking sector has expressed concerns about its liability if it does not report suspected financial abuse.<sup>35</sup> If a mandatory reporting framework is established, banks should report reasonable suspicions of financial abuse to relevant authorities and failure of banks to act reasonably could result in banks being liable to their customers. However, banks being held liable for failure to act reasonably is not something that is unique to mandatory

---

<sup>31</sup> Carol M. Mangione et al, ‘Mandatory Reporting of Elder Abuse: Between a Rock and a Hard Place’ (2006) 4 *Ann Fan Med* 403, 404-405; Benjamin Pomerance, ‘Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse’ (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 469-470.

<sup>32</sup> Shirley Lampkin and Lois Ritter, *Community Mental Health* (Jones & Bartlett Learning, 2012) 390.

<sup>33</sup> See Benjamin Pomerance, ‘Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse’ (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 470.

<sup>34</sup> See Benjamin Pomerance, ‘Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse’ (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439, 470.

<sup>35</sup> Australian Bankers’ Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017, 3.

reporting alone. Any failure of banks to act reasonably, such as a breach of the Code can result in FOS – the external dispute resolution scheme to make an adverse determination and award compensation to the customer as discussed in Chapter 3.<sup>36</sup> It is a matter for FOS to determine if a bank acted reasonably in not reporting financial abuse if it had suspicions but failed to act. In making a determination, FOS may have regard to the circumstances of each dispute. Such a system ensures that banks play a more proactive role in reporting reasonable suspicions of financial abuse while immunity provisions protect banks from proceedings for reports made in good faith.

Seniors Rights Service, a community legal centre in NSW submitted to the ALRC Inquiry that the Banking Code of Practice should have provisions that protect bank employees from any consequences of reporting financial abuse. The ALRC in its Final Report also recommended that ‘people who report suspected abuse to adult safeguarding agencies be given immunity from certain legal obligations that might otherwise prevent them from reporting abuse’ eliminating impediments to reporting abuse identified by the ABA.<sup>37</sup>

To further alleviate concerns expressed by the banking sector, any mandatory reporting framework enacted should ensure that financial institutions do not need to discharge a heavy evidentiary burden – where reasonable suspicion, such as in the US, should be adequate.<sup>38</sup> It is then the responsibility of the relevant reporting body to investigate and determine if there is actual financial abuse occurring.<sup>39</sup> As this Chapter shows, the banking sector’s concerns against mandatory reporting can be largely addressed by the enactment of minor changes to laws that protect banks from resultant liability for reporting.<sup>40</sup>

---

<sup>36</sup> Financial Ombudsman Service, *Determination Case number 472675*, 2 August 2017 <<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/472675.pdf>>.

<sup>37</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (2017) Report No 131, 307.

<sup>38</sup> Consumer Financial Protection Bureau, ‘Recommendations and report for financial institutions on preventing and responding to elder financial exploitation’ (March 2016), 25

<sup>39</sup> See *Ibid.*

<sup>40</sup> Sandra L Hughes, ‘Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly’ (2003) *American Bar Association*, 9.

## Conclusion

As Australia's 'baby boomer' generation gets older, the aged, in coming years, are going to represent a larger proportion of the population with life expectancy set to increase.<sup>1</sup> To a large extent, the management and prevention of elder abuse will determine the quality of life enjoyed by elderly people. Currently, the responses to elder financial abuse sit within a complex framework of legislative and policy instruments that have been described as "patchy and under-resourced".<sup>2</sup> The lack of an agreed definition has impacted the accuracy of the prevalence data on elder abuse. This in turn has hampered the required development of legislative responses on elder abuse.<sup>3</sup> The bank industry guideline that allows banks to respond to elder abuse is voluntary and does not provide a mechanism for banks to report financial abuse. Without a reporting body that investigates reports of financial abuse, the current responses to elder abuse are inadequate. Therefore, any implementation of a legislative framework on elder abuse should seek to provide greater clarity and consistency on these issues.

As demonstrated by this thesis, the appropriate approach to early identification and prevention of elder financial abuse can only be achieved by implementing a reporting framework of some kind.<sup>4</sup> The appropriate response also includes enacting an adult protective legislation and establishing a reporting body – much like the APS in the US that investigates and respond to reports of elder abuse. As a means of providing greater clarity to reporters of financial abuse, the legislative framework should provide a uniform definition of elder abuse; and outline the scope of reporting.

It should be noted, however that bank reporting of elder financial abuse is only a starting point in reducing its prevalence in the community. Instead, a holistic approach to this issue

---

<sup>1</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, 1, Chapter 5 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>2</sup> M Barnett, R Hayes, 'Not seen and not heard: Protecting elder human rights in aged care' (2010) *University of Western Sydney Law Review*, 14, 57.

<sup>3</sup> Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocate Inc, April 2011), 13.

<sup>4</sup> This can include mandatory or voluntary reporting by banks that provides a reporting mechanism.

requires a multidisciplinary and multi-agency response.<sup>5</sup> Such an approach should also consider community based models that raise awareness of elder abuse and its risk factors while equipping the public with the necessary tools to be able to respond to elder financial abuse.<sup>6</sup>

---

<sup>5</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35, 1, Chapter 9 <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>6</sup> World Health Organization, *World report on ageing and health* (2015) Geneva: WHO <<http://www.who.int/ageing/publications/world-report-2015/en/>>; see also Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011), 45-46.

## Bibliography

### *A Articles/Books/Reports*

Audrey S. Garfield, 'Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California' (1991) 42 *Hastings Law Journal* 861

Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131

Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, Discussion Paper No. 83 (February 2017)

Barnett, M, R Hayes, 'Not seen and not heard: Protecting elder human rights in aged care' (2010) *University of Western Sydney Law Review*, 14

Biviano, N, 'Abuse of the non-institutionalised aged: Dilemmas of policy and practice' (1996) 4 *Australian Social Work* 41

Black, Jane, 'The Not-so-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population' 82(7) *St. John's Law Review* 289

Boldy, Duncan. et al, 'Addressing Elder Abuse: West Australian Case Study' (2005) 24 *Australasian Journal on Ageing* 3

Clare, M, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative And Quantitative Investigation Of Existing Agency Policy, Service Responses And Recorded Data* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011)

Comijs, H. et al, 'Elder abuse in the community: Prevalence and consequences' (1998) 46(7) *Journal of the American Geriatrics Society* 885

Consumer Financial Protection Bureau, 'Recommendations and report for financial institutions on preventing and responding to elder financial exploitation' (March 2016)

Cripps, D et al, 'Abuse of older people: issues for lawyers' (2002) 1 *Elder Law Review* 14  
<<https://www.alrc.gov.au/news-media/speech-presentation-article/supporting-older-people>>

Dessin, C.L, 'Financial abuse of the elderly' (2000) 36 *Idaho Law Review* 203

Dickinson, Molly, Velick, Mandatory Reporting Statutes: A Necessary Yet Underutilised Response to Elder Abuse (1995) 3 *Elder Law Journal* 165

Dunn P.F, 'Elder Abuse' as an Innovation to Australia: A Critical Overview In J. Kosberg and J. Garcia, (Eds), *Elder Abuse: International and Cross-Cultural perspectives*, (New York: Haworth Press, 1995) *Elder Law Review*

Dunn, P, *Elderly abuse in the home. Conference Proceedings, Crime and the Elderly* (1989) National Workshop. Adelaide: South Australian Commissioner for the Aged and Victims of Crime Association

Edmonds, J, and P Noble, Loddon Campaspe Community Legal Centre, 'Responding to the Financial Abuse of Older People: Understanding the Challenges Faced by the Banking and Financial Services Sector' (2008) Report, Loddon Campaspe Community Legal Centre

English, B, *It's Society's Secret Crime*, Boston Globe (2 August 1989)

Molly Dickinson Velick, Mandatory Reporting Statutes: A Necessary Yet Underutilised Response to Elder Abuse (1995) 3 *Elder Law Journal* 165

Faye, B, and M Sellick, *Advocare's Speak Out Survey "S.O.S" on Elder Abuse* (2003) Perth, Advocare; <sup>1</sup> R Kaspiew, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* Research report No 35 (February 2016)

Fealy et al, *Financial Abuse of Older People: A Review* (2012) National Centre for the Protection of Older People, University College Dublin

Ginovsky, John, 'Financial Abuse' (2006) 14(1) *ABA Bankers News* 1

Glick, Jennifer, 'Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy' (2005) 12 *VA. J. Soc. POLY & L.* 714

House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007)

Hughes, Sandra, 'Identity Theft, Bank Secrecy, and Anti-Money Laundering Compliance: Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly' (2004) 58 *Consumer Finance Law Quarterly Report* 293

James, Marianne, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* at 15 July 2009

Kaspiew, R, R Carson, H Rhoades, *Elder abuse: Understanding issues, frameworks, and responses* (February 2016) Research report No 35 <<https://aifs.gov.au/publications/elder-abuse>>

Khoury, Phil, *Report of the Independent Review of the Code of Banking Practice* (2017)

Kinnear, P, and A Graycar, *Abuse of older people: crime or family dynamics? Trends and Issues in Crime and Criminal Justice* (1999) 113 Australian Institute of Criminology

Kurrle, S, P Sadler, & I Cameron, 'Elder abuse – an Australian case series' (1991) *Medical Journal of Australia* 155

Lacey, Wendy, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' 36 (2014) *Sydney Law Review* 99

Lampkin, Shirley and Lois Ritter, *Community Mental Health* (Jones & Bartlett Learning, 2012) 390.

Lawrence R. Faulkner, 'Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults' (1982) 60 *Family Law Quarterly* 69

Lemick, Taylor, 'Society's Response To the "Invisible" Abuse Of Elders: Understanding And Addressing The Financial Abuse Of Society's Most Vulnerable Citizens' (2015) 23 *The Elder Law Journal* 151

Lemke, J and S Moskowitz, 'Protecting the Gold in the Golden Years: Practical Guidance For Professionals On Financial Exploitation' (2005) 7(1) *Marquette Elder's Advisor* 1

Lewis, Kristen M, 'The Crime of the 21st Century: Financial Abuse of Elders' (2014) 28 *PROBATE & PROP* 10

Louis, Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 4

Lowndes, G P Darzins, J Wainer, K Owada, and T Mihaljcic, *Financial abuse of elders: a review of the evidence. Protecting Elders' Assets Study* (2009) Melbourne Monash University

Mangione, Carol et al, 'Mandatory Reporting of Elder Abuse: Between a Rock and a Hard Place' (2006) 4 *Ann Fan Med* 403

McCawley, A-L., et al, 'Access to assets: Older people with impaired capacity and financial abuse' 8(1) (2006) *The Journal of Adult Protection* 30

McCrudden, C, 'Legal Research and the Social Sciences' (2006) 122 (Oct) *Law Quarterly Review* 632

Mihaljcic, Tijana, Georgia Lowndes (2013) 'Individual and Community Attitudes Toward Financial Elder Abuse' (2013) 25(2) *Journal of Elder Abuse & Neglect* 183

Moon, A, *Perceptions of elder abuse among various cultural groups: Similarities and differences. Generations* (2002)

Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011)

Pendleton, M, 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditionally Scholarly Article' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007)

Pomerance, Benjamin 'Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse' (2015) 16 *Marquette Benefits & Social Welfare Law Review* 439

Price, G, and C Fox, 'The Massachusetts Bank Reporting Project: An Edge against Elder Financial Exploitation' (1997) 8(4) *Journal of Elder Abuse and Neglect* 59

Public Guardian and Trustee of British Columbia, *B.C.'s Adult Guardianship Laws: Supporting Self-Determination for Adults in British Columbia – Protecting Adults From Abuse, Neglect and Self Neglect*

Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How Well Does the Law in Queensland Cope?* (2010) Report, Queensland Law Society and Office of the Public Advocate

Rabiner, D J, D Brown and J O'Keeffe, 'Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them' (2004) 16(1) *Journal of Elder Abuse and Neglect* 65

Rabiner, Donna, David Brown, Dr Janet O'Keeffe, 'Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them' (2004) 16(1) *Journal of Elder Abuse & Neglect* 65

Ritter, Lois, and Shirley Manly Lampkin, *Community Mental Health* (Jones and Bartlett Learning, 2012)

Sanders, Leonie, *Financial Abuse of Older People: A Queensland Perspective* (September 2005) Elder Abuse Prevention Unit (QLD)

Schiamberg, B, and D Gans, 'Elder abuse by adult children: an applied ecological framework for understanding contextual risk factors and the intergenerational character of quality for life' (2000) 50 *International Journal of Aging and Human Development* 50

Sklar, J. B, 'Elder and dependent adult fraud: A sampler of actual cases to profile the offenders and the crimes they perpetrate' (2000) *Journal of Elder Abuse and Neglect* 12

Smith, Russel, 'Fraud & Financial Abuse of Older Persons' (1999) *Australian Institute of Criminology* 132

Trevor, Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355

Wilber K, and S Reynolds, 'Introducing a framework for defining financial abuse of the elderly' (1996) 8(2) *Journal of Elder Abuse and Neglect* 61

World Health Organization, Global status report on violence prevention (2014) Geneva: WHO

<[http://www.who.int/violence\\_injury\\_prevention/violence/status\\_report/2014/en/](http://www.who.int/violence_injury_prevention/violence/status_report/2014/en/)>

World Health Organization, *World report on ageing and health* (2015) Geneva: WHO

<<http://www.who.int/ageing/publications/world-report-2015/en/>>

## B Legislation

*Adult Guardianship Act*, RSBC 1996

ASIC, *ePayments Code* (9 March 2017) <<http://asic.gov.au/for-consumers/codes-of-conduct/epayments-code/>>.

Australian Securities and Investments Commission, *ePayments Code* (March 2016)

*Financial Elder Abuse Reporting Act of 2005*, 1018 USC (2005)

*Personal Information Protection and Electronic Documents Act*, SC 2000

## C Others

Aged and Community Services Australia, Submission No 102 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017

AgedCareCrisis.com, *Elder abuse* (28 May 2015) <<https://www.agedcarecrisis.com/care-issues/elder-abuse>>

ALRC's Disability and Elder Abuse Inquiries' (Speech delivered at the ADA National Conference, 27 March 2017) <<https://www.alrc.gov.au/news-media/speech-presentation-article/supporting-older-people>>

Annie Guest, 'Elderly Abuse Cases on the Rise', *ABC News* (online), 20 October 2009 <<http://www.abc.net.au/news/2009-10-15/elderly-abuse-cases-on-the-rise/1105894>>

Australian Banker's Association, *Code of Banking Practice* (at 1 February 2014)

Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013)

Australian Bankers' Association, *Code of Banking Practice—FAQs* (2013)

Australian Bankers' Association, *Promoting Understanding about Banks' Financial Programs* (May 2013)

Australian Bankers' Association, Submission No 107 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017

Australian Institute of Criminology, Submission No 40 to House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 2006

BITS Financial Services Roundtable, *Protecting the Elderly and Vulnerable from Financial Exploitation* (2010) <[http://fsroundtable.org/wpcontent/uploads/2015/05/BITS\\_Protecting\\_VulnerableAdults0410.pdf](http://fsroundtable.org/wpcontent/uploads/2015/05/BITS_Protecting_VulnerableAdults0410.pdf)>

Caxton Legal Centre Inc, Submission No. 112 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, 2007

Code Compliance Monitoring Committee, Code Subscribers <<http://www.ccmc.org.au/code-of-banking-practice-2/code-subscribers/>>

Code Compliance Monitoring Committee, *Codes of Practice in the Financial Services Sector* (November 2011) <<http://www.ccmc.org.au/cms/wp-content/uploads/2013/11/Codes-of-Practice-FSN-article-Nov-Dec-2011.pdf>>

Comizio G, L Petrasic, and A Kowalski, 'Compliance Risk Management: What Financial Institutions Need to Know About Reporting Elder Financial Exploitation' (March 2014) <<https://www.paulhastings.com/docs/default-source/PDFs/stay-current-compliance-risk-management-what-financial-institutions-need-to-know-about-reporting-elder-financial-exploitation.pdf>>

Consumer Credit Legal Service Inc., Submission 301 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017

COTA, Submission No 354 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 27 February 2017

Eileen Webb, 'The problems with asking bank to police financial abuse', *The Conversation*, 15 June 2017 <<https://theconversation.com/the-problems-with-asking-banks-to-police-financial-abuse-79187>>

Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006)

Fealy et al, *Financial Abuse of Older People: A Review* (2012) National Centre for the Protection of Older People, University College Dublin

Financial Crimes Enforcement Network, Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation, 22 February 2011 <<https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2011-a003>>

Financial Ombudsman Service, *Banking and Finance – Bulletin 56* (2007) <[https://www.fos.org.au/custom/files/docs/fos\\_banking\\_finance\\_bulletin\\_56.pdf](https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf)>

Financial Ombudsman Service, *Determination Case number 472675*, 2 August 2017 <<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/472675.pdf>>

Financial Ombudsman Service, *How FOS Resolves Disputes and Our Terms of Service* (2013)

Frost, James, 'Bank staff on alert for signs of elder abuse' *The Australian Financial Review*, 30 October 2017 <<http://www.afr.com/business/banking-and-finance/financial-services/bank-staff-on-alert-for-signs-of-elder-abuse-20171030-gzb316>>

Gardner, Julian, Uncovering elder abuse: powers of attorney, administration orders and other issues for banks, paper presented at the Banking and Financial Services Ombudsman Annual Conference, 25 November 2005

Gerard Michael Naughtin, *Regulating the Risks of Elder Abuse in Australia: The Changing Nature of Government Responses* (PhD thesis, University of Melbourne, 2007)

Gilbert, Ian, ABA, *Proof Transcript of Evidence*, 17 August 2007

Guest, Annie, 'Elderly Abuse Cases on the Rise', *ABC News* (online), 20 October 2009 <<http://www.abc.net.au/news/2009-10-15/elderly-abuse-cases-on-the-rise/1105894>>

Herd, Brian, Transcript of Evidence, 16 July 2007

Hall, Jessica, 'Bank workers will be trained to detect elder financial abuse: Those employees are in the best position to see signs of the growing problem, say backers of SeniorSafe' *Portland Press Herald*, 11 February 2014

Hon Susan Ryan AO, 'Elder Abuse: Financial Abuse' (Speech delivered at the Australian Human Rights Commission, 19 October 2015) <<https://www.humanrights.gov.au/news/speeches/elder-abuse-financial-abuse>>

Letter from Andrew Solomon to Phil Grano, 21 May 2010 <<https://www.fos.org.au/public/downloadjsp?id=11909>>

Letter from Andrew Solomon to Phil Grano, 21 May 2010 <<https://www.fos.org.au/public/downloadjsp?id=11909>>

Letter from Robert J. Seemann, Director, Elderly Protective Service, Louisiana Governor's Office of Elderly Affairs, 15 February, 2002

National Centre for State Courts, 'Prosecuting Elder Abuse Cases' (2012) 14 <<http://www.eldersandcourts.org/~media/Microsites/Files/cec/Prosecution%20Guide.ashx>>

National Seniors Australia, Submission 154 to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 24 February 2016

NSW Ageing and Disability Department, *Mandatory Reporting of Abuse of Older People* (1997), Sydney

Office of the Public Advocate, Queensland, *Submission No. 76 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Older People and the Law* (2007)

Patterson, Kay, 'When sons and daughters abuse our most vulnerable', *The Australian*, 6 February 2017

Croucher, Rosalind F, AM, 'Supporting Older People in Exercising and Protecting Their Rights—Insights from the ALRC's Disability and Elder Abuse Inquiries' (Speech delivered at the ADA National Conference, 27 March 2017)

Seniors Rights Victoria, Submission to the Victorian Law Reform Commission, *Guardianship Consultation Paper 10*, 3 June 2011

Setterlund, D, *The strategic plan for the prevention of elder abuse in Queensland* (2001) The Prevention Of Elder Abuse Taskforce (PEAT Force)

The National Clearinghouse on Family Violence, *Financial Abuse of Older Adults* <<http://publications.gc.ca/collections/Collection/H88-3-30-2001/pdfs/violence/finance.pdf>>

University of South Australia, *Prevalence of Elder Abuse in South Australia Final Report: Current Data Collection Practices of Key Agencies* (2017)

Victorian Government, Department of Health, *Elder Abuse Prevention and Response Guidelines 2012-2014* (June 2012)

Webb, Eileen, 'The problems with asking bank to police financial abuse', *The Conversation*, 15 June 2017 <<https://theconversation.com/the-problems-with-asking-banks-to-police-financial-abuse-79187>>

Western Australian Government, *Submission No. 74* to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007)

WHO/INPEA, *Missing voices: views of older persons on elder abuse* (2002) World Health Organisation, Geneva